

Project Finance

Consulting editors

Ayesha K. Waheed, Victoria Weir

Morgan, Lewis & Bockius LLP

Quick reference guide enabling side-by-side comparison of local insights into collateral and security packages; forex and withholding tax issues; remittances and repatriation of foreign earnings; foreign currency accounts; foreign investment issues, including investment, ownership, insurance, worker, equipment and nationalisation / expropriation restrictions and fiscal treatment; relevant government authorities; natural resource regulation; government approvals and filings; arbitration and governing law considerations; environmental, health and safety laws; project companies; public legislation, limitations and transactions; and recent trends.

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Contributors

Portugal



Teresa Empis Falcão
tef@vda.pt
VdA



Ana Luís de Sousa
als@vda.pt
VdA

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

What types of collateral and security interests are available?

Under Portuguese law, various types of security and collateral may be given to secure loans, notably mortgages on real estate and certain movable assets subject to registration (such as automobiles, ships and aircraft), and pledges on movable assets in general, including equipment, receivables, bank accounts, credits, deposits and shares (including new shares to be acquired). It is then possible to create security over different assets through a single security agreement.

The law generally requires the secured assets to be determined (although security over future assets and credits may be permitted in specific situations) and the concept of a floating charge does not apply under Portuguese law. As an exception to those principles, the law on financial collateral (which implemented the Directive on Financial Collateral Arrangements) allows for pledges similar to floating charges on money and securities in bank accounts.

Law stated - 15 June 2022

Collateral perfecting

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Immovable and movable assets

Mortgages are created by means of notarial deeds and must be registered as a condition for the validity (and not only perfection) thereof. Ranking of creditors is determined and evidenced by priority of registration of security at the relevant registry.

The law permits mortgages to cover fixtures (buildings, plants and machinery) not incorporated into the relevant property at the time of creation of security, a legal mechanism commonly used in the context of project financing of industrial premises (eg, factories and power stations). The creation of said security interests over plant and machinery may be made by means of a specific type of mortgage – the factory mortgage – which covers the property and surface rights over the land and buildings where the factory is located, and the equipment and the movable assets used in the factory's activity, which are identified in an inventory attached to the mortgage deed.

Pledges are the form of security interest entitling the beneficiary to be paid from the proceeds of a sale of movable (non-registered) assets or of credits. Pledges must generally be executed in writing and require the pledgor to make available to the beneficiary the relevant asset (transfer of possession, an exception being made to movable assets pledged in favour of banks under documents authenticated by a notary) or the documents enabling the beneficiary (or a relevant third party) to sell the asset or enforce the credit.

Receivables

A pledge over receivables qualifies as a pledge of credits under the law. Accordingly, in addition to the above-mentioned requirement, validity of this type of pledge requires that the counterparty of the pledgor (the credit of which has been granted in security to the pledgor financier) is served notice of the pledge.

A pledge of receivables covers all future payments to be made pursuant to the relevant contract. Save as otherwise provided for in the security agreement, the debtor will only be released from its obligations by making payments jointly to the pledgor and the pledgee. Pledge agreements generally permit payments to be made to the pledgor until enforcement of the secured debt.

Bank accounts

There may be a pledge over cash deposited in bank accounts, which also qualifies as a pledge of credits. This is typically achieved through financial pledges (ie, those created in accordance with the financial collateral regime (Decree Law No. 105/2004, of 8 May 2004, as amended, which implemented the Directive on Financial Collateral Arrangements into Portuguese law)), which allow the beneficiary to use and dispose of the deposited funds.

Shares

Security is created by means of a pledge, entailing a pledge declaration written by the pledgor on the certificates and a request for registration on the share ledger book (nominative shares represented by certificates) or an entry as to the creation of the pledge in the bank account of the pledgor (dematerialised shares). Share pledge agreements are also typically construed as financial pledges.

It is possible to create pledges over quotas (immaterial nominative representation of participation in the share capital of a company). These pledges must be made in writing, require registration with the Commercial Registry Office of the head office of the company and are not construed by law as financial pledges.

