

Portugal

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SECTION 1: Collateral/security

1.1 What types of collateral/security are available?

The Portuguese legal system includes the concept of security rights in rem (*direito real de garantia*) granting to the secured party: the right to pursue the secured asset, even if it is transferred to a third party; and the right to be paid out of the proceeds of the sale of the secured asset with priority over any other unsecured creditors.

Under Portuguese law, parties may establish different types of security rights on different types of assets. However, it is not possible to grant or create security rights different to those expressly foreseen and regulated in the law, as all rights in rem are subject to *numerous clausus*. It is customary in a project financing in Portugal that, on the date of financial closing, secured parties receive security interests in substantially all personal and real property of the project company and in the receivables of the project itself, the most common being: pledge of shares or quotas; pledge of rights, credits, movable goods, and bank accounts; assignment of rights by way of security; and, mortgages – normally for real estate.

Portuguese law also admits financial collateral on shares, debentures and banks accounts in line with the provisions of the Directive on Financial Collateral Arrangements.

SECTION 2: Perfection and priority

2.1 How is a security interest in each type of collateral perfected and how is priority established?

Contractual mortgages on real estate require the execution of a notarial deed (or equivalent document) and are subject to registration with the Land Registry Office. Priority granted by duly registered mortgages ranks according to the registration date and, if registered on the same date, equally. The mortgagee or creditor does not have the right to automatically take possession of the property in the event of default of the secured obligation: it must seek judicial sale and be paid out of the proceeds of such sale.

Pledges over capital stock are subject to the execution of a private written document containing the terms and conditions under which the pledge is granted, in favour of whom the pledge is granted and the rights which are to be secured. For quotas (which are participations in so called private limited companies – *sociedades por quotas*), the pledge must subsequently be registered with the Commercial Registry Office for it to be effective towards third parties (*erga omnes*).

For book entry shares, the pledge must be registered in the account in which the shares are registered. For nominative certified shares, declaration of the pledge must be recorded in the certificate itself, signed by the owner of the share to be pledged and subsequently registered in the share registry book. Finally, for bearer certified shares, dispossession or delivery of the share certificates to the pledgee is necessary.

In case of security over credits rights (either by way of a pledge or assignment in security), the creditor must take possession of any document evidencing the debt. The debtor owning the corresponding debt must be notified by the pledgor of the granting of the relevant security right in order for the pledge or assignment to be effective for the debtor.

Pledges over bank accounts is formalised by way of a private written document, subject to registration with the relevant credit institution.

The perfection of security over movable assets may be formalised by means of a private written agreement. Perfection of a pledge over movable assets requires that the creditor takes possession of the pledged assets until full discharge of the debt. In case such a pledge is granted in favour of banking institutions, the debtor may keep possession of the relevant pledged assets, acting as a holder on behalf of a third party. This requires that the signatures on the security documents be authenticated by a lawyer or public notary.

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

Lien searches are usually performed shortly before or on financial closing and allow secured parties to direct the debtor to extinguish intervening security interest on personal property as necessary.

For the pledge of capital stock, confirmation may be obtained by consulting: the share certificates and the share registry book, in the case of shares of joint stock companies; or, the commercial registry certificate, in the case of quotas of private limited companies.

For mortgages, the intervention of the public notary (or equivalent official) ensures title search, allowing good title confirmation and identification of any encumbrances.

In addition, secured parties often rely on representations from the relevant entities that there is no security interest in the collateral other than as permitted.

2.3 Are any fees, taxes or other charges payable to perfect security interest and, if so, are there lawful techniques to minimise and defer them?

Stamp tax (0.6%) is due over the value secured whenever a security interest is granted, if the maturity date is longer than five years (lower rates are applicable for lesser periods). However, the Portuguese Stamp Duty Code establishes an exemption for any document or obligation which is considered accessory to a document or obligation already charged for stamp duty. It is best to create security on the same date as the financing agreement it means to secure (as the financing itself is subject to stamp duty).

Fees (normally nominal) are generally payable upon the filing or registration of security documentation.

2.4 May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

As a matter of law, Portugal does not foresee any type of fiduciary ownership and trusts are not recognised (save in the limited context of the Madeira Free Trade Zone). In order to have a fully valid and enforceable security right in rem, the beneficiary of the security needs to hold a valid underlying claim. Accordingly, even if the finance documents establish that the security agent holds both the secured obligations and the security for the benefit of the members of a lending syndicate, unless all members of the syndicate are described in the document as legal creditors or beneficiaries, the security agent will appear as the sole beneficiary and will be the only entity with full authority to file enforcement procedures.

SECTION 3: Foreign investment and ownership restrictions

3.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

There are no restrictions, fees and taxes on foreign investment in or ownership of a project.

Economic activities within the regulated sectors, such as energy, telecommunications, water and waste management, postal services, railways, commercial aviation and financial services, may require (for Portuguese and foreign investors) authorisation from the relevant regulator.

