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Portugal

LENDING & SECURED FINANCE

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Portugal.

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PORTUGAL
LENDING & SECURED FINANCE

1. Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Loan origination is subject to the banking exclusivity rule, according to which only credit institutions and entities authorised under the applicable Portuguese legislation can lend funds or grant credit on a professional basis.

Entities may also be authorised to provide these activities in Portugal on the basis of freedom to provide services, if authorised to do so under the legislation of another European Union member state or if they fall within an exemption or exception from Portuguese licensing rules (which need to be assessed on a case-by-case basis).

Law 78/2021 of 24 November, which entered into force recently, established the legal framework for the prevention and combating of unauthorised financial activity and protection of consumers, setting out additional duties of abstention and report for parties involved (including lawyers, notaries and registrars) in transactions which (may) entail the practice of unauthorised financial activity.

The abovementioned principle and restrictions do not prevent foreign lenders from taking the benefit of security over assets located in Portugal.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

Portuguese law establishes a general prohibition on usury. Accordingly, although parties are generally free to agree on the applicable interest rates, maximum thresholds are established by reference to the legal rates (determined by ministerial order). The annual interest rate charged on a loan must not exceed the legal interest rate plus 3 or 5 per cent., depending on whether security interest was provided, while the annual surcharge rate in case of default is limited to 7 or 9 per cent. over the legal interest rate, depending on whether security interest was provided.

In addition, default interest charged by banks is subject to the maximum rate of 3 per cent.

Interest rates above these limits are automatically reduced regardless of the agreement of the parties.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

The disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, Portugal is generally accepted, without prejudice to certain controls and provisions (notably anti-money laundering controls imposed by EU law).

The matter is addressed in specific diplomas, particularly the Portuguese Foreign Exchange Framework (Decree-Law no. 295/2003 of 21 November), which establishes the legal framework for external economic and financial transactions, as well as for foreign exchange transactions carried out in the Portuguese territory.

In addition, Decree-Law no. 74-A/2017 of 23 June, on credit agreements for consumers for residential immovable property provides for enhanced information duties in the case of foreign currency loans made available to consumers.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in

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companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

The abovementioned types of assets may be the object of security, typically created in the form of mortgages or pledges over assets or credits/rights allowing the lenders to be paid from the proceeds of sale of the assets or credits subject to security.

Appropriation of the assets subject to security is generally forbidden, save for security created under specific regime which expressly provide for such appropriation right, and subject to the requirements foreseen therein, in particular the Commercial Pledge Law (Decree-law no 75/2017, of 26 June) and the Financial Collateral Law (Decree-law no. 105/2004, of 8 May, as amended, which implemented the Directive on Financial Collateral Arrangements).

As a rule, the creation of *in rem* security over assets or rights located in Portugal must be subject to Portuguese law as the law governing such assets or rights, which follows the general rule under Rome I Convention. Although alternative or mitigated approaches may be admitted for certain types of assets, they are seldom used in practice, namely taking into consideration applicable perfection formalities and impact on enforceability.

Security over real property (such as land, real estate property and surface rights) and moveable assets subject to registration (such as vehicles, ships and aircrafts) is created through mortgages (*hipoteca*).

Mortgages include fixtures, improvements and accessions to the property. Pursuant to a specific provision of the Portuguese Civil Code, in the case of mortgage over factories, the security may also cover machinery and other moveable assets relevant for the plant's activity but not part of the property.

Mortgages are created by means of a public deed executed before a Notary Public (with a certified private document also being possible, even though not usually followed in practice). In case of mortgages over factories and machinery, an inventory of the machinery and other relevant moveable assets must be attached to the mortgage deed and recorded in the registry.

Mortgages are required to be registered as a condition for their validity and ranking is evidenced by the priority of registration. To such effect, it is usual to apply for a prior registration submission of the mortgage, so as to ensure the prior ranking.

Without prejudice to the above, security over moveable assets such as equipment is created by means of a pledge (*penhor de coisas*).

For the pledge to be effective, the pledgor is required to deliver or confer possession of the asset to the beneficiary or to a third party. As an exception to this rule, pledgors are allowed to maintain possession of the assets pledged for the benefit of banks, provided that the pledge is created under an authenticated agreement.

Inventory may be regarded as moveable assets, in which case please refer to the answer above.

Although less used in practice (and to some extent disputed amongst scholars), in the case of inventory contained in business/commercial premises, a pledge may also be created over the business as a whole (*penhor de estabelecimento commercial*), therefore including the moveable assets held and used for business activity (as well as certain contracts and rights).