Trusteeship is not recognised under Portuguese law. Instead, security in Portugal is commonly held by a security agent on behalf of project lenders and the security agent is generally the only entity empowered to enforce security. The agency mechanism, sometimes coupled with parallel debt-type and similar arrangements, has to date proved sufficient to establish the value of the debt in the security agent's books for purposes of enforcement as well as to make parties comfortable as regards segregation of the agent in a bankruptcy context (however, no insolvency of a project's security agent has happened to date, and, therefore, no such contractual arrangements have yet been tested in that context).

Stamp duty is levied on security interests created in Portugal and the relevant rate applies to the secured amount under the relevant security interest (the amount of credit, the value of the asset or an agreed secured amount). Exemption of stamp duty over security interests applies when the security instruments are ancillary and simultaneous with the loan (ie, when they are executed concurrently with the documentation of the loan they purport to secure and such loan has itself been subject to stamp duty). Subjective exemptions may also apply, notably in relation to loans granted by or security granted to institutions such as the European Investment Bank.

Law stated - 15 June 2022

Assuring absence of liens

How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Regarding real estate and certain movable assets (such as nominative shares), priority is established by means of registration, such registration becoming public record. As such, a creditor may receive information concerning all existing encumbrances, as well as their rank and amount.

With regard to assets not subject to registration, assurance over the absence of liens may only be obtained through possession or on the basis of representations and warranties by the pledgor.

Law stated - 15 June 2022

Enforcing collateral rights

Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

If a project company breaches its obligations under a loan facility agreement, the creditors may issue a formal demand for full repayment of the loan and further enforce any security that has been granted in relation thereto.

Mortgages are enforced by means of a sale of the relevant assets (normally by an auction system) within specific court proceedings, while a private (out of court) sale is permitted for enforcement of pledges. Appropriation or foreclosure as enforcement mechanisms are generally not permitted under Portuguese law, save in the context of financial collateral or (as authorised by the enactment of Decree Law No. 75/2017, of 26 June 2017) of pledges securing commercial obligations provided that the beneficiary of the guarantee shall reimburse to the guarantor the amount corresponding to the difference between the value of the pledged assets (valued in accordance with the criteria set out in the relevant agreement) and the amount of the obligation guaranteed.

Law stated - 15 June 2022

Enforcing collateral rights following bankruptcy

How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Upon the opening of bankruptcy proceedings, all security other than financial pledges over the insolvent party's assets must be enforced within the bankruptcy proceedings and payment of creditors' claims shall be made in accordance with the Portuguese Insolvency and Company Recovery Code (CIRE) rules.

The insolvency order from the court has the effect of suspending outstanding executory proceedings directed at the attachment or seizure of the insolvent's assets and preventing the enforcement of security (and any new executory proceedings) against the insolvent estate. Accordingly, once initiated, all creditors must claim their credits (and provide evidence of any security as collateral thereto) within the bankruptcy proceedings.

The law qualifies certain transactions as detrimental to the insolvent estate and to creditors' rights. Project lenders typically tend to establish arrangements leading to creation of security preferably at the outset of a project, and tend to avoid security arrangements that lead to the creation of security interests during the project company life, that is, within what they consider to be probable repudiation or clawback periods (to avoid discussions as to eligibility of security).

After payment of the costs of the insolvency proceedings (which must be settled prior to all other claims), creditors shall be paid in the following order:

- employees' claims over the specific company premises where they carry out their activity;
- property taxes;
- secured claims (those with security over assets that are part of the insolvent estate up to the value of those assets);
- preferential claims, including:
 - general creditors' preferential claims over the assets in the insolvent estate up to the value of the assets over

which such preferential claims exist and where the claims are not extinguished in consequence of the declaration of insolvency;

- certain debts to the tax and social security authorities;
- claims by creditors that have provided capital to finance the insolvent's activity during the proceedings over all movable assets of the insolvent; and
- claims by the party that applied for the opening of the insolvency proceedings;
- unsecured claims; and
- subordinated claims (eg, the credits of related parties). Bankruptcy proceedings are generally applicable to all persons or legal entities, with the exception of the Republic of Portugal and public or administrative entities and companies. In addition, insurance companies, credit institutions and other financial corporations are subject to specific insolvency rules (and not to the CIRE).

No different rules apply to domestic or foreign creditors.

Law stated - 15 June 2022

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer?

There are no restrictions on foreign currency exchange or transfer, save those resulting from applicable EU money laundering controls and reporting obligations to the Bank of Portugal in the context of transactions.

