

# Project finance in Portugal: overview

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Country Q&A | Law stated as at 01-Jan-2018 | Portugal

A Q&A guide to project finance in Portugal.

This Q&A is part of the global guide to project finance. Areas covered include market overview, regulatory framework and regulatory considerations; methods for structuring the financing; corporate vehicles; forms of security; contractual protections; insurance arrangements; typical risks; use of PPPs or PFIs; social, ethical and environmental issues; ownership rights to natural resources and minerals; foreign investment; choice of law and jurisdiction; and recent developments and reform.

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## Market overview

1. What types of projects make use of project financing in your jurisdiction? What have been the most significant project finance deals in the past 12 months?

### Types of projects

Project finance is normally used in the following types of projects:

- Construction and operation of long-term infrastructure projects, either public or private, such as roads (including tunnels and bridges), railways, ports and airports, water and sanitation, hospitals and university campuses.
- Energy sector projects, either electricity or gas, such as electric power plants (renewables) and power transmission networks.

### Significant deals

Some significant project financing deals in the last 12 months include:

- Financing of the construction, operation and maintenance of two 15MW biomass power plants in Fundão and Viseu.
- Refinancing of an operator of regional distribution networks of gas.
- Refinancing of a 8MW windfarm in Castelo Branco.

The Metro do Porto (Oporto's subway), which is a public private partnership (PPP), was launched and awarded during this period. The authors are not aware of PPPs launched at municipal level.

## Regulatory framework

2. What regulatory framework governs project finance in your jurisdiction?

### Regulatory framework

There is no specific framework for project finance. Therefore, the applicable regulatory framework encompasses all laws, regulations and judicial decisions connected with project finance such as the general rules applicable to bank loans and securities (*see below, [Material Laws](#)*).

Public private partnerships (PPPs) are, in particular, subject to Decree-Law No. 18/2008 of 29 January, as amended, that approved the Code of Public Contracts (CPC) and Decree-Law No. 111/2012 of 23 May (PPP Law), which establishes the rules applicable to state intervention in the definition, conception, preparation, launching, awarding, modification, control and survey of PPPs.

### Regulatory authorities

Generally, project finance is not subject to any regulatory or supervisory authority. However, some sectors that can be financed through a project finance structure may be subject to sector regulators, such as the:

- Directorate General of Energy and Resources (DGEG) in the energy sector.
- Institute for Mobility and Transport (IMT) (*Instituto da Mobilidade e dos Transportes*) in the road sector.
- National Authority of Medicines and Health Products (Infarmed), which is a government agency in the human medicine and health products' sector.

Whenever a project entails public investment or when the PPP Law applies, the Ministry of Finance may also be required to intervene.

The PPP Technical Support Unit (UTAP) (*Unidade Técnica de Acompanhamento de Projetos*), which is an administrative entity directly dependent on the Ministry of Finance, monitors PPP projects. The Technical Budget Support Unit (UTAO) (*Unidade Técnica de Apoio Orçamental*), which is a unit dependent on Parliament, also monitors the execution of PPP contracts.

### Material laws

The main laws include:

- Portuguese Civil Code (Decree-Law No. 47344 of 25 November 1966, as amended).

- Portuguese Companies Code (Decree-Law No. 262/86 of 2 September, as amended).
- Portuguese Civil Procedure Code (Law No. 41/2013 of 26 June).
- CPC.
- PPP Law.
- Competition Law (Law No. 19/2012 of 8 May).
- Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I).
- Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation).
- Voluntary Arbitration Law (Law No. 63/2011 of 14 December, as amended).

Depending on the type of project, numerous sectorial laws may apply relating to, among others, the environment, energy, health, industrial safety, mining and telecoms.

### **International treaties**

There are no specific international treaties concerning project finance. However, some treaties concerning the settlement of disputes, and the recognition and enforcement of foreign arbitral awards may be applicable ([see Question 43](#)).

## **Regulatory considerations**

3. Are government approvals required before financing a project? Are fees typically paid for such approval?

Depending on the type of project for which the relevant parties seek financing, government approvals and permits may be required, for example:

- In projects for the construction of motorways, where public tenders are launched, the sponsors or project company must be approved by the state road and railway infrastructures company (*Infraestruturas de Portugal*).
- In projects connected with the energy sector, the parties must obtain the relevant permits from the Directorate General of Energy and Resources.
- For projects within specific legal thresholds and locations, an Environmental Impact Assessment (*Avaliação de Impacte Ambiental*) or Assessment of Environmental Effects (*Avaliação de Incidências Ambientais*) may apply.
- A construction permit is usually required.

Fees that vary according to the type of project are usually payable when obtaining permits from regulatory authorities.

4. Is there any requirement to file or register project documents with a regulatory authority or other government body?

There is no general requirement to file or register project documents with a regulatory authority or other government body.

However, when a PPP structure is adopted and involves the state, it is subject to prior authorisation and monitoring of the Minister of Finance, together with the relevant sectorial Minister. Subsequently, the process is controlled and conducted by the PPP Technical Support Unit (UTAP). If the project documents are deemed as generating expenses or as being representative of any direct or indirect costs, and responsibility for the entities is subject to a priori control of the Portuguese Court of Auditors (typically public entities), the documents must be submitted to the Court of Auditors for its prior examination and supervision.