A pledge over receivables is created as a pledge of rights or credits (*penhor de direitos*).

The creation of this pledge must comply with the form and publicity requirements applicable to the transfer of the pledged receivables and notice must be served to the debtor of the receivable.

Certain types of receivables – namely credits arising from financial instruments and cash deposited in bank accounts – may be subject to financial pledge provided that the remaining requirements established under the Financial Collateral Law are fulfilled.

In addition, another common security arrangement in respect of receivables is assignment by way of security (*cessão de créditos com escopo de garantia*), whereby ownership of the receivables is assigned to the beneficiary, who becomes the fiduciary holder thereof. The requirements and formalities applicable to the assignment are determined by the type of credit and notice must be served to the debtor.

Finally, receivables generated by immoveable assets (property) and moveable assets subject to registration may also be subject to assignment of income (*consignação de rendimentos*), pursuant to the Portuguese Civil Code. The assignment of income is subject to registration and must be created by means of a public deed executed before a Notary Public (certified private document also being possible but seldom used, as detailed above). When the relevant receivables arise from immovable assets (for example, rents of real estate

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assets) the tenure of the assignment shall not exceed 15 years.

Security over the share capital of companies incorporated in Portugal is created by means of a pledge (*penhor*) and often extend to the rights inherent to the share capital (such as voting rights).

Pledges over shares of limited liability companies by shares (*sociedades anónimas, S.A.*) must be registered in the share certificates and the company's share registry book (when such certificates are represented in physical form) or in the relevant account (in case of book-entry shares).

In limited liability companies by quotas (*sociedades por quotas, Lda.*), pledges must be created in writing and registered in the commercial registry certificate. The consent of the company is required.

Pledges over shares may be created under the Financial Collateral Law. Although this regime does not apply to quotas, pledges over quotas may be created under the Commercial Pledge Law, which allows for a similar appropriation regime.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Under Portuguese law, the assets and rights subject to security need to be determined and, as a general rule, security cannot be effectively created over assets which do not exist / are not held by the guarantor at the time (promissory agreements are possible but do not exclude the need to grant the security at a later stage).

The admissibility of pledges over future receivables is debated and upheld by relevant scholars, provided that certain conditions are met: the future receivables must be sufficiently identifiable, and perfection of the pledge depends on the receivables coming into existence. Without prejudice to the discussion around pledges, the assignment by way of security of future receivables is generally accepted and often implemented in secured finance transactions.

These same comments apply, *mutatis mutandis*, to the creation of security interests for future obligations – although not a clear-cut issue, it is generally accepted that security may be created for obligations that are not yet quantified but are sufficiently identifiable (notably the maximum secured amount). In particular, the Portuguese Civil Code states that mortgages may be created for *future or conditional obligations*.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

A single security agreement may be used, although certain types of security require additional documents to be executed (such as mortgages and assignment of income) require, in addition, to be formalised via a public deed as mentioned above.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

Certain types of security require notarisation/legalisation. In addition to the situations mentioned above, we note that signatures must be certified for the right of appropriation to be effective under the Commercial Pledge Law.

For additional details, please refer to our answer to question no. 4.

When notarisation or legalisation is required, parties will typically need to execute the documents in person at a notarial meeting, with the Notary Public being responsible for the perfection of such documents. In this case, any foreign powers of attorney issued for the execution of the documents must also be notarised (and bear the Apostille of the Hague Convention if applicable). Foreign entities receiving the benefit of registered security in Portugal are required to apply for a Portuguese equivalent taxpayer number and registration of their ultimate beneficial owner.

8. Are there any security registration requirements in your jurisdiction?

Yes. Please refer to our answer to question no. 4 above.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in

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respect of such costs (e.g. upstamping)?

Stamp duty typically represents the most significant cost at the outset of a financing transaction.

Loans, when granted in Portugal or to Portuguese resident entities, are generally subject to stamp tax assessed over the loaned amount at the rate of 0.04% (per month or fraction), 0.5% or 0.6% depending on the tenor of the loan.

As a rule, stamp duty also applies to guarantees or security granted in the Portuguese territory or presented in Portuguese territory for any legal purpose (except when they are materially accessory to a specifically taxed contract, notably a loan agreement, and are granted simultaneously to the secured obligation). Stamp tax is assessed over the guaranteed/secured amount at the rate of 0.04% (per month or fraction), 0.5% or 0.6% depending on the tenor of the guarantee or security.