No specific taxes apply to foreign exchange transactions, although general taxes – corporate income tax on income arising therefrom and stamp duty on banks' commissions – do apply.

Law stated - 15 June 2022

Investment returns

What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

Interest in relation to loans or dividends paid by Portuguese-resident companies to non-resident entities are, as a general rule, subject to withholding tax at a rate of 25 per cent (this rate may, under certain circumstances, be increased to 35 per cent). Payments of interest in relation to loans and financial fees also attract stamp duty at a rate of 4 per cent.

Withholding tax can be waived or reduced under the EU Interest and Royalties Directive, the EU Parent-Subsidiary Directive or under bilateral double tax treaties to which Portugal is a party.

A participation exemption regime for dividends (and capital gains) also applies under Portuguese law. This has extended the cases in which dividends paid to entities in other jurisdictions are not subject to withholding tax.

No stamp duty or withholding tax applies in relation to interest payments made in respect of the bonds registered with the Portuguese central securities depository (Interbolsa) to bondholders who are not Portuguese residents and do not

have a permanent establishment in Portugal.

Law stated - 15 June 2022

Foreign earnings

Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There are no restrictions on the remittance of profits or investments abroad – in local or foreign currencies available in the market – and no such requirements for repatriation arise from Portuguese law.

Law stated - 15 June 2022

May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes.

Law stated - 15 June 2022

FOREIGN INVESTMENT ISSUES

Investment restrictions

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Under Portuguese law, certain activities may only be exercised by private entities – whether national or foreign – pursuant to licencing or concessions granted by the state (as is the case of certain activities within the energy, water, waste management, postal services, telecoms, railways, commercial aviation and financial services sectors).

A specific framework is set forth with respect to strategic assets that allows the Council of Ministers to oppose transactions that may lead to the acquisition of control, direct or indirect, by a person or persons of a country outside the European Union and of the European Economic Area, to the extent that such transactions may put into question the defence and national security, or the country's security of supply of services that are fundamental for the national interest.

Portugal abides by the Law on Money Laundering and the Financing of Terrorism, which transposed the EU Money Laundering Regulations into Portuguese law, which may entail further restrictions on both national and foreign investors. There may also be temporary embargo situations applying to persons or entities from non-EU states.

There is no distinction regarding foreign investors or creditors in the context of foreclosure on a project and related companies.

Law stated - 15 June 2022

Insurance restrictions

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

There are no restrictions on insurance policies being provided or guaranteed by foreign insurance companies and no specific taxes or charges apply in connection thereto.

Law stated - 15 June 2022

Worker restrictions

What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

The employment of workers from non-EU countries requires that such workers be granted a work visa, which includes a residence permit, to live and work in Portugal.

Law stated - 15 June 2022

Equipment restrictions

What restrictions exist on the importation of project equipment?

There are no restrictions on imports, the import of goods being in general a taxable event for the purposes of value added tax and customs duties, applying at the time the goods pass customs.

Law stated - 15 June 2022

Nationalisation laws

What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

Private property is a constitutional right, nationalisation or expropriation being only permitted on the grounds of public interest and subject to payment of compensation to private entities.

There is a specific legal framework setting out the terms for the expropriation process and calculation of indemnification payable in relation to immovable assets. No similar legal framework exists for nationalisation processes.

There is, nevertheless, a specific legal regime setting out the framework for the public appropriation of share capital, in whole or in part, from private legal persons for public interest reasons.

There is no distinction between domestic and foreign investors for this purpose.

Law stated - 15 June 2022

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Portugal has implemented tax regimes directed at the promotion of foreign investment, comprising tax incentives to investment in specific business sectors (eg, the mining and manufacturing industry), under the form of corporate income tax deductions and exemptions or reductions in real estate tax, real estate transfer tax and stamp duty.

Foreign investment made in Portugal through a subsidiary or other form of local permanent representation will make the affiliate subject to the taxes generally applying to Portuguese companies and corporate activities.

Transactions made without a local presence will generally trigger payment of withholding tax on income and dividends.

Foreign loans and security instruments will be subject to the transaction taxes generally applying in Portugal, in particular, stamp duty at varying rates (typically 0.5 or 0.6 per cent depending on the maturity of the loan or the term of the security). Stamp duty will be levied on the value of the loan or the secured amount under the collateral instrument, and exemptions may be available for security created concurrently with taxable loans (eg, collateral granted to financial institutions).