5. Do any specific laws exist in relation to state ownership or state repatriation of assets?

### **State ownership**

There is no rule providing that the Portuguese State must hold any stake in a project or is prevented from doing so.

However, under the Portuguese Constitution the following belongs to the public domain:

- Territorial waters, together with their beds and the adjacent seabeds, lakes, lagoons and watercourses that are suitable for navigation or floatation, together with their beds.
- Airspace over Portuguese territory, above the recognised limit for proprietary or surface rights.
- Mineral deposits, mineral and medicinal water sources, and natural subterranean cavities below the ground, save for rocks, common lands and other materials normally used for construction.
- Roads.
- National railway lines.

Law No. 88-A/97 of 25 July, stipulates that private companies and other similar entities are barred access, except when under a concession, to the following economic activities:

- Multi-municipal systems for the supply of drinking water and wastewater collection, treatment and disposal. Additionally, such concession can only be awarded to companies that are controlled by public entities and can only be awarded to private entities through sub-concession agreements with the grantor's approval.
- Rail transport operated on a public service basis.
- Operation of seaports.

Mainly during the 1990s and the 2000s, Portugal privatised numerous public companies (*empresas públicas*). Privatisation has resumed and intensified recently during the implementation of the Memorandum of Understanding on Specific Economic Policy Conditionality. However, the Portuguese State still holds majority stakes in companies in several sectors such as water supply, mining and minerals, real estate, the banking sector, road and railway infrastructures.

### **State repatriation of assets**

Private property can be nationalised or expropriated to serve a duly motivated public interest under certain situations and with due compensation. Nationalisation of shares in a private company can only occur when exceptional reasons reveal it is necessary to safeguard the public interest (Law No. 62-A/2008 of 11 November). Expropriation can only occur on the basis of public utility such as, for instance, building of infrastructure (Law No. 168/99 of 18 September).

## **Structuring the financing**

### **Main parties**

6. Who are the main parties in a project finance transaction?

Typically, the main parties in a project finance transaction are:

- Sponsors of the project.
- The project company.
- Lenders and hedging providers.
- The grantor (whenever a public concession or a public private partnership structure is adopted).

### **Types of financing**

7. How are projects financed? What sources of funding are typically available?

The most common source of funding in Portugal is through debt and equity. However, there are more sources of funding available, such as bond issues and mezzanine finance.

Both private finance initiatives and public private partnership structures are usually funded by private sector equity and debt funding. However, it is not uncommon in large projects, typically connected with the construction, operation and maintenance of public infrastructures, to have the European Investment Bank financing part of the project.

8. What are the advantages and disadvantages of using project financing to structure a construction or infrastructure project?

**Advantages**

The main advantages in using project financing to structure construction, infrastructure or public services are as follows:

- It ring-fences the risk to reduce the recourse to the promoters.
- A thorough risk assessment is done.
- The return for an investor improves due to the high leverage.
- It is off-balance-sheet financing.
- It reduces the risk of the promoters' solvency.

**Disadvantages**

The main disadvantages in using project financing to structure construction, infrastructure or public services are as follows:

- The contractual structure is complex.
- There are high costs in structuring the project.
- The lenders must be involved in the negotiation of the project documents and respective amendments (for example, to control the allocation of the project risks and the project costs), as well as in the most significant decisions related to the project companies.
- The lenders control the project during the life of the project to assure the allocation of the cash-flow generated by the project.

**Corporate vehicles**

9. What corporate vehicles are typically used for financing projects? What are the considerations behind choosing these vehicles?

A special purpose vehicle (SPV) is usually created to head the project.

Under Portuguese law, the SPV can have different legal structures such as a commercial company, a consortium (*consórcio*), a complementary group of companies (*Agrupamento Complementar de Empresas*), a European economic interest group (*Agrupamento Europeu de Interesse Económico*), among others.

The choice of vehicle depends on the following considerations, among others:

- The extent to which the sponsors wish to be insulated from the risks and liabilities that may result from the project.
- The extent to which the sponsors wish to avoid monies borrowed for funding the project appearing on their respective balance sheets.
- Tax efficiency.
- Flexibility of management structure.

Within the same project, different vehicles may be used if considered more appropriate to best allocate risk and areas of responsibility between different sponsors.

In Portugal, the project company is a commercial company in most cases.

The most common forms of Portuguese commercial companies are the private limited company (*sociedade por quotas*) (SQ) and the public limited company (*sociedade anónima*) (SA).

The main differences between SQs and SAs are:

- In SQs, the shareholding (*quotas*) are registered with the commercial registry office and it is always possible for third parties to know the shareholders' identity.
- In SQs, the shareholders have more powers to control the company.
- In SAs, shares can be represented by certificates or in book entry form, but the identity of the current shareholders is normally not publicly available.
- In SAs, management powers are generally exclusively entrusted to the board of directors.

In most of the high-profile public private partnership projects in Portugal it is common to see a requirement that the main SPV contracting with the public contracting party was a SA, incorporated by the sponsors to whom the project was awarded, with restrictions on the transfer of shares.