Compliance with the anti-money laundering and anti-terrorism financing legislation needs to be assured at all times.

3.2 Are there any bilateral investment treaties with key nations states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Please see question 3.1.

3.3 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic/national security or other reasons?

A public contracting party may unilaterally terminate an agreement based on duly justified public interest reasons and compensation will be due to the other party (for all investors). A duly authorised private transaction with a foreign investor may not be unwound.

SECTION 4: Documentation formalities and government approvals

4.1 Is a submission to foreign jurisdiction and a waiver of immunity effective and enforceable?

Submission to a foreign jurisdiction is effective and enforceable in Portugal so long as there is a serious interest in that choice or a connection with the underlying transaction. However, Portuguese courts may claim to hold exclusive jurisdiction, such as over actions related to: local land; the validity of the incorporation and dissolution of companies domiciled in Portugal; the validity of entries in public registers; or, to the registration or validity of patents.

Waiver of immunity is effective and enforceable in Portugal. However, state immunity has a narrow scope and is limited to acts involving the exercise of sovereign authority.

4.2 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?

In general terms, the relevant ministries are responsible for the launching, licensing and major regulation of projects, either directly or through their governmental departments. The approval of the Ministry of Finance may also be required whenever the project involves public investment.

The *Tribunal de Contas* (Court of Auditors) also plays an important role. It is responsible for the supervision, approval and control of public funds, and particularly PPP contracts in Portugal.

Finally, reference should be made to the *Unidade Técnica de Acompanhamento de Projectos* (UTAP), an administrative entity under the supervision of the Ministry of Finance in charge of the follow-up of PPP projects.

4.3 What government approvals are required in relation to environmental concerns for typical project finance transactions? What fees and other charges apply?

Typical project financing requires environmental permits. For certain projects, an environmental impact assessment (EIA) is required.

The administrative procedure for EIAs may now run simultaneously with the licensing and authorisation procedure of the construction and installation of the project, although the final decision may not be given before the issuance of the EIA.

Environmental permit fees are often de minimis application processing fees. However, costs of compliance with, and mitigation measures required by, environmental permits can be significant. In order to minimise this risk, the Portuguese PPP Act imposes that any applicable environmental impact declarations must be obtained by the public partner prior to the launching of a PPP tender.

SECTION 5: Bankruptcy proceedings

5.1 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/security?

On the opening of bankruptcy proceedings, all security other than financial collateral over the insolvent's assets must be enforced within the bankruptcy proceedings. Payment of the creditor's claims should be made in accordance with the provisions of the Portuguese Insolvency and Company Recovery Code. Any insolvent entity's creditor must lodge its claims within the bankruptcy proceedings, indicating the amount of its claim and any security from which it may benefit in the assets of the insolvent entity.

An insolvency order ruled by the court suspends any outstanding enforcement proceedings relating to seizure or attachment of any of the insolvent's assets and prevents any new executor or enforcement proceeding against it.

5.2 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

Creditors may enforce security over assets outside the court provided such security has been granted under the Directive in Financial Collateral Arrangements.

If the creditor holds a claim arising from expenses or damages caused by certain assets (and provided that such assets are in its possession) the creditor may retain possession without filing a court proceeding.

5.3 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/security?

Enforcement of security is usually regulated in the respective security agreement, and may freely determine (other than in specific cases, such as mortgages) if assets may be sold by a court procedure or by private sale, and in the latter case, the conditions (if any) that must apply to such private sale.

SECTION 6: Foreign exchange, remittances and repatriation

6.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

As a general rule, Portuguese Law does not impose currency controls and there are no restrictions on the remittance of profits or investment abroad. Reporting obligations to the Bank of Portugal may apply to certain transactions.

Income derived from foreign currency exchanges may be subject to Corporate Income Tax. Commission fees payable to a financial institution for foreign currency exchange may trigger stamp duty.

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

Project companies have no obligation to repatriate foreign earnings.

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

The Portuguese Government has put in place (for 2014 onwards) a corporate income tax reform with the purpose of promoting international investment and simplifying red tape.

Some of the investment-friendly tax measures enacted are:

- Exemption of foreign-sourced income from permanent establishments of resident companies (for at least three years and for all permanent establishments in the same jurisdiction);
- Simplification of the certification process to benefit from reduced rates of withholding tax regarding entities resident in a country with which Portugal has entered into a Double Tax Convention;
- Participation exemption for foreign dividends (EU and non-EU) received from a qualifying shareholding (at least five percent) held uninterruptedly for at least two years;
- Withholding tax exemption for dividends paid to non-resident shareholders (EU and non-EU), with shareholdings of at least five percent held uninterruptedly for at least two years.

In addition, the recently implemented golden visa has opened up the possibility of applying for a residence permit for pursuing investment activities to those who have entered the country regularly (such as holders of valid Schengen visas, or beneficiaries of visa exemptions), by transferring capital, creating jobs or acquiring real estate, with advantageous periods of stay in Portugal.