There are also notary fees and registration costs, which are usually negligible and vary depending on the complexity of the transaction and/or the number and type of assets.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

Pursuant to Article 6 no. 3 of the Portuguese Companies Code (Decree-Law no. 262/86 of 2 September, as amended), guaranteeing or securing the obligations of another company is deemed contrary to a company's corporate purpose, unless (i) there is a justified corporate interest (corporate benefit) of the guarantor in doing so or (ii) the companies are in a control or group relationship. The existence of a control or group relationship is assessed in accordance with the definitions set forth in the Portuguese Companies Code.

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

Under Article 322 of the Portuguese Companies Code, it is unlawful for a limited liability company by shares (*sociedade anónima*) to provide (loans/funds or) guarantees/security to a third party for the purchase of "shares representing its share capital" except under certain circumstances. While there is no similar rule for limited liability companies by quotas (*sociedade por quotas*), the applicability of Article 322 to such companies is disputed among scholars.

No such limitation applies to the provision of guarantees and/or security to support borrowings incurred for the purposes of acquiring shares in a related company (without prejudice to the requirement mentioned in question 10. above).

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

The concept of trusteeship is not recognised under Portugal Law (save for a particular exception applicable to the free zone of Madeira) and therefore alternative structures are often implemented in cross-border transactions as better detailed below. In Portuguese structures, a security agent can be appointed to receive the benefit of security for and on behalf of the lenders, acting with under a representation mandate (*mandato com representação*) as detailed below.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

To meet this type of trustee/agent structure for the purposes of enforcement, *maxime* in cross-border transactions, an agent is typically appointed to hold, manage and enforce the security on behalf of the lenders. To that effect, the agent shall be duly empowered by the lenders with a representation mandate (*mandato com representação*) and may benefit from parallel debt (if admissible under the law governing the loan agreement) or similar arrangements.

Although it has proven successful for the purposes of enforcement of security, this agency relationship is contractual and, therefore, certain typical features of trusts (such as segregation of assets) do not apply by

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operation of the law.

There is also the specific case of common representatives of bondholders (in financing structures where a notes issuance is at stake) and following specific provision of the Portuguese Companies Code. Common Representatives undertake the powers to represent the bondholders in court proceedings (including enforcement proceedings against the issuer) and mandatory rules governing its role are expressly foreseen in the Portuguese Companies Code.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

Portuguese law provides that the rights and duties of the parties to a transaction with a foreign element may be determined by the laws of the country selected by the parties, provided that the rules and limitations set forth in Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 (Rome I) and Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), and/or resulting from any applicable Portuguese mandatory rules and public policy, are complied with.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

Portuguese courts generally enforce the judgments of courts in other jurisdictions.

In the case of a judgement from an EU member state, the Recast Brussels Regulation (1215/2012) ("EU Brussels Recast"), which determines that a judgment issued in an EU member state is recognised and enforceable in all other EU member states without any special procedure or declaration for that effect (provided that none of the grounds for refusal under Article 45 of the EU Brussels Recast are met), shall apply.

In the case of the UK, the EU Brussels Recast ceased to apply after Brexit, with the UK having acceded to the Hague Convention on Choice of Court Agreements ("Hague Convention"), which Portugal was already a party to as an EU member state. Under the Hague Convention, a formal procedure must be initiated for the recognition and enforcement of a foreign judgement and there is also a list of grounds for refusal (Article 5 of the Hague Convention).

As for the US, as it has not ratified the Hague Convention, Portuguese domestic laws shall apply. A proceeding for the verification of several cumulative requirements must be initiated before the Portuguese courts, such requirements include (but are not limited to) the absence of doubt regarding the authenticity of the document and that the decision is no longer appealable according to the law of the rendered state.

We note that Portugal is also a party to the New York Arbitration Convention.

16. What (briefly) is the insolvency process in your jurisdiction?

The Insolvency proceedings are urgent and universal enforcement proceedings which commence by filing a request for insolvency typically either by the debtor (via its management) or any of its creditors. With the declaration of insolvency of the debtor, an insolvent receiver will be appointed by the court, to whom will typically be entrusted management powers over the assets of the debtor. Thereafter, credits claim phase will take place, under which, creditors will be able claim its credits and other rights and the insolvent receiver and the court will be responsible for the recognition and ranking of the claims.

Being the insolvency proceedings principally aimed at satisfying creditors' rights in the most efficient way possible, the same will be called upon to resolve – at a creditors' meeting for that effect – on whether to recover the debtor through whether as foreseen in an insolvency plan, based on the debtor's recovery, or through liquidation of the debtor's assets and the subsequent distribution of the sale proceeds among its creditors.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

According to Portuguese insolvency law (Decree-Law no. 53/2004 of 18 March, as amended), following a debtor's declaration of insolvency, all rights, including secured

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rights, must be enforced under the context of insolvency proceedings, which entails that the lender shall claim its credits, which will be recognised and graduated by an insolvency receiver and by the court, except for financial pledges (governed by Decree-Law no. 105/2004 of 8 May, which transposes the Financial Collateral Directive), provided that the parties have foreseen enforcement of the pledge by appropriation or sale, which can be enforced even after the debtor's insolvency declaration.

