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Portugal: Law & Practice

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PORTUGAL

Law and Practice

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1.1 Impact of the Regulatory Environment and Economic Cycles

Impact of Regulatory Environment and Economic Cycles

It is evident that the war in Ukraine, the inflationary pressures and the increase in interest rates are having and will continue to have an impact on the loan market in Europe and in Portugal, although it is unclear to what extent and in what form such impacts will be felt.

Amid the current economic situation and outlook, banks appear to be restricting credit standards and fixed interest rates are becoming more common in credit agreements.

As a result of the above-mentioned circumstances, it is expected that there will be an increase in non-performing loans (NPLs) and thus new opportunities for the secondary market for NPLs.

1.2 Impact of the COVID-19 Pandemic

The Portuguese loan market has been affected by the economic crisis triggered by the COVID-19 pandemic, particularly due to the government's measures aimed at facilitating the access of companies to credit (credit lines to support treasury needs backed by the Portuguese Republic in specific situations) and the credit moratorium regime which enabled companies and individuals to suspend bank loan payments and extend the term of credits. Moratorium regimes of this type expired at the end of 2021.

Notwithstanding such expiration, the impact of the COVID-19 pandemic (exacerbated by the macroeconomic conditions mentioned in **1.1 Impact of the Regulatory Environment and Economic Cycles** above) is expected to continue, resulting in banks once again facing challenges with non-performing loans, which are likely to increase significantly.

1.3 The High-Yield Market

The war in Ukraine, the high inflation and the increase in interest rates by the central banks have also significantly affected the high-yield market in Europe and in the US in the first half of 2022, with a significant decline in bonds issuances as a result of the latest available data and a much more challenging market environment.

Furthermore, the use of floating interest rates (instead of fixed rates) is on the rise in the high-yield market, making bonds become more attractive for investors in a scenario of rising interest rates.

1.4 Alternative Credit Providers

Alternative credit-providers have not seen significant growth because credit activity is a regulated activity in Portugal. This limits substantially the activity of alternative credit-providers, such as funds, which can only grant loans in specific situations – eg, loans granted by a certain type of investment fund (ie, venture capital funds) to SMEs.

Since 2019, loan funds have been recognised in the Portuguese jurisdiction. Portuguese Securities Market Commission (CMVM) regulates the activity of loan funds by amending the prudential and behavioural requirements. Loan funds are considered AIFs and are exempt from the banking monopoly rules, thereby allowing them to perform direct lending. They can grant loans (loan origination) as well as participate in loans acquired from the credit's originator or from third parties (loan participation).

1.5 Banking and Finance Techniques

Despite the limitations previously discussed, which strongly limit the evolution of banking and finance techniques, there has been some development and growth of financing through crowd-funding, new digital platforms and loan funds. The growth of these activities has been boosted by legislation specifically applicable to them.

There has been an increase in direct lending, despite the limitations of the banking monopoly rules. However, there are interesting funding alternative schemes, such as the issuance of bonds.

1.6 Legal, Tax, Regulatory or Other Developments

As far as restructuring is concerned, 2022 marked the year when the Special Revitalisation Proceeding (PER) was comprehensively revised under Law No 9/2022 as a result of the introduction of Directive (EU) 2019/1023. As part of its goal to promote preventive restructuring, Law No 92022 introduced several amendments aimed at supporting and streamlining the PER. There are, however, some deficiencies and complexities in the new regime that could lead to increased litigation involving the PER.

As another new piece of legislation with significant impact on the loan market, the Legal Framework for Participative Loans, approved by Decree Law No 11/2022, has introduced participative loans in Portugal. These are financing arrangements that can take the form of loans or debt securities, and the respective remuneration can be indexed, exclusively or partially, to a share in the borrower's profits and, in certain cases, may be converted into shares. Due to their qualification as equity, the participative loans are considered subordinated debt. Notwithstanding its innovative nature, the entities that can grant participative loans (even if in the form of debt securities) are essentially those that are already qualified to grant credit, so the new regime has limited impact on the diversification of financing sources.

In terms of future developments, there is anticipation surrounding the new Code of the Banking Activity (which was subject to public consultation in 2020) as well as the transposition of Directive (EU) 2021/2167 on credit servicers and credit purchasers, both of which will have a significant impact on the NPL sector, particularly given that servicing is currently not regulated in Portugal.

1.7 Developments in Environmental, Social and Governance (ESG) or Sustainability Lending

In recent years, the ESG and sustainability-linked lending market has grown significantly and has become one of the most active markets. There were a number of ESG-linked loans and green bond issuances by different market players such as utilities, power grid operators, telecom operators, and food retailers.

Legislatively, trends have been mainly driven by the European Commission with the approval of Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the Taxonomy Regulation) as well as implementing and delegated acts.

As part of the national legislation, Portugal approved the Climate Basic Law (Law No 98/2021), which includes several provisions that relate to sustainable lending.

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

The granting of loans or other financing, which includes factoring, financial leasing and granting of guarantees, on a professional basis, is a regulated activity. Non-banks are, in principle, not authorised to provide financing to a company incorporated in Portugal, unless they incorporate one of the relevant credit institutions or financial companies authorised by the regulator to do so.

EU-domiciled banks may benefit from the EU passport established in the CRD IV and may be registered with the Bank of Portugal in order to carry out credit activities, allowing them to provide services on a cross-border basis without establishing any local presence in Portugal.

This registration process is initiated by a notification made in the home country indicating the activities that the entity wants to carry out in Portugal, which is then sent by the entity to the Bank of Portugal for registration. Upon receiving such a notification, the credit institution or financial company may begin to provide its services in Portugal under the EU passport.

However, non-EU-domiciled entities are only allowed to carry out banking activities in Portugal by setting up a branch or establishing a subsidiary, which both require specific authorisation procedures from the Bank of Portugal.