The incorporation of a SPV allows the economic and legal segregation of the investment and its investors, which results in the 'ring fence' principle, which provides that the:

- Sponsors safeguard any negative impact of the project's development in their balance sheet, therefore limiting their risk to the capital and security brought by them to the project.
- Project's cash flow can be segregated regarding any other debits or credits connected with the sponsors' other projects or activities.

## Documentation

10. What are the typical documents in a project finance transaction?

Generally, a project finance transaction entails an extensive and complex contractual framework that, depending on the project in question, can comprise the following agreements:

- Shareholders' agreement, which sets up the arrangements between the sponsors as shareholders of the main special purpose vehicle and rules for the governance of the vehicles and transfer restrictions.
- Bye-laws, which set up the internal rules of a company, such as governance rules.
- Equity subscription agreement, under which the sponsors agree to inject equity in the form of share capital, quasi equity or subordinated loans. Obligations under the equity subscription agreement usually amount to the maximum sponsors' financial exposure to the project.
- Concession agreement or licence, under which the project company is granted the right to carry out the project.
- Construction agreement, which provides for the construction of project facilities (when applicable).
- Operation and maintenance agreement, which sets out the rules applicable to the operation and maintenance of the project that can be carried out by the project company or by a third party.
- Development services agreement, which sets out the rules applicable to the rendering of services within the context of the project, such as assisting on any administrative or regulatory acts or procedures that may be necessary, dealing with local or national public institutions, governmental bodies or regulatory entities, obtaining licences, and so on.
- Facility agreement, which sets out the rules applicable to the financing granted by the finance parties to the project company to carry out the project, in particular, drawings under the facility, margins, charges and fees, reimbursement schedule and payment of interest. The agreement also sets out the rules on financial and other covenants that grant the finance parties certain rights to overview the financial sustainability of the project and to control the project.
- Security agreement, under which the security package is created in favour of the finance parties to secure the fulfilment of the obligations undertaken under the facility agreement.
- Accounts agreement, which sets out the rules related to the project's bank accounts, in particular, the conditions for such accounts to be operated and the rules for the crediting and debiting of such accounts.



- Forecasting agreement, which sets out the calculation rules and the terms and conditions for making financial projections in compliance with the finance documents, including how to calculate the project financial ratios.
- Call option agreement, which sets out the conditions under which the lenders can exercise the right to purchase the shares representing the project company's share capital.
- Hedging agreement, which is an interest rate agreement to protect the project company against adverse movements in interest rates.
- Direct agreements, which are agreements made between the public contracting party and the finance parties and other key third party providers (such as the contractor and the operator) with a view to ensure to the public contracting party that their agreements are kept in place in case the latter intervenes in the main contract. There are also direct agreements between the finance parties and the public contracting party and other key third party providers to the project to ensure that step-in rights are granted to the finance parties.

## Security

11. What forms of security are available to protect investments? How are they created and perfected?

### Forms of security

The security most commonly used in financing transactions is any of the following (or a combination):

- Mortgage (*hipoteca*), which is a security interest created over real estate and other movable assets that are subject to mandatory registration. It does not result in the transfer of title over the property for the benefit of the beneficiary.
- Pledge (*penhor*) or financial pledge (*penhor financeiro*), which is a security interest that may be validly created over movable non-registered property (*penhor de coisas*), receivables (*penhor de créditos*), bank accounts (*penhor de contas*), shares (*penhor de ações* or *quotas*) and other rights or interests, to the extent that these assets are capable of being transferred to third parties.
- Assignment of receivables by way of security, which involves the assignment of receivables by the borrower in favour of the lender and usually entails the granting of a mandate by the lender to the borrower, so that the borrower, despite not holding title to the receivables, can preserve its relationship and receive the monies from the relevant debtors.

### Formalities

**Mortgage.** A mortgage must be executed by one of the following:

- Notarial public deed drawn up before a Portuguese notary.
- Private document certified by a Portuguese notary.
- A public document signed before a registrar.

A mortgage is subject to registration formalities and it is only deemed valid and in existence, even among the parties concerned, when recorded in the relevant real estate registry office.

**Pledge.** Generally, a pledge over an asset is deemed validly created between the charger and chargee, and vis-a-vis third parties, if a written pledge agreement is executed between the pledgor and pledgee, and possession of the charged asset is transferred to the pledgee.

However, there are certain exceptions to this requirement, such as:

- A pledge over receivables, which is valid and effective if the debtor was notified of it or acknowledged it.
- A pledge in favour of banking institutions (*penhor bancário*), which may be validly created without the need to effectively transfer possession of the pledged assets. This is usually the type of pledge elected to secure movable property (for example, equipment) under Portuguese financing transactions, which, generally, must be executed through a written agreement authenticated by a notary or lawyer.
- A commercial pledge (*penhor mercantil*) can be entered into without the need to effectively transfer possession of the charged assets. This type of pledge is deemed to exist when it secures commercial transactions, which according to the Portuguese Companies Code includes most of the financing transactions entered into with banks. If the parties agree on the appropriation of the asset by the creditor in case of breach of the debtor's obligations, the security or pledge agreement the parties enter into must be executed through a written agreement and the parties' signatures must be certified (*reconhecimento presencial de assinaturas*).