Law stated - 15 June 2022

GOVERNMENT AUTHORITIES

Relevant authorities

16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The ministers entrusted with the supervision of the relevant sectors (energy, infrastructure, transport, health) are in general responsible for the initiative as well as for licensing and regulation of projects in the sectors under their supervision. This may be done by the specific departments or agencies functioning under the relevant ministries (energy, roads, health, etc). The involvement of the Minister of Finance is also required for the launch of any PPP project.

Moreover, reference should be made to the Unidade Técnica de Acompanhamento de Projetos, an administrative entity under the supervision of the Ministry of Finance, created for the follow-up of PPP projects.

In addition to the governmental authorities, the independent regulatory authorities for each specific sector (eg, the Entidade Reguladora dos Serviços Energéticos, the Autoridade Nacional de Comunicações, the Entidade Reguladora dos Serviços de Águas e Resíduos and the Autoridade da Mobilidade e dos Transportes) are invested with regulatory and supervisory powers over the respective sectors, notably responsible for enforcing the applicable rules and regulations and monitoring the development of each respective sector, both in dealing with private companies acting therein and with consumers.

Additional ownership restrictions and authorisation requirements may apply with respect to exploitation of natural resources.

Law stated - 15 June 2022

REGULATION OF NATURAL RESOURCES

Titles

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Mineral resources, as well as water, are generally in the public domain and may not be appropriated by private entities (whether national or foreign), although their economic use may be granted by means of concession or similar type of right of use that does not entail the transfer of property of the relevant assets or resources. 'Water' means not only the actual resource but the entire sea (within the boundaries of the Portuguese international jurisdiction), the riverbeds and other bodies of water, as well as the corresponding margins and shores.

With the exception of the above cases, land and other assets may generally be owned by private entities, as no distinction generally exists between national and foreign entities in this respect.

Law stated - 15 June 2022

Royalties and taxes

What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The extraction of oil (but not of natural gas) is subject to a specific taxation regime, also including the payment of fees on prospecting, research and production oil concessions, calculated by reference to the relevant concession area.

Excise duties also apply to the supply of petroleum and energy products to final consumers, in line with EU legislation.

With regard to mining resources, there are no general rules concerning royalties payable to the state. Royalties are, nevertheless, typically negotiated and included in prospecting and exploitation agreements, and they may be either excise- or profit-based.

The extraction of natural resources may also be subject to the general taxes applicable within the tax system, namely corporate income tax and value added tax.

Law stated - 15 June 2022

Export restrictions

What restrictions, fees or taxes exist on the export of natural resources?

The export of natural resources may be subject to the general taxes applicable within the tax system, namely corporate income tax and value added tax.

Law stated - 15 June 2022

GENERAL LEGAL ISSUES

Government permission

What government approvals are required for typical project finance transactions? What fees and other charges apply?

Project finance transactions pertaining to agreements entered into with governmental authorities typically require the intervention of the relevant governmental body. In certain cases, sector-specific government approvals or authorisations may be necessary, as is the case with transactions within regulated areas (such as energy projects).

The approval of the Ministry of Finance may also be required where a project involves public investment or, more generally, where the PPP legal framework applies.

In this respect, reference should be made to the Unidade Técnica de Acompanhamento de Projetos.

Moreover, certain mergers, acquisitions or joint ventures may be subject to either EU merger control rules or Portuguese merger control rules, in the latter case requiring the non-opposition of the Portuguese Competition Authority.

No fees or charges are typically applicable as a direct result of such transactions, without prejudice to amounts that may be contractually due under concession agreements as consideration for the rights granted thereunder.

Law stated - 15 June 2022

Registration of financing

Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Save for the references made above in the context of registration of security, project documents are generally valid and enforceable without any need for registration, authentication or filing with any governmental authority. However, powers of attorney and other notarial instruments executed abroad are required to be authenticated with an apostille (Hague Convention) or similar formality to be accepted by the equivalent Portuguese authorities.

To ensure swift enforcement of a private agreement acknowledging a payment obligation, or the appropriation of a commercial pledge created pursuant to the recently enacted Decree Law No. 75/2017, of 26 June 2017, it is advisable to have the same authenticated by a notary.