The Portuguese legislature has expressly established the reverse solicitation principle or passive marketing rule, in the case of the provision of services by a non-EU-domiciled entity on the sole initiative of the client. According to the reverse solicitation principle or passive marketing rule, if a Portuguese domiciled client directly contacts the non-EU-domiciled entity and requests a determined banking service on its own and exclusive initiative without any prior solicitation and marketing of such service by the entity, the aforementioned registration/authorisation with the Bank of Portugal will not be required.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

Only credit institutions and financial companies previously registered with the Bank of Portugal can engage, on a professional basis, in activity related to credit operations, including the granting of guarantees and other commitments, financial leasing and factoring.

If, however, the credit operation is an isolated transaction, and there will be no further transactions in the future, one can be confident that it does not qualify for the definition of a professional credit activity.

Additionally, the aforementioned registration/authorisation with the Bank of Portugal will not be required to the extent that, in respect of a specific transaction, the transaction is carried out pursuant to the aforementioned reverse-solicitation rule as outlined in the Legal Framework of Credit Institutions and Financial Companies.

An alternative method to raise financing is the issuance of bonds integrated in a Portuguese clearing system, given that it is not qualified as a credit activity for regulatory purposes and has a favourable tax regime.

3.2 Restrictions on Foreign Lenders Granting Security

The granting of security or guarantees is not restricted by credit activity. However, there are certain corporate limitations that govern the granting of security or guarantees.

In accordance with the Portuguese Companies Code (PCC), companies can only grant guarantees or security to third parties provided that they:

- have a justified corporate self-interest; or
- are in a control or group relationship with the beneficiary of the security or guarantees.

A "control relationship" is defined as the relationship between Portuguese companies where one has, directly or indirectly, a dominant influence over the other. Such influence is presumed to exist whenever one of the companies, as regards the other, directly or indirectly:

- holds the majority of the share capital;
- has more than half of the voting rights; or
- is able to appoint the majority of the members of the board of directors or supervisory board.

However, two or more Portuguese companies will be in a "group relationship" whenever:

- one of the companies holds, directly or indirectly, 100% of the other;
- the companies have entered into a group contract; or
- the companies have entered into a subordination agreement whereby one of them is subject to the instructions or management of the other.

Furthermore, the PCC includes a prohibition on financial assistance and, therefore, guarantees or security provided by Portuguese companies cannot be used to guarantee obligations related to financing incurred for the acquisition of shares representing the guarantor's share capital or the shares representing the direct or indirect parent company's share capital. Any such guarantees or security would be deemed null and void and trigger both civil and criminal liability for the directors of the target company.

For tax purposes, secured obligations are typically limited to an agreed maximum amount, which is usually linked to the value of the asset being encumbered or to the intrinsic value of the Portuguese target or subsidiary company.

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions or controls regarding foreign currency exchange and there is no limitation on the expatriation of dividends or investments abroad. However, certain financial transactions are subject to reporting obligations to the Bank of Portugal and to the standard Anti Money Laundering (AML) regulations.

3.4 Restrictions on the Borrower's Use of Proceeds

Apart from those mentioned above, there are no restrictions on how a borrower may use the proceeds from a loan or debt security. However, it should be noted that it is market practice to stipulate contractually that the capital granted to a borrower may not be used for any other purpose than that specified in the facility agreement.

3.5 Agent and Trust Concepts

Portuguese law does not recognise the concept of parallel debt or of trusteeship, except for a very specific regime in the Madeira Free Trade Zone. Therefore, the beneficiary of the security

needs to have a valid underlying obligation duly secured by the security and, accordingly, the lenders would, in principle, need to be registered as holders of the security with the competent registry office.

Nonetheless, typically, the security agreement and/or indenture, as well as the inter-creditor agreement, state that only the security agent has the right to enforce security documents in its capacity as both an agent and joint and several creditors, thereby making it the only entity that can enforce the security and is registered as the beneficiary of the security. Accordingly, the guarantee or security is usually enforced by the security agent. Consequently, it may be necessary to demonstrate that the Security Agent has been duly and expressly authorised for this purpose by each of the creditors.

Alternatively, the banks may request to have the security registered in their own name to be able to enforce it directly.

3.6 Loan Transfer Mechanisms

Loans can be transferred through the assignment of credits or through the assignment of contractual positions.

Usually, parties prefer the assignment of credits' mechanism, which, contrary to the assignment of contractual position, does not require the consent of the borrower. There can be limitations established for the assignment, including those related to tax (given that foreign lenders may be more expensive in terms of taxation if there is a gross-up obligation) and regulatory requirements.

The assignment is made by private contract between the assignor and the assignee, and it involves the transfer of the security package that is associated with it. If the security includes mortgages, a public deed or private document with signature recognition is required as a formality for the transfer. Depending on the type of security, further steps for the transfer may be required, including registration with the real estate registry office for mortgages, registration with the bank for bank account pledges or registration with the commercial registry for quota pledges.

3.7 Debt Buy-Back

A debt buy-back by the borrower is typically not allowed, as it may trigger a subordination of the debt in the case of insolvency. Alternately, and as a way of overcoming this limitation, the borrower is usually entitled to repay the loan early, partially or in full.

3.8 Public Acquisition Finance

There are no specific rules regarding "certain funds" similar to those contained in the City Code on Takeovers and Mergers.

An offeror in a public takeover bid is only required to have the funds deposited or to present a bank guarantee for payment when applying for the registration of the takeover bid with the CMVM. There can be debt financing for the consideration of the offer, but such a financing must always be in the form of a bank guarantee or a deposit in favour of the target company's shareholders. Thus, in such cases, there will need to be a direct commitment of the lenders towards those shareholders.

In addition, when public takeover bids are at stake, there is usually a financial intermediary (although this is no longer mandatory) who coordinates all financial arrangements with the offeror. Due to the above, "certain funds" provi-

sions are not commonly used in public acquisition finance transactions.