A pledge over shares of a public limited company (*sociedade anónima*) is subject to the following formalities:

- Shares represented by certificates:
  - record the pledge for the benefit of the pledgee in those certificates; and
  - serve notice of creation of the pledge to the relevant company or financial intermediary if the shares are deposited there.
- Shares represented in book entry form: the pledge is usually recorded by the financial intermediary where the shares are registered, on request of the pledgor.

The pledge over shares (*quotas*) of private limited companies (*sociedades por quotas*) is subject to mandatory registration with the commercial registry office.

**Assignment by way of security.** This is deemed validly created between the assignor and assignee if a written assignment agreement is executed and delivered among them.

An assignment must be notified to a debtor or acknowledged by them to be binding on them.

**Fees.** The fees levied on registration of security usually range between EUR100 and EUR300, depending on the type of security and asset.

**Taxes.** Stamp duty (tax) is generally levied on the creation of security over Portuguese assets or if created by Portuguese providers.

Stamp duty is calculated over the maximum secured amount at rates varying in accordance with the tenor of the secured obligations (*see Question 37*). If the secured financing agreement is itself also subject to stamp duty

(calculated using similar rules and percentages), in order to avoid double taxation, no stamp duty is levied on the security if the security is entered simultaneously with the financing agreement. However, security created in Portugal for financing agreements not connected with Portugal that are not subject to stamp duty will not benefit from such exemption.

The borrower is usually the party liable for payment of stamp duty levied when security is created.

12. What mechanisms are available to protect security interests against competing interests?

The beneficiaries of in rem security, such as mortgages and pledges, have the right to enforce their security and be paid with the respective proceeds with priority over the remaining creditors. See [Question 13](#).

13. How is priority established?

What usually determines the priority of a security in relation to conflicting security or interest is the date when the perfection formalities are accomplished. For example:

- For a mortgage the relevant moment is the date of registration.
- In an assignment of receivables by way of security or pledge of receivables, the relevant moment is the date when the debtor of the assigned or charged receivable is notified.

However, certain exceptions may apply.

Within an insolvency procedure, creditors rank as follows:

- Holders of claims against the insolvent estate are paid ahead of all secured, preferential and unsecured claims. For example, claims for court and insolvency administrator fees and expenses, and obligations arising from the administration, liquidation and division of the insolvent estate.
- Secured creditors rank above common creditors and they usually encompass creditors holding:
  - specific legal privilege (*privilégio (i)mobiliário especial*) over certain movable property or real estate assets. These specific legal privileges rank ahead of all other secured creditors (with interests over the same assets);
  - retention rights over assets (*direitos de retenção*); and

- in rem security, such as mortgages and pledges.
- Preferential creditors who may hold a general privilege over movable property (*privilégio mobiliário geral*) and real estate assets (*privilégio imobiliário geral*) rank above the other unsecured creditors. For example, claims by the tax authorities for corporate income tax, claims for social security contributions and employees' claims.
- Employees benefit from a:
  - general legal privilege over all movable assets that rank ahead of unsecured claims but behind other secured claims; and
  - specific legal privilege over real estate property where employees perform their work, which ranks above security (for example, a mortgage) granted by the insolvent over the same assets.
- Common creditors, that is those holding no security and not qualified as subordinated creditors, rank behind the secured creditors but above the subordinated creditors.
- Subordinated creditors, that is those holding credits specifically qualified as subordinated credits by the Portuguese Insolvency Code, such as, without limitation:
  - credits held by persons specially related to the debtor;
  - credits whose subordination was agreed between the parties;
  - donations and other credits with no consideration paid to the debtor in return;
  - interest accruing on non-subordinated credits further to the declaration of insolvency and credits arising under shareholder loans (*suprimentos*).

14. Can an agent or trustee hold security on behalf of a group of lenders?

A security trust is not recognised under Portuguese law and an agent cannot hold security on behalf of a group of lenders. However, an agent can execute security formalities on behalf of lenders and a parallel debt scheme can be used in syndicated loans, provided that the loan is subject to English Law (or another law that recognises parallel debt structures).

15. How can security interests be enforced? What steps can a lender take to enforce security?

## Mortgage

To enforce security interests under a mortgage, an enforcement (or insolvency) proceeding must be commenced before a Portuguese court.

### **Pledge**

The law allows the parties to agree that the enforcement of a pledge can be conducted by way of a private sale. In the absence of such agreement, the law generally requires the pledge to be enforced through a judicial proceeding. In certain cases, the law also sets out the possibility of appropriation of the pledged assets (*see Question 16*).

### **Assignment by way of security**

To enforce this security interest, the assignee can request the debtor to effect payment directly to its own account as holder of the receivables or sell the credits in favour of a third party.

16. Can a lender foreclose or appropriate against an asset?

Generally, for the pledgee to gain possession of the asset a judicial proceeding must be commenced. The court evaluates the relevant asset prior to possession by the pledgee and any surplus must be returned to the chargor.