Law stated - 15 June 2022

Arbitration awards

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

International arbitration clauses are generally recognised by Portuguese courts, irrespective of the rules applying – Portuguese arbitration law or the commonly chosen rules of international centres such as the International Chamber of Commerce, the London Court of International Arbitration and the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) – or of the seat of arbitration. Foreign arbitral awards are recognised and enforced in Portugal under the applicable international treaty or generally under the New York Convention.

Portugal is a party to the following international conventions:

- the Geneva Protocol on Arbitration Clauses of 1923;
- the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;

- the New York Convention, which entered into force in Portugal on 16 January 1995;
- the Inter-American Convention on International Commercial Arbitration, adopted in Panama on 30 January 1975; and
- the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force in Portugal on 1 August 1984.

The enforcement of foreign awards not covered by any of these international treaties will be carried out via the general provisions of the Portuguese Arbitration Act, which closely follow the principles of the UNCITRAL Model Law and the New York Convention.

On a bilateral level, Portugal has a number of bilateral agreements with Portuguese-speaking countries that are directed at equating arbitral awards to judgments by the national courts. There are treaties in force with Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe and the Special Administrative Region of Macao (People's Republic of China). These bilateral agreements entered into between Portugal and other Portuguese-speaking countries equate arbitral awards to national courts' judgments and subject both decisions to the same legal regime.

Law stated - 15 June 2022

Law governing agreements

Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Other than in the case of concession contracts and certain project agreements entered into with public entities – which are normally required to be governed by Portuguese law – parties are in general free to choose the governing law of contracts.

Project and finance documents for projects in Portugal are typically governed by Portuguese law, although finance documents in international syndicated loans or bond issues are not uncommonly governed by English law, with the associated security documents subject to Portuguese law. Irrespective of the governing law of the contract, Portuguese rules shall mandatorily apply to the creation and enforcement of security instruments, to insolvency and to certain company arrangements (for instance, in the context of shareholder agreements of Portuguese companies).

Law stated - 15 June 2022

Submission to foreign jurisdiction

Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

The parties may freely choose to submit any disputes to a foreign jurisdiction. Indeed, Portuguese courts recognise the parties' autonomy to select the forum of their disputes, even when the selected forum has no particular connection with the dispute, and have consistently recognised the provisions of the Brussels Regulation as prevailing over the Portuguese Code of Civil Procedure, under which the parties are required to establish a significant interest in the designated jurisdiction to select it as the appropriate forum for their disputes.

Notwithstanding, Portuguese courts may ignore foreign jurisdiction clauses and assume jurisdiction in special cases where they may claim to hold exclusive jurisdiction, eg, proceedings relating to local land, the validity of the incorporation or dissolution of companies domiciled in Portugal, the validity of entries in public registers or the

registration and validity of patents.

Disputes concerning collective labour rights and sports regulation are subject to mandatory domestic arbitration (Decree Law No. 110/2018, of 10 December 2018, which altered the Code of Industrial Property, as well as Law No. 62/2011, of 12 December 2011, and, consequently, intellectual property rights related to medicines are now subject to voluntary arbitration, not mandatory arbitration).

In addition, waivers of immunity are generally recognised and enforceable in Portugal. Although there is no specific national act or international convention entered into by Portugal in this regard, Portuguese law gives immunity from jurisdiction of the Portuguese courts to sovereign states (and to other public entities) by virtue of a general principle of customary international law. State immunity is, however, given a strict extent and is limited to acts involving the exercise of sovereign authority.

Law stated - 15 June 2022

Anti-money laundering rules

Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

Law No. 83/2017, of 18 August 2017, as amended (the AML Act), and related regulations establish the obligation of certain entities to adopt and implement a compliance programme addressing money laundering or terrorist financing risks.

The investor status does not in itself trigger any anti-money laundering compliance checks or other compliance rules. Yet, while the relevant activity entails wiring money to the Portuguese financial and banking system, the investor will be subject to AML checks. Moreover, should the relevant scope of business be related, notably, with financial, banking, insurance, legal, real estate, mining, automotive and gaming sectors, the investor may be subject to AML checks from the relevant supervisory body and must implement a comprehensive AML compliance programme.