SECTION 7: Public private partnerships

7.1 Is there a public private partnership act or similar statute authorising PPPs and are both greenfield and brownfield PPP projects permitted?

The Portuguese PPP Act has recently been revised, defining new rules applicable to the state's intervention regarding the definition, conception, preparation, launching, awarding, modification, supervision and monitoring of PPPs. The goal of this revised legal regime, which was approved in the context of the Economic and Financial Aid to Portugal Programme, is to reinforce the prior evaluation by the Ministry of Finance, of risks to the state when participating in the PPP, as well as the monitoring of their execution. Concessions of multi-municipal water supply for human consumption systems, and sanitation of residual waters and management of urban solid waste are expressly excluded from the scope of the PPP Act and are regulated by specific legislation.

Both greenfield and brownfield PPP projects are permitted under Portuguese law.

7.2 May a concessionaire grant security interest in the project to the lender and, if so, is consent of the government or contracting authority required?

The concessionaire may not normally grant security over its shares and over rights and goods arising from or integrated in the concession without the government or contracting authority's approval. It will also be impossible to grant any security over assets considered to be in the public domain (such as roads). In project financings, it is common for the concession agreement to include provisions authorising the granting of security in favour of the lenders.

7.3 Are government guaranties or other payment obligations of the government or contracting authority subject to appropriation or other periodic authorisations?

In the control measures for budgetary execution foreseen in the Financial and Economic Assistance Programme, a set of legal rules (Law of Commitments) has been established for the assumption of commitments and delayed payment of public entities.

Financial commitments may only be assumed to the extent of available funds, subject to several control mechanisms such as: (i) verification of legal compliance and financial regularity of expenditure, in accordance with the law; (ii) registration in the computer system of budget execution support; and, (iii) issuance of a valid and sequential commitment number reflected in the purchase order, order form or equivalent document.

7.4 May the government or contracting authority unilaterally amend or terminate a concession?

The public contracting authority may not force its counterparty to sign an amendment to a concession agreement that does not deserve the latter's consent, nor may it impose the execution of a different agreement to the one originally agreed between the parties. The public contracting party may, however, unilaterally impose, via administrative order and based on public interest reasons, measures that modify the development conditions of the activities within the concession agreement. Here, the concessionaire will be entitled to claim the financial rebalancing of the concession.

In the event of serious default by the concessionaire under its obligations under this agreement, the grantor may: i) through sequestration, temporarily endorse the execution of any works and the development of the activities forming part of the concession, or the operation of its services; or ii) terminate the concession agreement (in case no remedy has been provided during a remedy period), being the concessionaire liable for compensating the grantor. In case of termination, financing entities normally have a prior step-in right.

Based on public interest, the grantor may redeem the concession at any time. Notice must be given to the concessionaire of the intention to redeem the concession. In the event of redemption, the concessionaire will be entitled to receive from the grantor, by way of compensation and for each year from the date of redemption until the end of the concession period. In this scenario, finance documents should normally be assumed by the grantor.

SECTION 8: National update

In order to fulfil the goals required by the Memorandum of Understanding signed with the Troika, the Portuguese Government has engaged a review of existing PPP agreements.

The Portuguese Republic is renegotiating road sector agreements with a view to obtaining a 30% reduction in the costs imposed on public funds in 2014. The expected reduction of costs means a decrease, in equal amount, in availability payments supported by the state concerning road concessions, which are subject to the availability model. The concessions included are Costa de Prata, Grande Porto, Norte Litoral, Algarve, Beira Interior, Interior Norte, Beira Litoral and Beira Alta (previously subject to the shadow toll regime, SCUT), Norte and Grande Lisboa.

Availability payment reductions result from the combined effect of several measures, such as: i) the reduction of shareholders' internal rate of return (IRR) in the base case; ii) the review of rendering of services' agreements concerning the toll tax payment between Estradas de Portugal (EP) and the concessionaires (reducing EP's payments); and iii) the structural change of the regulatory model, in order to reduce the services related to routine maintenance and repair, protection against noise in accordance with European legislation, extension of roads and minimal conditions for movement on roads under construction.

Portugal's strong investment in public infrastructure during the boom years under PPP structures may be part of the reason why it found itself in a difficult economic position in 2008. Several projects that were launched were hard to justify economically and have had serious revenue issues, which has meant added dependence on the state. The government appears to recognise the importance of investment in public infrastructure so long as such infrastructure is viable; it has recently published a discussion paper on essential infrastructure projects for the next five years, with an emphasis on railways and ports, which may also help attract international banks back to the Portuguese lending market.

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Since 1996, Monjardino has worked on international public tenders, including privatisations, and on several types of operations in the area of project finance. She has represented promoters, financing banks (national and international) and administrative authorities, especially in regard to motorway (SCUT and toll), transport, water and waste infrastructures, and health care partnerships.

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