
Banking, Finance and Capital Markets

Legal Flash | Portugal

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I. Decree-Law no. 144/2019, of September 23

On September 23, Decree-Law no. 144/2019 (“**Decree-Law no. 144/2019**”) was published, approving the transfer of prudential supervision over management companies of investment funds and securitization funds from the Bank of Portugal to the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*) (“**CMVM**”).

Decree-Law no. 144/2019 also includes articles 5-B, 5-C and 5-D in the legal framework for venture capital, social entrepreneurship and specialized investment (approved under Law no. 18/2015, of March 4), and introduces alternative investment funds specialized in loans (“**Loan Funds**”) into the Portuguese market.

The creation of this new type of alternative investment fund aims to boost capital markets and provide a greater variety of funding sources for companies. The Portuguese legislator seeks to correct market failures in the demand and supply of funding, and to improve complementarity with banking, venture capital and securitization markets. Loan Funds are likely to improve funding (i) directly, by granting loans to companies; and (ii) indirectly, by purchasing loans initially held by banks, including non-performing loans.

II. Legal framework for alternative investment funds specialized in loans (Loan Funds)

Introducing Loan Funds into the Portuguese market through loan companies (*sociedades de créditos*) and loan funds (*fundos de créditos*) has transformed the more traditional sources of funding available to companies.

Loan Funds are allowed to grant loans (loan origination) and purchase loans originated by banks or other entities (loan participation).

Main features and innovations:

- > **Incorporation**: Loan Funds may be incorporated under a corporate form, such as loan companies, or set up under a contractual form, such as loan funds.
- > **Management**: Loan Funds that are not self-managed can be only managed by third parties that are management companies of undertakings for collective investment or management companies of venture capital funds.
- > **Prohibitions**: To avoid operational risks, some transactions are prohibited, notably:
 - short-selling financial instruments;



- providing direct or indirect financing for securities, including lending securities; and
 - entering into derivative financial instruments (except for hedging purposes).
- > **Debtholders:** In compliance with the legal frameworks of other European Member States and with ESMA's opinion,¹ Loan Funds cannot grant loans to:
- individuals (natural persons)
 - credit institutions
 - direct and indirect own investors
 - their management company, or companies in a group or control relationship with the management company
 - their depositary or the depositary's subcontractors, or companies in a group or control relationship with the depositary's subcontractors
 - other investment funds
- > **Indebtedness:** To minimize the liquidity risk and prevent mismatches between debt maturity and liquidity, and avoid competition and regulatory arbitrage risks, Loan Funds are subject to the following limits on the funding of their lending activity: (i) the maturity of Loan Funds' borrowing arrangements must be equal to or higher than the maturity of the assets they intend to finance; and (ii) the leverage cannot be higher than 60% of their total assets.
- > **Diversification requirements:** Investment diversification is a tool to mitigate concentration and counterparty risks. The CMVM is expected to regulate this matter.
- > **Supervision:** Loan Funds' activities (loan origination and loan participation) are subject to CMVM's supervision.

In addition to Decree-Law no. 144/2019, the CMVM will need to tighten the regulations on Loan Funds, bringing them in line with the public consultation it held in 2017. The new rules will apply to (i) maximum maturity of loans granted by Loan Funds, (ii) diversification requirements, (iii) disclosure duties towards investors and reporting requirements to CMVM, and (iv) regular stress tests, adjusted to the Loan Funds' activity.

The legal framework on Loan Funds will enter into force on January 1, 2020.

¹ *Opinion - Key principles for a European framework on loan origination by funds*, April 11, 2016, which identifies a number of aspects that are, in ESMA's perspective, necessary for establishing a robust European legal framework on loan funds., available at <https://www.esma.europa.eu/press-news/esmanews/esma-publishes-opinion-eu-framework-loan-origination-investment-funds>



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