
Banking, Finance and Capital Markets

Legal Flash | Portugal

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I. Law no. 23/2019, of 13 March

Law no. 23/2019, of 13 March (“Law”) was recently published, which transposed Directive (EU) 2017/2399 of the European Parliament and of the Council, of 12 December 2017 (“Directive 2017/2399”) into the Portuguese legal order, which itself had altered Directive 2014/59/EU of the European Parliament and of the Council, of 15 May 2014, that established a framework for the recovery and resolution of credit institutions and investment firms (“Directive 2014/59”).

The approval of this law foresees an amendment of (i) Decree-Law no. 199/2006, of 25 October, which regulates the winding-up of credit institutions and financial companies based in Portugal and its branches established in another Member State, (ii) the Legal Framework of Credit Institutions and Financial Companies (“RGICSF”), and (iii) Decree-Law no. 345/98, of 9 November, which regulates the operation of the Mutual Agricultural Credit Guarantee Fund.

This Law entered into force on 14 March 2019.

II. Debt Instruments for TLAC

The Law transposed Directive 2017/2399 and defined the rules for certain debt instruments to be eligible for the purposes of the minimum requirements of TLAC (Total Loss-Absorbing Capacity), foreseen in Directive 2014/59.

In order to fulfil the eligibility requirements, the credits arising from debt instruments shall be paid after all common credits are fully paid and before the subordinated credits are paid, in proportion to the respective amounts if the estate is insufficient.

For this purpose, the following are considered as debt instruments:

- ✧ Bonds;
- ✧ Other securities representative of debt;
- ✧ Any instruments that create or recognize a credit right.

Nonetheless, for the debt instruments to have the mentioned preference, they must meet the following conditions:

- (i) The original contractual maturity of the debt instruments is of at least one year;
- (ii) The debt instruments contain no embedded derivatives and are not derivatives themselves;



- (iii) the contractual provisions applicable to debt instruments and, if applicable, the respective prospectus, explicitly refer that, in case of insolvency, the ranking of credits arising from debt instruments is the one mentioned above (foreseen in article 8.-A of the Decree-Law no. 199/2006).

Additionally, the mentioned preference shall only be applicable to debt instruments of entities that, on the date of issuance or execution, are:

- Credit institutions or investment firms that perform the activities foreseen in subparagraphs c) or f) of paragraph 1 of article 199-A of RGICSF, with exception to the service of placing without a firm commitment basis; or
- Entities referred in paragraph 1 of article 152 of RGICSF.

III. New Prior Ranking

By virtue of the new Law, in addition to credits from deposits secured by the Deposit Guarantee Fund, i.e. to a maximum of 100,000 euros, now all remaining credits from deposits benefit from a general prior ranking (*privilégio geral*) over the movable assets of the credit institution and from a special prior ranking (*privilégio especial*) over the immovable assets of the institution, with preference over all other prior rankings (except over the prior rankings that protect the credits from deposits covered by the Deposit Guarantee Fund).

Finally, the general and special prior rankings that are accessory to credits over the insolvency held by the State, local governments and social security institutions and constituted for more than 12 months before the start of the insolvency procedure are not terminated with the declaration of insolvency.



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