The following exceptions apply:

- Possession can occur in relation to security subject to the rules of law that implemented the Financial Collateral Directive (for example, financial pledge) if the:
  - pledge documentation sets out the rules applying to the evaluation of the charged asset; and
  - pledgee undertakes to return to the pledgor any cash surplus from an enforcement of the security.
- Appropriation can occur in relation to an asset subject to a commercial pledge (*penhor mercantil*) if:
  - the pledge documentation sets out the rules applying to the evaluation of the charged asset;
  - over such asset no other pledge ranking with priority over the commercial pledge to be enforced has been created; and
  - the pledgee undertakes to return to the pledgor the difference (if any) between the value of the asset and the amount of the secured obligation.
- For a pledge over a bank account held with the lending bank, even when the pledge does not qualify as financial pledge, in view of the liquidity of the assets involved the Portuguese courts have already ruled that it is possible for that lender to set-off its claims against the deposited cash.

17. How does the start of bankruptcy/insolvency proceedings affect a lender's ability to enforce its security?

On the date when (and if) an insolvency is declared, any judicial enforcement procedures against the insolvent debtor are stayed and attached to the insolvency procedure. Additionally, any private enforcement measures adopted (for example, appropriation or private sale of secured assets) are deemed null and void.

In principle, a secured creditor retains its priority rights under the insolvency procedure. However, the enforcement can only be conducted by the insolvency administrator if the creditors' assembly decides to wind up the company. As soon as the asset is judicially sold by the insolvency administrator, secured creditors immediately receive the proceeds of the sale in line with their priority. If the assets are not sufficient to satisfy a secured creditor's claims, they will be paid along with the common creditors.

Some acts performed up to two years before the declaration of insolvency can, under very strict circumstances foreseen in the Portuguese Insolvency Code, be terminated by the insolvency administrator for the benefit of the insolvent estate.

For creditors' ranking within an insolvency procedure see [Question 13](#).

## Contractual protections

18. What other forms of contractual protections are available to lenders to protect their investment?

To protect the lenders' investment, it is common to include provisions related to step-in rights, subordination and warranties in the transaction documents. It is also common to include the borrower's obligation (or the respective shareholder(s) obligation) to:

- Grant powers in favour of the lenders (through an irrevocable power of attorney).
- Perform all acts for the collection of monies, or the creation and perfection of security if the borrower fails to do so.
- Enforce security in the event of default.

## Insurance

19. What insurance arrangements are typical for projects in your jurisdiction? How do lenders protect their interests as regards project insurance?

Depending on the project to be financed, it is usual to find the following insurance arrangements, among others:

- Construction-all-risks insurance.
- Civil liability insurance.
- Work accidents insurance.
- Property insurance.
- All-risk insurance.

These insurances are for the contractor, the operator, and so on (as applicable).

Lenders can protect their interests in project finance by being included in the insurance policies as co-insured (*see Question 22*).

20. Are lenders named as co-insured or joint insured?

Lenders are usually named as co-insured, along with the borrower, the contractor, the operator, and so on (as applicable), each for their respective rights and interests.

21. Are non-vitiation provisions common?

Non-vitiation provisions are common in project finance transactions in Portugal.

22. How are insurance proceeds treated and applied?

Insurance proceeds are assigned by way of security, that is, such receivables, when originated, are automatically held by the lenders as security.

Typically, provided that no event of default or acceleration occurs, the receivables are paid to the project company in a specific bank account opened with the account bank.

If default or acceleration notice is served, such receivables can be used by the lenders to pay the secured obligations and the respective debtors, who from that moment onwards should be bound to pay any amounts directly to the lenders.

23. Are there any restrictions on insurance over projects provided by foreign companies?

There are no restrictions in project companies using foreign insurers.

24. Is reinsurance a feature of project financing in your jurisdiction? Are there any other aspects of project insurance that are particular to the jurisdiction?

Reinsurance is common.

There are no other aspects of project insurance that are particular to Portugal.

## Project risks



25. What risks are typical in your jurisdiction and how are these mitigated or allocated?

Typical risks are:

- Construction risks, which are the risks inherent to abandonment, delays, defects and higher costs than expected that may occur within the construction phase. Such risks can be mitigated through contractual mechanisms, in particular provisions concerning:
  - fixed and non-revisable prices;
  - supervision of the construction by independent entities;
  - severe penalties in case of breach of the agreement by the contractor;
  - back-to-back principles.
- Operational risks, which include decrease in production, revision of prices, higher administrative costs than expected, and so on. These risks can be mitigated, for example, by:
  - choosing approved and suitable technology;
  - providing long-term agreements regarding administrative costs;
  - providing operator warranties regarding performance and development;
  - implementing proper insurance strategies.
- Supply risks, which include lack of raw materials, variation of their costs, inflation, foreign exchange risks, among others. These can be mitigated through long-term supply agreements, having reserves, executing hedging agreements, and so on.
- Production, market or demand risks, which include variations in demand, inflation and currency fluctuations. These can be mitigated through executing long-term supply agreements, examining previous market studies, executing hedging agreements, and so on.
- Financial risks, in particular related to variation of interest rates, foreign exchange rates and inflation, can be mitigated through executing hedging agreements.
- Environmental risks, such as earthquakes and floods, which can be mitigated through proper insurance strategies.