4. Tax

4.1 Withholding Tax

In accordance with Portuguese Corporate Income Tax (CIT) rules, interest owed by Portuguese residents to non-resident entities is subject to final withholding tax at the domestic rate of 25% over the interest gross amount.

The domestic withholding tax rate may, however, be reduced pursuant to the provisions of a double taxation agreement concluded between Portugal and the country of residence of the lender, typically to 10% or 15%.

Notwithstanding, interest derived from loans granted by non-resident financial institutions to resident credit institutions is exempt from withholding tax to the extent that the interest is not allocated to a local permanent establishment of the non-resident creditor. However, this exemption is not applicable if:

- the recipient of the interest is resident in a "tax-blacklisted jurisdiction"; or
- the recipient of the interest, without a permanent establishment in Portugal, is held, directly or indirectly, in greater than 25%, by resident entities, except when the entity is resident in another EU country, in an European Economic Area (EEA) country bound by fiscal co-operation identical to the one established within the EU or in a country that has concluded a double tax treaty with Portugal providing for exchange of information.

Non-residents may also benefit from an exemption from withholding tax on interest derived from listed bonds, as provided in Decree Law No 193/2005, as amended (which also allows for an exemption from capital gains upon disposal of the bonds). See **4.2 Other Taxes, Duties, Charges or Tax Considerations** for stamp duty on issues of bonds.

In summary, and to the extent that the necessary requirements regarding the beneficiaries (ie, bondholders) are met, no withholding tax applies over the interest, provided the necessary formalities are completed, namely, proof of the beneficiaries' non-residence status and the information about the debt securities and beneficiaries are provided.

The bonds must be integrated in a centralised system managed by an entity resident for tax purposes in Portugal (ie, Interbolsa), or an international clearing system managed by an entity located in another EU member state (such as Euroclear and Clearstream Luxembourg) or in an EEA member state, provided it is bound by an administrative co-operation in tax matters similar to the one established within the EU or integrated with other centralised systems. In this last case, the competent government member must authorise the application of the special tax regime.

The Court of Justice of the European Union ruled that the Portuguese domestic CIT rules imposing withholding tax over interest obtained by non-residents were in breach of EU Law, based on the fact that the withholding tax is based on the gross amount of the interest, whereas resident financial institutions (only) pay tax on their net income (decision of 13 July 2016, on Brisal – Auto Estradas do Litoral SA, KBC Finance Ireland v Fazenda Publica – Case C-18/15). While it was expected that this decision would deter-

mine tax rules, this has not been the case to date.

The reimbursement of the principal and other payments to the lender are not liable to Portuguese withholding tax.

4.2 Other Taxes, Duties, Charges or Tax Considerations

Value-Added Tax (VAT)

Financial transactions are, as a rule, exempt from VAT under domestic VAT law. This exemption covers notably the granting and negotiation of credit, the respective administration and management by the entity granting the credit, the negotiation and granting of security and guarantees, and transactions (including negotiation) related to the deposit of funds, current accounts, payments, transfers, collection and cheques.

The VAT treatment of bank commissions and fees is determined on a case-by-case basis, depending on their particular features, although those commissions corresponding to the above transactions are in principle VAT-exempt.

Conversely, other commissions or fees charged by the banks – eg, for consultancy, certain structuring and settlement services – are in principle out of the scope of the referred exemption, hence liable to VAT taxation. Where these fees are charged by non-resident banks to Portuguese VAT taxpayers, Portuguese VAT will apply by means of the "reverse charge mechanism".

Financial transactions subject to but exempt from VAT are subject to stamp duty.

Stamp Duty

Portuguese stamp duty is due on a list of specified taxable events when deemed as occurring in Portugal, including several transactions, contracts, acts and documents, as outlined in the stamp duty chart, including financial transactions. However, no stamp duty is levied over transactions subject to and not exempt from VAT – eg, certain services provided by banks, as referred to above.

The grant of credit is subject to stamp duty, levied over the principal at rates that vary depending on the term during which the credit is used as follows:

- credit for less than one year – 0.04% per month or fraction thereof;
- credit for one or more years – 0.5%; and
- credit for five or more years – 0.6%.

The extension of the term of the contract constitutes a new granting of credit, which raises additional taxation with stamp duty borne by the borrower. No stamp duty, however, applies in the case of funding obtained through the issue of bonds over the principal or interest (see taxation of interest below).

The granting of security is also subject to stamp duty whenever it is:

- granted in the Portuguese territory;
- for the benefit of a Portuguese resident entity; or
- herein presented to produce legal effects, except if it is materially accessory to a taxable stamp duty event; and
- granted simultaneously with it.

Stamp duty is borne by the entity required to present the guarantee (ie, the debtor). Accordingly, security granted in the context of a loan agreement tends not to be subject to stamp duty, as the use of credit under the loan agreement will itself be subject to taxation – provided

that (a) and (b) above are met – such as in the case where a Portuguese company borrows funds from a non-resident bank. In the case of issuance of bonds, the security granted for the benefit of the relevant bondholders may trigger Portuguese stamp duty.

When due, the stamp duty taxable basis is the value of the underlying security (ie, maximum secured amount), which is the effective tax rate, depending on the applicable term, as follows:

- security with a term lower than one year – 0.04% per month or fraction thereof;
- security with a term equal to one year and up to five years – 0.5%; and
- security with a term equal to or over five years or without any specific term – 0.6%.

In the case of transactions carried out by or with the intermediation of credit institutions, financing companies or other entities legally equated to them, or any other financial institutions, interest is also liable to stamp duty over the respective amount at a rate of 4%, as well as commissions and other bank fees over the respective amount at a rate of 3% (commissions for guarantees), or 4% (other commissions and fees for financial services).

As outlined above, no stamp duty is levied over operations subject to and not exempt from VAT – eg, those bank commissions subject and not exempt from VAT.