18. Please comment on transactions voidable upon insolvency.

According to Portuguese insolvency law, any act considered to be detrimental to the debtor (i.e. if it reduces, hinders, hardens, risks or delays fulfilment of the claims of the insolvency creditors) carried out in the 2 (two) years prior to the beginning of insolvency proceedings may be challenged by the appointed insolvency receiver.

The revoking of these acts is subject to the third party acting in bad faith. Bad faith is presumed in respect of acts carried out (or failed to be carried out) in the 2 years prior to the beginning of insolvency proceedings and in which such third party participated, or if such acts resulted in a benefit to a person or entity especially connected to the debtor, even if such special relationship did not exist on that date. Bad faith is defined as knowledge that the debtor was insolvent (i.e. unable to fulfil its obligations as they fall due); or that the act was of a detrimental nature and the debtor was in a situation of imminent insolvency; or that the insolvency proceedings had already started.

Certain acts and transactions are deemed to be detrimental to the debtor without the need for any additional proof, for example where: (i) security has been granted within a period of 6 (six) months prior to the commencement of insolvency proceedings (where the security was granted in respect of pre-existing obligations); or (ii) gratuitous acts performed less than 2 (two) years before the commencement of insolvency proceedings resulted in a reduction in the assets of the debtor.

Provided that certain conditions are met, security created under the Financial Collateral Law benefits of additional protection in case of insolvency, notably setting aside claw back provisions otherwise applicable under general insolvency law.

19. Is set off recognised on insolvency?

Set off (as a means to discharge obligations whenever two entities are reciprocally creditor and debtor) is permitted in an insolvency scenario provided that the following requirements were met prior to the declaration of insolvency: (i) the relevant credit entitlement is judicially enforceable, and no defence is applicable thereto; and (ii) both obligations are fungible and of the same kind and quality. Set off may also be recognised if the above-mentioned requirements are not met prior to declaration of insolvency but have been fulfilled in relation to the lender's credits before the insolvent estate's credits.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

Special statutory liens (*privilégios creditórios especiais*), such as labour credits or state credits related to real estate property tax (IMI) and rights of retention of title, are recognised under Portuguese law and are generally ranked prior to a secured lender (with a pledge or mortgage).

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

We have no knowledge of any impending reforms with significant impact on lending by foreign lenders. In any case, a complete review of the Portuguese banking law is awaiting final approval. This review is not expected to have a material impact on the current principles / rules discussed in our answer to question no. 1, although additional powers are granted to the Bank of Portugal in case of suspicion of unauthorised activity.

In addition, the proposal for the new banking law foresees restrictions on transactions with non-cooperative countries (although such prohibition is mainly addressed to Portuguese credit and financial institutions).

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

Although alternative lending sources are progressively

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gaining ground, traditional bank debt remains the main source of funding for Portuguese companies.

Alongside traditional banking and capital markets lending (through bonds, public and private placements), there are new interesting options such as credit funds, whose purpose consists of lending to corporate entities (created by Decree-Law no. 144/2019, of 23 September) and equity loans (approved by Decree-Law no. 11/2022, of 12 January), consisting of loans on which the relevant remuneration corresponds to a participation in the results of the borrower and grants the right to convert the claims into equity, subject to certain conditions.

Current market conditions, heavily characterised by uncertainty and the rise in inflation and interest rates, may result in banks adopting a more restrictive approach to lending, potentially driving companies to alternative sources.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

At a domestic level, Law no. 78/2021 of 24 November, mentioned in our answer to question no. 1 above, requires certain (simple/short) references to be made in finance or security documents, including confirmation that no unauthorised activity is being pursued.

In addition, the recent market turmoil, still marked by the strong post pandemic impacts, together with political instability and war in Europe and the re-shaping of interest rates and the banking market in recent months has had and will most probably continue to have impacts on the structuring and drafting of financing transactions.

Finally, and probably more meaningful in terms of structuring, the growing importance of ESG finance is likely to re-shape the features of new deals and boost refinancing, with the EU Taxonomy playing a pivotal role in this regard.

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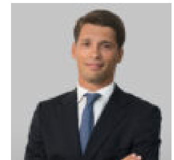

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