Public private partnerships (PPPs) and public contracts in general are not subject to a strict equality between public and private parties. Therefore, the following particular risks must also be addressed:

- **Unilateral changes:** the public contracting party can make unilateral changes to concession or service agreements entered into with the project company, However, it must restore the financial balance of the project company. One of the aspects that must be considered when negotiating a public contract is what events trigger such right to seek financial rebalance.
- **Redemption:** in concession contracts the public contracting party can redeem the project and terminate the agreement on the basis of public interest. When negotiating such contracts, it is important to have clarity within

the limits provided for in the law on when this right exists, and the compensation that is due to the project company if this right is exercised.

- Termination for breach: there is no express rule providing for the right of the project company to be compensated for the amount invested in building up the project where termination is caused by a breach of the project company. It can be argued that the public contracting party that is receiving the project or part of it should still compensate the project company. However, this risk must be taken into account and, within the limits of the law, negotiated by the private sector in its discussions of a public contract.

It is common in PPP projects for the lenders and the public contracting party to enter into a direct agreement to set out the rules applicable to their relationship, especially on the exercise of step-in rights.

## Public Private Partnerships (PPPs)/Private Finance Initiatives (PFIs)

26. Has your jurisdiction enacted any specific legislation for enabling the use of PPPs or similar funding models such as PFIs?

The Public Private Partnership Law (PPP Law) (that repealed Decree-Law No. 86/2003 of 26 April, which was the first law expressly governing PPPs) governs the general regime of PPPs awarded by Portugal (including all state public entities, autonomous funds and services, and public companies). This is a generic law and is not industry specific. It sets out the rules regarding definition, concept, preparation, bidding, adjudication, modifications, audit and global monitoring of PPPs. It promotes a more centralised PPP process in the Ministry of Finance to increase transparency and control over PPPs.

The PPP Law does not apply to all PPPs. In fact, although having to comply with some of the main principles provided in the PPP Law, it is expressly said not to apply to:

- PPPs with expenses below EUR10 million or investments below EUR25 million during the life of the PPP.
- Multi-municipal concessions for the supply of drinkable water, waste water and management of solid urban waste.
- Concessions awarded by the state, by decree law, to public entities or entities with exclusively public capital.

The choice of the procedure for the formation of the PPP contract must follow the rules set out in the Code of Public Contracts, which also defines the material regime for administrative contracts and some specific rules concerning the execution and modification of PPPs.

There is no specific legislation in Portugal regarding private finance initiatives.

27. Are there any limitations on the use of PPP or PFI transactions?

Regarding PPPs and PFIs, there are no significant legal or practical limitations to its use. Legal limitations are set out in the PPP Law, that is, the launch and award of a PPP is subject to:

- A demanding process of evaluation of the respective need.
- A clear statement of the objectives as well as adequate allocation of responsibilities and risk sharing of the partnership between public and private partners.
- The specific model of PPP to be adopted and the adequacy of the respective term.

28. How are projects involving PPPs or PFIs typically financed? How does this differ to other projects?

The projects involving PPPs and PFIs usually take the form of a design-build-finance-maintain-operate project. The private contracting party is responsible for obtaining the financing (in whole or in part). Whether involving PPPs or PFIs, and considering that the projects are usually related to the infrastructure sector, they are typically financed through a project finance structure, normally encompassing equity and debt financing.

Generally, the differences compared to other projects arise from the fact that the PPP contracts are a result of public procurement processes and therefore are subject to a number of legal and contractual limitations as per the respective performance or modification.

29. Can security be given to lenders by a concessionaire over interests in PPP or PFI projects? Does this require consents?

The concessionaire can provide the finance parties with security over interests in PPP or PFI projects to fulfil the obligations undertaken under the finance documents (see [Question 11](#)).

Generally, consent is not required for the creation of security over assets that are not in the public domain. The creation of security over assets comprised in the public domain is not permitted. Furthermore, concession

agreements and other public contracts typically set out rules prescribing the need for consent of the public contracting party for the creation and enforcement of security.

The Code of Public Contracts sets out a step-in rights general rule stipulating that, provided that there are contractual provisions to that effect, in case of a serious breach the finance parties can step into the project to remedy any situation to ensure obligations are discharged. The public contracting party must consent. The obligations can be discharged by transferring the control of the private special purpose vehicle or the PPP contract to the finance parties or to a third party indicated by the latter. Direct arrangements are often put in place (see [Question 10](#)).

## Social, ethical and environmental issues

30. What social and ethical issues are relevant to project financing in your jurisdiction?

Other than key constitutional principles mainly concerning economic rights and duties, there are no rules specifically concerning social and ethical issues in connection with project financing. However, the level of protection is as demanding as in any other EU member country. In particular, entities participating in project financing are subject to, among other things:

- General criminal law that sets out corruption and bribery as criminal offences, punishable with fines or imprisonment.
- Law on money laundering and the financing of terrorism (Law No. 83/2017 of 18 August that establishes the measures necessary for the effective implementation of Regulation (EU) 847/2015 on information accompanying transfers of funds (Anti-money Laundering Regulation)).
- Specific regulations concerning money laundering issued by administrative authorities.
- Applicable laws and conventions on human rights and labour rights.

Some financial institutions have adopted the Equator Principles (a risk management framework adopted by financial institutions).

31. What environmental risks might be encountered? How is potential environmental liability assessed and how is liability allocated?

There is a wide range of environmental risks that should be considered, including:

- Contamination of soil, atmosphere and water.
- Environmental damages deriving from the activity and the materials used (typically the polluter is liable).
- Impact on the migration of birds, bats and mammals (common in renewables, mainly wind farms).