Notwithstanding the above, an exemption applies to interest and commissions charged, security granted, as well as to the use of credit granted by credit institutions, financial companies and financial institutions to venture capital companies, and in addition to companies or entities the form and object of which corresponds to those of credit institutions, financial companies, financial institutions as provided in EU Law, both domiciled in the EU member states or in other states, with the exception of jurisdictions with a more favourable tax regime as defined by Ordinance No 150/2004 of the Ministry of Finance (as amended).

4.3 Usury Laws

In addition to the criminal framework, there are two main legal regimes regarding usury:

- for credit agreements between professionals and consumers; and
- for credit agreements between credit or financial institutions and consumers.

Credit between credit institutions and consumers

In relation to this, the Portuguese Civil Code (CC) stipulates that any loan agreement containing an annual interest rate greater than the legal interest rate (currently 4% or 7% for civil or commercial contracts respectively), plus 3% or 5% (depending on whether or not there is an in rem guarantee), is always considered a usurious agreement. Additionally, whenever the interest rate exceeds the referred-to threshold, the interest rate shall be considered reduced to that level.

The CC also establishes a generic prohibition against usury, whereby an agreement is void as a result of usury when someone, exploiting a situation of need, inexperience, dependency, mental state or weakness of character of others, obtains the promise or granting of excessive or unjustified benefits.

Credit between credit institutions and consumers

Decree Law No 133/2009 on consumer credit between credit institutions and consumers (DL

133/2009) considers an agreement to be usurious whenever the overall effective annual rate (TAEG) at the time of the conclusion of the agreement:

- exceeds by 25% the average TAEG applied by the credit institutions in the previous quarter for each type of credit agreement for consumers; or
- exceeds by 50% the average TAEG for consumer credit agreements entered into in the previous quarter.

Additionally, the following credit agreements are considered usurious:

- an overdraft facility with a repayment obligation of one month and the TAEG of which, at the time of its conclusion, and calculated in accordance with the above mentioned methods, exceeds the maximum TAEG value set for credit agreements in the form of an overdraft facility with a repayment-obligation period exceeding one month; and
- overrunning, the nominal annual percentage rate (TAN) of which, at the time of its conclusion, exceeds the maximum TAEG value, defined in accordance with the above mentioned methods, of the overdraft facilities establishing the repayment obligation for a period exceeding one month.

Any interest rate above the threshold established by law is automatically reduced to half of the stated maximum limit, without prejudice to any criminal and/or administrative liability.

DL 133/2009 is not applicable, among others, to:

- loans secured by mortgage for the acquisition of houses;
- lease agreements on moveable assets that do not grant the right or obligation to purchase the leased assets;
- credit agreements whose amount is lower than EUR200 or higher than EUR75,000;
- loans granted without interest and other charges.

Finally, it is worth noting that the Decree-Law No 58/2013 limits the default interest rate to 3%.

5. Guarantees and Security

5.1 Assets and Forms of Security

The typical Portuguese collateral package includes:

- mortgages over real estate properties in Portugal;
- pledges over the shares/quotas of material guarantors or financed companies;
- pledges over fixed movable assets (namely stock, equipment or inventory);
- pledges over bank accounts;
- pledges/assignments over intercompany receivables;
- pledges/assignments of receivables; and
- pledges/assignments over insurance policies and, in some cases, intellectual property rights (ie, patents, trade marks).

Security over real estate assets is less frequent, except on project finance or real estate transactions or where real estate is the key asset of the guarantor/ financed company. In certain specific financing transactions (such as vessel financing and aircraft financing), security is taken over the financed assets, in this case mortgages over the vessel or the aircraft.

If the requirements are met, the lenders will use the financial collateral regime, such as bank account pledges or share security.

Formalities
Formalities vary significantly according to the type of security.

In terms of documentation, mortgages over properties and banking pledges require a public deed or a document with a term of authentication of the notary. Conversely, bank account pledges and share pledges require only a simple private document, except for commercial pledges with appropriation (which require a certification of signatures). In any case, public deeds or notarial term of authentication are usually recommended in order to serve as judicial enforcement titles.

In the case of possessory or similar actions, the creation of a pledge over movable assets requires the asset to be delivered to the creditor (unless the pledge at stake is a bank pledge). Assignments of receivables and pledges over credits must be notified to the respective debtors.

In most cases, taxation (stamp duty) is the most significant cost, while notarial costs are rarely significant.

Registration
The registration requirements also vary with the type of security at stake.

Pledges over bank accounts require a registration with the bank with which the account is held.

Pledges over shares are:

- subject to registration with the issuer (in the shares' registry book and inscription of the pledge in the share certificates, if they exist);
- subject to registration with the relevant depositary bank in the case of deposits, or with the relevant financial intermediary with which the shares are registered in the case of dematerialised shares (regardless of being integrated in a centralised clearing system).

Pledges over quotas are subject to registration with the commercial registry.

Mortgages over properties or registrable movable assets – such as aircraft, vessels, vehicles – are subject to registration with the competent registry office (real estate or other).

Registration costs are also not material.

5.2 Floating Charges or Other Universal or Similar Security Interests

A floating charge or any other universal or similar security interest cannot be granted over all of a company's present and future assets. Security is granted over specific assets, which need to be identified. Security over future assets can be granted to the extent that they are identifiable, although there are further limitations depending on the type of security. However, some authors argue the admissibility, even if in a limited way, of floating charges.

5.3 Downstream, Upstream and Cross-Stream Guarantees

In accordance with the PCC, downstream, upstream and cross-stream guarantees are allowed, provided that certain requirements are met. However, a few scholars have argued that in cases where there is only a dominant influ-

ence (capable of originating a "de facto group"), upstream guarantees are not allowed, due to the lack of legal protection of the controlled company.

As previously mentioned, Portuguese companies must have a justified corporate self-interest in granting guarantees or security to third parties or otherwise be in a group or control relationship with the beneficiaries (see **3.2 Restrictions on Foreign Lenders Granting Security**).