In this context, it is important to note that Decree Law No. 109E/2021, of 9 December 2021, on anti-bribery and anti-corruption (the ABC Law), which entered into force on 8 June 2022, imposes several ABC-related obligations upon entities with 50 or more employees as well as to local branches of foreign entities that fulfil that requirement. Entities subject to the ABC Law have the obligation to, inter alia, adopt and periodically revise corruption prevention plans, as well as to draft and implement specific instruments and procedures provided therein.

Law stated - 15 June 2022

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

What environmental, social and governance (ESG) issues are relevant in typical project sectors? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations?

ESG issues are quite relevant in all typical project sectors given the long-term nature of projects and the underlying nature of the special purpose vehicle credit risk mostly linked (if not wholly) to the project. Environmental issues are always critical in typical project sectors and projects are subject to environmental laws and regulations, impact assessments, approvals (as applicable) and environmental monitoring.

Projects are also facing higher scrutiny from communities and public opinion; social and governance issues are increasingly scrutinised. Companies are increasingly paying attention to gender diversity in boards and leadership

positions, even though this is only mandatory under Portuguese law for large companies or public companies. Attention to supply chain considerations is also increasing.

Project companies which are part of larger groups usually abide by the sustainability strategy of the group – this is particularly relevant in the case of renewables.

As regards financings, we note the Equator Principles adopted by the financial institutions. Additionally, when projects resort to sustainable financings, projects are thoroughly assessed, including for the purposes of issuance of the Second party Opinions and subsequent monitoring – such as for the financing of some renewable energy projects.

The growing relevance of ESG issues is also reflected in new clauses being added to project and financing agreements, reflecting the concerns of sponsors and lenders in ensuring that ESG issues are complied with by counterparties (such as human and labour rights, anti-bribery, anti-corruption, etc). Also, new considerations are being added to all due-diligence processes.

As regards ESG reporting requirements, only large (500 or more employees) listed companies (and large banks and other financial undertakings) are subject to ESG reporting requirements:

- under Law No. 89/2017, of 27 July 2017 (that implements Directive 2014/95/EU (Non-Financial Information Reporting Directive) (NFRD) and, more recently;
- under Commission Delegated Regulation (EU) 2021/2178, of 6 July 2021, applicable as from January 2022 (only climate-related issues).

Some project companies make voluntary disclosures, the most common reporting standard being the Global Reporting Initiative. A few companies (mostly those that are carbon-intensive and (or) committed to carbon emissions reduction targets) also report on a voluntary basis under the Recommendations of the Task Force on Climate-Related Disclosures.

Law stated - 15 June 2022

PROJECT COMPANIES

Principal business structures

What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Project companies are usually established as special purpose vehicles (SPVs) for a single project, which then subcontract works (namely, operation and maintenance or construction works) for the development of the project. Such SPVs typically secure financing primarily through national or international lending syndicates, but capital markets and EU-level or state subsidies may also be important sources of financing.

Law stated - 15 June 2022

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Portugal has enacted PPP legislation with a broad national scope. Decree Law No. 111/2012, of 23 May 2012, as amended, sets out the main principles applicable concerning the relationship between public and private entities, public

procurement, risk sharing and transparency. There is also specific legislation for PPPs in the health sector (Decree Law No. 185/2002, of 20 August 2002, which was heavily amended by Decree Law No. 111/2012, of 23 May 2012).

Nonetheless, each individual project (and in light of any specifications thereof) remains subject to compliance with the regulatory framework that may be applicable.

Law stated - 15 June 2022

PPP – LIMITATIONS

Legal limitations

What, if any, are the practical and legal limitations on PPP transactions?

The principles and procedures set out in Decree Law No. 111/2012, of 23 May 2012, shall govern the relationship of the state with the private sector in these agreements.

Moreover, with regard to contracts between the state and private entities, the rules of public procurement set out in the Public Procurement Code must be complied with, PPP contracts being typically awarded pursuant to public tender procedures.

These agreements are normally required to be subject to the prior audit of the Audit Court for purposes of approval of the associated public expenditure. Further, any amendments to these agreements that may involve an increase in costs or obligations of the state or state-owned entities must also be subject to such audit.

Law stated - 15 June 2022

PPP – TRANSACTIONS

Significant transactions

What have been the most significant PPP transactions completed to date in your jurisdiction?