The sponsors usually obtain additional insurance coverage for such risks.

Also, quite often infrastructure projects are subject to an Environmental Impact Assessment or an Assessment of Environmental Effects. Projects can also be subject to environmental licensing if the relevant applicable rules and thresholds regarding pollution prevention and control are met (under Decree-Law No. 127/2013 of 30 August, as amended). In addition, some projects concerning certain industrial sectors may be subject to the EU emission trading system and therefore require a permit to emit greenhouse gases as well as emission allowances.

Depending on the project and the sector of activity in question, additional regulations may apply.

## Natural resources and minerals

32. Who has title to minerals or other natural resources? Can foreign companies acquire rights to such assets?

Mineral deposits, mineral and medicinal water sources and natural subterranean cavities below the ground, save for rocks, common lands and other materials normally used for construction, integrate the public domain and consequently fall outside the legal trade (see *Question 5, State Ownership*).

Geological resources integrated in the public domain of the state, including those located in the national maritime space, may be subject to the following rights of private use:

- Prior evaluation rights.
- Prospecting and research rights.
- Experimental exploitation rights.
- Rights of exploitation.

Geological resources not included in the public domain may be subject to the following rights, granted by licence:

- Prospecting and research rights, and exploitation rights of mineral masses.
- Spring waters' exploitation rights.
- Exploitation rights of formations and geological structures, and other similar natural assets.

There is no distinction between national and foreign entities.

33. What royalties and/or taxes are payable on the extraction of minerals or other natural resources?  
How is the charge calculated?

No specific taxes apply to the extraction of minerals or other natural resources, except for the tax due on oil production.

However, if a foreign company has a place of extraction or a mine located in a Portuguese territory for longer than six months, it may be considered that such company has a Permanent Establishment (PE) in Portugal. Profits attributable to the PE will be subject to corporate income tax in Portugal.

34. Are there restrictions, fees or taxes on the export of minerals or natural resources?

The tax legislation does not foresee any specific rule applicable to the export of minerals or other natural resources. The general rules for corporate income tax and VAT are applicable.

## Foreign investment

35. Are there any incentives to encourage foreign investment in projects?

According to the Portuguese tax legislation some tax benefits may be granted to eligible investments (for example, extractive industry) provided certain requirements are met.

There is also a special incentive tax regime for research and development investments. Both regimes are only applicable to corporate entities domiciled in Portugal.

36. Are there investment treaties that protect foreign investment in projects?

There are no investment treaties protecting foreign investment. However, provided certain conditions are met, investment projects of or exceeding EUR3 million may benefit from a contractual tax benefit regime that includes several tax exemptions (for instance, exemption of property transfer tax).

37. What fees or taxes are payable on foreign investment in a local project company? Are payments of principal, interest or premiums on loans or debt securities held by parties in other jurisdictions subject to fees or taxes?

#### **Stamp duty**

Generally, loans (on the principal amount) and other forms of providing funds, interest, commissions charged and guarantees or security are subject to stamp duty. However, loans raised by the issue of bonds are not subject to stamp duty.

Interests are subject to stamp duty to the extent they are paid to a financial institution.

Loans are subject to stamp duty at the following rates:

- For periods of less than one year (per month or fraction): 0.04%.
- For periods equal or exceeding one year: 0.5%.
- For periods equal or exceeding five years: 0.6%.
- Periods not determined (current account), for each month by the monthly average of the debt: 0.04%.

The stamp duty on interest is 4%.

Provided certain specific requirements are met, a stamp duty exemption may be applicable to shareholders' loans.

#### **Corporate income tax (CIT)**

Interest and other types of investment income from debt securities issued by Portuguese entities received by non-resident legal persons without a Portuguese permanent establishment to which the income is attributable, are subject to withholding tax at a rate of 25%, which is the final tax payable on that income.

Investment income paid or made available to accounts opened in the name of one or more accountholders acting on behalf of one or more unidentified third parties is subject to a final withholding tax rate of 35%. If the relevant beneficial owner of the income is identified, the withholding tax rates applicable are 25% or 35% for legal persons resident in blacklisted countries or territories. Under the tax treaties entered into by Portugal, the withholding tax rate may be reduced provided the relevant formalities are met. The reduction may apply at source or by way of a refund of the excess tax.

Under the special debt securities tax regime (Decree-Law No. 193/2005 of 7 November), interest and capital gains deriving from debt securities are CIT exempt provided certain conditions apply.

38. Can project companies establish and maintain foreign currency accounts, both locally and in other jurisdictions?

There are no restrictions in opening and maintaining foreign currency accounts, both locally and in other jurisdictions.

39. Are there any restrictions on the payment of dividend/repayment of shareholders' loans to a foreign parent?

Dividend distribution is not permitted whenever the equity is lower than the amount of the subscribed share capital plus those reserves that may not be distributed under the law or the articles of association.

Additionally, if the company needs to offset losses computed or does not hold the minimum reserves imposed by law or by the articles of association, a dividend distribution is not permitted.

Dividends paid by a resident company to a non-resident parent company are exempt from withholding tax in Portugal to the extent these entities are eligible for the parent-subsidiary directive.