Usually, cross-stream guarantees cannot fulfil the requirement of the group or control relationship. As such, they need to meet the requirement of the justified corporate interest, otherwise they will be null and void.

5.4 Restrictions on Target

The PCC provides for a prohibition of financial assistance. The target company is prohibited from granting any type of guarantees or security or any other types of funding in respect of any financing for the purposes of acquiring shares in the target company or in its direct or indirect parent company. This shall also include any guarantees or security for the refinancing of a previous debt incurred in the acquisition of shares of the target company or its parent company.

Breach of the financial assistance prohibition renders the respective guarantees, security, financing or funding made by the target company null and void. In addition, directors may incur civil and criminal liability. For this reason, it is common to include guarantee-limitation language in a guarantee or security agreement.

5.5 Other Restrictions

The parties usually agree, for tax reasons, to limit the maximum amount secured by the guarantees or security in order to limit the impact of stamp duty that is due in connection therewith (see **4.2 Other Taxes, Duties, Charges or Tax Considerations**).

In the event that the assets of the Portuguese companies are covered by legal immunities, namely, public-domain assets of the Portuguese Republic, or are allocated to any public-service purposes, those companies can claim immunity from suit, attachment or other legal process in respect of this.

Finally, any guarantee or security must guarantee or secure one or more obligations, to which they are ancillary, and such obligations shall be identified in the guarantee or security agreement. Accordingly, the guarantee/security will always follow the underlying secured obligation and the invalidity of the underlying obligation entails the invalidity of the guarantee/security and termination of the underlying obligation entails termination of the guarantee/security.

5.6 Release of Typical Forms of Security

Guarantees and security are ancillary to the guaranteed or secured obligation and thus the repayment, satisfaction or cancellation in full of such obligations automatically determines the release of the guarantees or security.

Nonetheless, it is market practice to execute a formal release agreement in order to obtain all necessary documentation from the lenders that allows perfection of the release of the security with the relevant authorities. This is particularly relevant if the security had been registered with a real estate or commercial registry office (mortgages and quota pledges) or with a bank (bank account pledges). Other actions such as notices, return of share certificates and cancellation of registrations may also be required, depending on the type of security that is being released.

5.7 Rules Governing the Priority of Competing Security Interests

As the priority of competing security interests is determined by the date of registration of the security interest (registration priority principle) if the security is subject to registration, mortgages on properties, vessels, aircraft, factory and car mortgages, quota pledges, pledges over bank accounts and pledges over deposited and dematerialised shares are all examples of security interests that are subject to registration. Conversely, if no registration is required but merely the transfer of possession (eg, assignment of receivables), priority is determined by the date on which the relevant perfection requirements of the security are completed, namely, the act of possession by the creditor or similar (eg, notification to debtors in an assignment of receivables).

Contractual subordination is allowed under Portuguese law. Creditors may qualify their debt as subordinated and have it treated as such in an insolvency proceeding. However, contractual subordination is only recognised if it is made before all creditors (eg, deeply subordinated debt) and not just before certain creditors (eg, mezzanine debt). This is because insolvency law has general classes of creditors (see **7. Bankruptcy and Insolvency**).

Therefore, waterfall provisions of inter-creditor agreements are not recognised in an insolvency proceeding; therefore, distributions may have to be corrected amongst creditors after having received the proceeds in an insolvency proceeding based on the payment provisions of the inter-creditor agreement.

Under Portuguese law, structural or legal subordination resulting from law is also permitted.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

Security interests are usually enforced by the secured parties directly (if lenders hold the security directly and retain the enforcement right) or by the security agent upon the occurrence of an enforcement event following an instruction of all or the majority of lenders.

Early termination clauses based exclusively on the declaration of insolvency are generically not allowed and, following the recent changes to the Portuguese Insolvency Code (PIC), the exemption previously foreseen based on customary practice has been eliminated.

Notwithstanding the above, the PIC now expressly allows early termination in situations preceding the declaration of insolvency.

Enforcement procedures vary significantly, depending on the type of security. The enforcement of mortgages is subject to a judicial enforcement proceeding, and no private or out-of-court enforcement is allowed.

In general, appropriation by the creditor is not allowed; therefore, enforcement requires a court sale or an extra-judicial sale. However, the financial pledges over shares and bank accounts and other financial collateral arrangements allow for an appropriation of the asset and for an extra-judicial sale, provided that the agreement sets forth rules for the evaluation of the asset, as well as for disposal of the underlying asset even before enforcement. Decree Law No 75/2017 on commercial pledges also allows for appropriation, provided that there is an evaluation of the asset in accordance with the terms and criteria established in the pledge agreement and that the

pledgee has the obligation to repay the pledgor the difference between the value of the appropriated asset and the secured amount owed.

Finally, assignment of receivables only requires a notification to the debtor/client of the borrower or guarantor to make payments directly to the secured parties.

Borrowers or guarantors usually grant irrevocable powers of attorney in favour of the security agent to create additional security over the new assets or to enforce security and sell the assets upon the occurrence of an event of default.

6.2 Foreign Law and Jurisdiction

The choice of a foreign law is valid, recognised and enforceable under Portuguese law, unless there is a mandatory provision that determines the competence of Portuguese law, in accordance with Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

The submission to a foreign jurisdiction is also valid, recognised and enforceable under Portuguese law, provided that the exclusive jurisdiction provisions, set forth in Council Regulation (EC) No 1215/2012 (Regulation 1215/2012), are complied with.

A waiver of immunity is also recognised, except where, as previously mentioned, the assets are in the public domain (*bens do domínio público*) or allocated to public interests or owned by states and diplomatic entities.

6.3 A Judgment Given by a Foreign Court

Judgments rendered by EU Member State courts are enforceable in Portugal in accordance with the terms of Regulation 1215/2012.