Relevant PPP or project-related deals completed recently (some of which took place during the covid-19 pandemic) that are worth mentioning (both by size and relevance in this context) are the following:

- the consensual orderly handover of a road concessionaire to its project finance lenders ensuring the continuity of the road operation and the protection of the public interest after the first-ever step-in by project finance lenders in a concessionaire in Portugal;
- the refinancing of existing debt of the Vauban group incurred in connection with the acquisition of a road concessionaire and in Portugal;
- the financing by EIB and Banco BPI (CaixaBank) of a wind-farm portfolio with 125.25 megawatts (MW) of installed capacity;
- the financing by EIB and Banco BPI (CaixaBank) of a wind-farm portfolio with 96MW of installed capacity and benefitting from a feed-in tariff;
- the refinancing of the Finerge group debt and operations in excess of €700 million, one of the largest wind financings in Europe, and the longest tenor renewables deal and largest green loan deal in Portugal;
- the €150 million refinancing of existing debt of the Finerge group incurred in connection with the acquisition of two solar plant portfolios in Spain and Portugal;
- the €59 million refinancing of existing debt of the Finerge group incurred in connection with the acquisition of one solar plant portfolio in Portugal;
- the financing of 40 photovoltaic small-scale generation units, including several regulatory and real estate matters, which, due to the size and specificities of the project of each production unit, had led the project to be structured

in such a way that carves out mechanisms to prevent contamination of projects and allow for long-term flexibility and solidity;

- the refinancing by an international syndicate of banks (including commercial banks and EIB) of the debt of approximately €240 million of six port operators, owned by the same shareholder;
- the refinancing of existing debt of a windfarm portfolio with 125.25MW of installed capacity and a wind farm portfolio with 96MW of installed capacity and benefitting from a feed-in tariff in connection with the exit of the European Investment Bank and Banco BPI, SA of the financing and the entry of Banco Santander Totta, SA; and
- the refinancing of a wind and hydro portfolio installed in Portugal, comprising 10 wind power plants with a total installed capacity of 423,4MW and nine hydro plants with a total installed capacity of 33,2MW developed by 14 SPVs, part of Generg's group.

Law stated - 15 June 2022

UPDATE AND TRENDS

Key developments of the past year

In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

The Portuguese market continues to show signs of increasing confidence from investors as a significant number of greenfield projects are being discussed and planned for the near future, both in the infrastructure and the energy sectors.

Alongside the new public-private partnership in the health sector, whose tender is ongoing, the ports sector has also been attracting the attention of investors.

The energy market also remains attractive with the new wave of merchant solar power plants under development in the context of the award through public tenders of 1.8 gigawatts (GW) of installed capacity in 2019 and 2020 and an additional 183MW of installed capacity in 2022 for the first floating solar power plants, as well as the announcement of an additional 17GW of capacity to be granted through agreements with the grid operators for reinforcement of grid capacity.

With the recent enactment of the new legal framework for the energy sector and the Portuguese government's willingness to accelerate the achievement of renewable generation targets proposed before the European Commission, it is expected that the overpowering, repowering and hybridisation of brownfield projects and financing thereof or refinancing of the existing portfolio takes place in the coming years.












Besides green loans and sustainable finance, mobility projects are also expected to bring new financing opportunities.

The activity in secondary market sales of participation in project companies in the road, ports, water and energy sectors continues. Investment funds keep seeking to enhance their position in the market, replacing to a certain extent the traditional banking groups and the investors.

The maturity of the projects combined with an increase of liquidity in the financing market increased the number of refinancings of project debt transactions, some of which were within the context of merger and acquisition deals, with recourse to bond issues by Portuguese issuers and registered with the Portuguese clearing and settlement house, Interbolsa. This type of structure has been favoured by both sponsors and lenders, as it has proven very efficient not only from a contractual perspective but also from a tax point of view.

Law stated - 15 June 2022

Jurisdictions

| | | |
|--|--------------------|------------------------------|
|  | Australia | Allens |
|  | India | Cyril Amarchand Mangaldas |
|  | Italy | Legance - Avvocati Associati |
|  | Mozambique | VdA |
|  | Portugal | VdA |
|  | South Korea | Shin & Kim |
|  | Switzerland | Walder Wyss Ltd |
|  | Taiwan | Lee and Li Attorneys at Law |
|  | Thailand | Chandler MHM Limited |
|  | USA | Morgan, Lewis & Bockius LLP |
|  | Vietnam | Chandler MHM Limited |