Accordingly, to apply the withholding tax exemption the recipient company must:

- Be a resident in the EU or in an EEA country or resident in countries that have entered into tax treaties with Portugal that includes an exchange of tax information clause.
- Be subject to income tax, without the possibility of being exempt (companies outside the EU and EEA must be subject to corporate tax at a rate not lower than 60% of the standard corporate income tax rate).
- Own directly, or directly and indirectly, at least 10% of the share capital or voting rights of the payer.



- Maintain this share participation for an uninterrupted period of at least one year before the dividend distribution.

If these conditions are not verified, dividends are subject to withholding tax at a rate of 25% or a reduced tax rate under the applicable tax treaty.

This tax regime is also applicable to legal reserves' distribution.

The repayment of shareholders' loans to a foreign parent is not subject to tax in Portugal.

40. Are there restrictions on the importation of equipment from abroad for use in a project?

Importation of equipment can be subject to VAT and customs duties.

## Choice of law and jurisdiction

41. Will local courts recognise a choice of foreign law or jurisdiction in a project contract or financing agreement? Are there any mandatory rules that apply despite a choice of foreign law or jurisdiction?

### Foreign law

The Portuguese courts will recognise a choice of foreign law or jurisdiction within the terms and conditions of Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I). The choice of a foreign law will not be recognised by the Portuguese courts under Rome I in certain specific and limited circumstances, for example where:

- To do so would be contrary to principles of Portuguese public policy (*Article 21, Rome I*).
- There are other overriding mandatory rules of Portuguese law (*Article 9, Rome I*).

Under Portuguese conflict of law provisions set out in the Civil Code, the security interests for the security agreement (for example, creation of formalities, validity, enforceability, priority and transferability of the security) will, generally, be governed by the laws where those assets are located regardless of the choice of law governing the security agreement. For registered assets (for example, vessels), it is generally understood that they are located in the place of their registry.

## Jurisdiction

The parties to a security agreement can agree to submit the resolution of any disputes to the jurisdiction of any foreign court or arbitration institution.

However, jurisdiction agreements are not valid if the dispute is connected to any of the following:

- Rights over real estate located in Portugal.
- The incorporation or dissolution (including insolvency) of Portuguese based companies (without prejudice to Regulation (EU) 848/2015 on insolvency proceedings (recast) (Recast Insolvency Regulation)).
- The validity of resolutions taken by Portuguese based companies.
- The validity of acts that are subject to public registration (for example, mortgages).

In these cases, the dispute can only be settled before a Portuguese court or through arbitration proceedings held in Portugal.

Judicial enforcement proceedings for security agreements (that is, proceedings that involve the seizure or attachment of assets) or of a court decision entitling the grantor to seize the debtor's assets must be brought before the Portuguese Courts for sovereignty reasons, provided such proceedings relate to assets located in Portugal.

42. Are waivers of immunity enforceable?

Sovereign immunity is recognised in Portugal through a principle of customary international law, although only in cases that involve the exercise of sovereign authority (*ius imperii*). If a state acts like a private party (for example, in a commercial transaction), it cannot invoke its immunity in the disputes that may arise from the transaction.

There is no rule preventing the waiver of immunity, including situations where a state, as defendant, does not invoke its immunity in the proceedings. However, if such waiver means an infringement of a state's sovereignty, the courts may refuse enforceability (and declare that they have no jurisdiction) based on the ground that a state's sovereignty is a matter of international public policy.

43. Will the courts recognise a foreign arbitral award or court judgment?

A foreign arbitral award will be recognised and enforced in Portugal under the terms and conditions of any or all of the following:

- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which is the most relevant.
- Geneva Convention on the Executive of Foreign Arbitral Awards 1927.
- Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965.

If no convention applies, recognition and enforcement of a foreign arbitral award will comply with the Voluntary Arbitration Law (*Lei da Arbitragem Voluntária*).

A foreign court judgment will be recognised and enforced in Portugal under the terms and conditions of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation). Generally, a judgment given in a member state will be recognised in the other member states and a judgment given in a member state that is enforceable in that member state will be enforceable in the other member states without any declaration of enforceability required.

When the Recast Brussels Regulation (or any other international convention or bilateral treaty) is not applicable, a foreign court judgment may be recognised and enforced under the rules of the Portuguese Civil Code, which provides a specific and prior recognition procedure, to be filed in an appeal court (*Tribunal da Relação*). The court may refuse to recognise the judgment based on basic:

- Procedural grounds, including the inauthenticity of the award and exclusive jurisdiction of Portuguese courts.
- Material grounds, if such recognition is manifestly contrary to public policy.

## Reform

44. Are there any recent or proposed legal developments affecting project finance?

There are no recent or proposed legal developments affecting project finance in Portugal.

### Online resources

**Portuguese Official Gazette**  
W <https://dre.pt/web/guest/home>

**Description.** This is the website of the Portuguese Official Gazette, which contains all Portuguese laws, regulations and treaties.

### **Attorney General's Office of the Lisbon District**

W [www.pgdlisboa.pt/home.php](http://www.pgdlisboa.pt/home.php)

**Description.** This is the website of the Lisbon District Attorney General's Office, which contains updated versions of Portuguese legislation and case law.

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