Judgments rendered by foreign courts outside the EU, should there be no bilateral treaty, will also be recognised and enforced in Portugal according to the procedures set out in the Portuguese Civil Procedure Code on the recognition of foreign judgments, provided that the following requirements are met:

- the judgment must be final, translated into Portuguese and apostilled;
- the judgment shall not be contrary to Portuguese public policy, and the obligation that the petitioner is attempting to execute must be lawful in Portugal;
- there shall not be a pending proceeding between the same parties in Portugal concerning the same issues;
- there shall not be a judgment rendered between the same parties and for the same cause of action in Portugal or in another country;
- the matters under discussion shall not be related to matters in which the Portuguese courts consider themselves exclusively competent, and the competency of such foreign courts shall not have been obtained by unlawfully circumventing applicable rules;
- the rights of defence of the defendant should have been protected when rendering the foreign judgment (*princípio do contraditório*) and with respect for the principle of equal treatment of the parties; and
- the request of recognition of a judgment rendered by a court of competent foreign jurisdiction may be challenged if the party against whom the judgment was rendered is a Portuguese citizen or a Portuguese company and the result of the judgment would be more favourable to that party if the foreign court had applied Portuguese law (assuming that the Portuguese law would be applicable

according to the Portuguese rules of conflict of laws).

In respect of foreign arbitral awards, the enforcement scenarios may vary, depending on the concrete situation and whether or not they are covered by the New York Convention or by any bilateral agreement.

6.4 A Foreign Lender's Ability to Enforce Its Rights

Aside from the above, there are no other matters which might impact a foreign lender's ability to enforce its rights under a loan or security agreement (other than all documents having to be translated into Portuguese, including any enforcement titles).

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

There are two main recovery/reorganisation procedures outside of insolvency proceedings: Out of Court Recovery Proceeding (RERE) and the Special Revitalisation Proceeding (PER).

The RERE is an extra-judicial voluntary mechanism aimed at allowing the recovery of companies in financial difficulties or imminent insolvency through negotiations with creditors for its revitalisation. If the parties' aim that the negotiations for reaching a restructuring agreement produce the effects provided for in the RERE, the company and the creditors, representing at least 15% of the company's liabilities (non-subordinated), must sign a negotiation protocol and promote its deposit at the commercial registry. Once the requirements have been met, the agreement reached will have some similarities to the agreement in a PER, although the RERE (contrary to the PER) does not provide for the cramming down of the non-participant creditors.

The PER aims at allowing debtors in financial difficulties or imminent insolvency, but whose recovery is still feasible, to negotiate with creditors an agreement for the revitalisation of the company. Law No 9/2022 introduced several amendments to the PER regime and changed dramatically the terms of the PER's approval, which now needs to take into account the different classes and, if existent, the categories (a new concept introduced by Law No 9/2022) of creditors. The PER is now considered approved in the following situations:

- If creditors are classified in different categories, it is voted in favour in each of the categories by more than 2/3 of all votes cast, thus obtaining:
  - (a) the favourable vote of all categories;
  - (b) the favourable vote of the majority of the established categories, provided that one of the said categories is composed of secured creditors;
  - (c) in the event there are no secured creditors category, the favourable vote of the majority of the established categories, provided that, at least one of said categories is composed of non-subordinated creditors; and
  - (d) in the event there is a tie, the favourable vote of, at least, a non-subordinated category.
- In the remaining cases, when it is voted by creditors whose credits represent at least 1/3 of the total number of claims with voting rights, the plan is approved if it obtains:
  - (a) the favourable vote of more than two-thirds of the votes cast; and
  - (b) the favourable vote of more than 50% of the votes cast pertaining to non-subordi-

nated credits with voting rights.
- When the recovery plan receives:
  (a) the favourable vote of creditors whose claims represent more than 50% of all claims having voting rights; and
  (b) the favourable vote of more than 50% of the votes issued pertaining to non-subordinated credits carrying voting rights as listed in the provisory credits list.

There is a specific Legal Framework for Conversion of Debt into Equity that allows companies in a negative equity position to restructure their balance sheet and strengthen equity, assuming that a majority of creditors propose a conversion of debt into equity.

7.2 Impact of Insolvency Processes

The declaration of insolvency triggers, in principle, the automatic acceleration of the liabilities of the insolvent entity. As such, there will be, in principle, an automatic acceleration of the loan.

In respect of guarantees, the declaration of insolvency determines the automatic claw-back actions of:

- granting of in rem guarantees ancillary to pre-existing obligations, or others that replace them, within six months prior to the beginning of the insolvency proceeding;
- personal guarantees, sub-guarantees, sureties and credit mandates made within six months prior to the beginning of the insolvency proceeding and not corresponding to transactions with a real benefit for the insolvent entity; and
- granting of in rem guarantees simultaneously to the creation of the secured obligations within 60 days prior to the beginning of the insolvency proceeding.

These automatic claw-back actions do not apply to financial collateral arrangements, such as financial pledges. In addition to such automatic claw-back actions, the acts performed or omitted within the two years prior to the insolvency proceedings may generally be subject to claw-back if they are found to be detrimental to the insolvency and have been carried out in bad faith.

Additionally, enforcement of guarantees and security are made within the insolvency proceeding of the guarantor, except for, eg, financial collateral arrangements. Therefore, all future enforcement proceedings will no longer be allowed and those ones currently pending will be suspended, and creditors will need to lodge their claims in the insolvency proceeding.

7.3 The Order Creditors Are Paid on Insolvency

The PIC provides for the following classes and ranking of credits:

- guaranteed credits – credits secured by in rem guarantees, including special statutory liens; accordingly, these include real estate special statutory liens (eg, state credits related to the real estate property tax, IMI), third-party security rights (eg, mortgage, income assignment, pledge), and movable assets' special statutory liens (eg, credits resulting from justice expenses incurred in the interest of the creditors);
- privileged credits – credits secured by general statutory liens over assets integrated in the insolvent estate up to the amount corresponding to the value of the assets that are the object of the guarantee or the general statutory liens; these include movable assets' general statutory liens (eg, employment credits), and real estate general statutory liens;

- common credits – all credits not included in another class; and
- subordinated credits – namely, the interests and credits held by persons with special relations to the debtor (eg, controlling shareholder), the directors or members of the supervisory board.

The payment will be performed according to the credit ranking: firstly, guaranteed credits, followed by privileged credits, then common credits and finally subordinated credits.

If the assets of the insolvent estate are insufficient to pay all creditors in full, the payment to common creditors will be made by apportionment amongst all creditors and in proportion to their credits.

The payment of subordinated credits will only take place after full payment of common credits.

7.4 Concept of Equitable Subordination

Subordinated credits ranking include any credits held by "related entities" to the insolvent company, provided that the special relationship existed at the time the credit was constituted, and those that were transmitted by those entities in the two years prior to the insolvency proceeding. Credits arising from shareholders' loans are subordinated.

7.5 Risk Areas for Lenders

Aside from the above, all security over assets of the insolvent entity (except for financial collateral arrangements) will need to be enforced in the respective insolvency proceeding, and accordingly the creditors will need to wait for the liquidation of the assets and respective payments to creditors to be made.

Furthermore, if there were any pending judicial enforcement proceedings, these will be suspended, and the creditors will need to lodge their claims in the insolvency proceeding and wait for the liquidation of the assets and payment to creditors within that proceeding.

In addition, and from a practical perspective, it should also be outlined that the insolvency proceeding can jeopardise the day-to-day functioning of the company (debtor, guarantor or other) and thereby the value of the company and recoveries of the lender. Additionally, the special recovery processes referred to above are dependent on the debtor's will, which makes it more difficult to entail a recovery proceeding based on an agreement exclusively between creditors.

8. Project Finance

8.1 Introduction to Project Finance

It is likely that there will be a new incentive for public investments and public-private partnerships, as well as new opportunities for project financing, following the enactment of the National Investment Plan 2030, defining the structural investment priorities for this decade, and the more recent presentation of the Recovery and Resilience Plan by the Portuguese government within the framework of the EU Recovery and Resilience Mechanism.

There is no specific legal framework for project finance. The Portuguese Public Contracts Code (PPCC), approved by Decree Law No 18/2008, which implemented Directives 2004/17/EC and 2004/18/CE, establishes the legal regime applicable to public contracts and the material regime applicable to contracts of an administrative nature. One of the PPCC's major innovations

has been the creation of adequate regulation of some aspects of project finance techniques not reflected in ordinary legislation and which had hitherto created a conflict between the contractual techniques and the legal rules relating to public procurement.

8.2 Overview of Public-Private Partnership Transactions

The PPP legal framework is based on the PPCC and the Decree Law No 111/2012 (PPP Laws) and sets forth the regime for the preparation, launch, implementation and subsequent amendment of a PPP.

Portuguese PPPs typically follow project finance structures with a Build Operate-Transfer (BOT) model. The concession agreement regulates the major contractual issues of the PPP, namely, the terms on which the project company will construct the project and operate it as well as the payment terms associated with the PPP. In addition to the concession agreements, the remaining documents that comprise the PPP package are also attached: the equity subscription agreement, the shareholder agreement, the direct agreement, the construction contract, the operation contract, and the financial documents.

Before launching and awarding the PPP, the environmental impact declaration and urban planning licences need to be issued. An environmental licence may also be required for certain industrial projects.

Under PPP Laws, the risks of the project shall be clearly and contractually identified, and its allocation shall be made in accordance with each partner's ability to manage it. Nonetheless, the partnership must also involve a significant and effective transfer of risk to the private partner, particularly the financing risk, which will always be the private partner's responsibility.

The financial rebalance, as the main mechanism covering project risks, remains with the public contracting entity.

Following the execution of the PPP contract, and prior to its entry into force, the Court of Auditors will review the agreement to verify that the acts, contracts or other instruments that generate expenditure or represent direct or indirect financial liabilities are in accordance with the laws in force. The acts, contracts and other instruments subject to the previous auditing by the Court of Auditors may produce its findings prior to the visa, except in respect to payments resulting from such acts, contracts or instruments being audited.

8.3 Government Approvals, Taxes, Fees or Other Charges

Project finance transactions do not need governmental approval, except for certain sectors of activity or public concessions (namely, energy, transport, health, etc). The authority for such approvals lies with the relevant ministries or governmental agencies or departments (eg, IMT for transports, DGEG for energy). In addition, the Court of Auditors is responsible for verifying that the acts, contracts or other instruments that generate expenditure or represent direct or indirect financial liabilities are compliant with the laws in force.

As regards PPP, the Technical Unit for Monitoring Projects (UTAP or *Unidade Técnica de Acompanhamento de Projetos*) has the role of executing the majority and most relevant tasks in respect of the preparation and implementation of PPP contracts.

Typically, the project finance documents do not have to be registered or filed with the governmental body, except in cases referred to above, or when it is necessary to execute a public deed or make a term of authentication with the notary public.

Stamp duty may be due in respect of the granting of guarantees or security, as well as for providing loans (see **4.2 Other Taxes, Duties, Charges or Tax Considerations**).

8.4 The Responsible Government Body

The regulatory authorities for oil and gas are the Ministry of Economy, the General Directorate for Energy and Geology (*Direcção Geral de Energia e Geologia* or DGEG), the Regulatory Entity for Energy Services (*Entidade Reguladora do Sector Energético* or ERSE), and the Energy Sector National Entity (*Entidade Nacional para o Sector Energético* or ENSE). The following are the primary laws and regulations applicable to oil and gas:

- Decree Law No 31/2006, establishing the general framework for the organisation and operation of the national oil system relating to the survey, exploration, development and production of hydrocarbons.
- Decree Law No 13/2016, establishing provisions concerning the safety measures in oil and gas offshore operations, transposing Directive 2013/30/EU.
- Decree Law No 109/94, establishing the legal regime for the prospection, exploration and production of petroleum.

In the power sector, the responsible government bodies are the Ministry of Economy, ERSE, DGEG and ENSE.

The Portuguese electrical system is regulated by Decree Law No 15/2022.

Additionally, the following ERSE regulations are relevant (as amended):

- Regulation 1129/2020, which regulates the commercial relationships between the various players in the National Electrical System (SEN) and in the Natural Gas System (SNG).
- Regulation No 785/2021, which specifies the definition of regulated tariffs and prices and the determination of revenues from regulated activities.
- Regulation No 406/2021, which regulates the quality-service obligations of technical or commercial nature applicable to SEN operators and SNG operators.
- Regulation No 560/2014, which establishes the access conditions to electricity networks.
- Regulation No 557/2014, which establishes the conditions for the management of the electricity flow in the National Electricity Transmission Network.
- Regulation No. 610/2019, which regulates the services to be provided within the scope of electrical facilities integrated into smart electricity distribution networks.

In relation to the mining sector, the main regulatory entity is the DGEG, which is currently integrated into the Ministry of Environment and Energy Transition.

The main regulatory framework for the exploration and extraction of mineral resources in Portugal is provided in (as amended):

- Law No 54/2015, which contains the legal framework for the discovery and exploitation of geological resources.

- Decree Law No 30/2021, which sets forth the mineral deposits' regulation.
- Decree Law No 270/2001, which contains the legal framework regarding the exploration and exploitation of mineral masses.

Regulations related to the environment, public procurement, health and safety, labour, tax, planning and expropriation of land shall also be applicable.

Additionally, there are a couple of local mining laws applicable in the archipelagos of the Azores and Madeira.

8.5 The Main Issues When Structuring Deals

Project finance structures in Portugal are similar to those used internationally. A special-purpose vehicle (SPV) is usually incorporated as a share company. The financing structure is usually a loan, although bond structures are also used when there is international financing involved or there is the participation of funds that, for regulatory reasons, cannot grant loans. Monoline structures are less common but they were successfully used in the past. The loan structures can have different types of facilities for working capital, letters of credit or banking guarantees, liquidity, VAT or long-term loans, and they can be granted by one or two banks, or they can be club deals, depending on the size of the financing. In certain projects, there can also be a credit agreement with the European Investment Bank (EIB).

There is typically a full security package which, however, limits the recourse to the project, project assets and project documents (such as the construction and operation contract) and, apart from the pledge of shares of the SPV, is not available to shareholders of the project company, which usually have their liability limited to certain amounts in relation to their respective participation in the share capital of the project company.

The laws relevant to the project depend on the project at stake. In the energy sector, the energy legal framework is of utmost importance and the lenders usually try, for example, to obtain certain protection on the reduction of feed-in tariffs. In the transportation and infrastructure sector, the concession agreement is usually the main legal document to consider.

There are no relevant limitations on foreign investment, except for energy and certain other sectors.

8.6 Typical Financing Sources and Structures for Project Financings

Export credit agency financing is not that common in Portugal, although it has increased in the last few years. It is common to have financing coming from both commercial banks and the EIB, which requires the structure to be properly modelled to ensure a higher ranking for EIB debt and, usually, guarantees from the commercial banks of the bank financing. The use of project bonds is not common but they have been used successfully in certain project finance deals. In the past, monoline structures were commonly used, particularly in the railway and subway financing contracts, but nowadays they are much less prevalent.

The use of performance bonds is quite standard and are provided by the contractor, as well as by the operation and maintenance (O&M) contractor and the constructor in concession projects. These bonds are usually backed by bank guarantees and are intended to ensure contractors are performing their obligations.

8.7 The Acquisition and Export of Natural Resources

The ownership of hidden mineral resources is vested in the state. Any entity that is interested in searching for or exploiting such resources needs to obtain an adequate licensing title. The type of licence that is required can vary, depending on the type of resource sought and also on the type of activity. Usually, mere exploration requires a simple licence, while exploitation will necessarily imply a concession.

Mining rights can be acquired by direct negotiations with the licensing authority, which can be the DGEG or, in the case of oil and gas, also the National Entity for Fuel Market (ENMC). However, in the case of oil and gas rights, there has been an indication that future rights will only be awarded as part of a competitive bidding process.

The exploration and exploitation operations require prior adequate environmental assessment, subject to public discussion. Any protective or remedial actions that are identified as necessary are exclusively the responsibility of the licensee.

The licensee is entitled to take and dispose of the production resulting from their activity, except for any quantities that may be due to the state as royalties that the state decides to take in kind. Exports are not subject to any specific duty or tax, and is free, except as may otherwise be regulated by sanctions adopted by the UN or the EU, or by another competent international organisation.

8.8 Environmental, Health and Safety Laws

Projects may be subject to environmental impact assessment, to environmental incidence assessment, and sometimes to environmental licensing.

The main environmental legislation applying to projects are the following:

- Law No 19/2014, which enacts the Environmental Bases Policy.
- Decree Law No 151-B/2013, as amended, which sets forth the legal regime for the Environmental Impact Assessment.
- Decree Law No 127/2013, together with Decree Law No 75/2015, which regulate administrative proceedings related to the grant of pollution and emissions licences for several activities.

The regulatory body that oversees the Environmental Law is the Portuguese Environment Association, which is an independent administrative entity supervised by the Environment Ministry.

Decree Law No 273/2003 established the prerequisites regarding health and safety in projects that entail construction. It requires the use of a health and safety plan as well as the appointment of a safety co-ordinator, both during the drafting of the project and later during its execution.

The Authority for Work Conditions is responsible for the control of the aforementioned requirements.

In order to obtain and maintain a permit to perform public or private works, an insurance for work accidents is required, the existence of which is supervised by the IMPIC (*Instituto dos Mercados Públicos, do Imobiliário e da Construção*). In turnkey or concession contracts, additional rules regarding health and safety can be included.

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