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Portugal

Project Finance

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

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Portugal: Project Finance

1. What are the typical ownership structures for project companies in your jurisdiction? Does this vary based on the industry sector?

The market standard does not differ from the typical structures used, which is project companies, used as special-purpose vehicles, incorporated in Portugal as limited liability companies, either LLCs ("sociedades por quotas") or PLCs ("sociedades anónimas"). Subject to either type of SPV not being a wholly owned subsidiary, this allows for adequate ring-fencing of assets, with the associated viability of limited or no recourse financing.

Especially in highly regulated sectors, such as those connected with public services (energy, transportation, health and other infrastructure PPPs), these also allow for the correct allocation of permits, licenses, and authorizations required for the activities at hand. Specifically, public service concessions are mandatorily subject to asset segregation, expediting public sector step-in rights in case of default

2. Are there any corporate governance laws or accounting practices that foreign investors in a project company should be aware of?

All investors, foreign and national alike, are subject to the same corporate and accounting frameworks, which includes the Companies Code ("Código das Sociedades Comerciais"), the Commercial Register Code ("Código do Registo Comercial") and general GAAP/IFRS guidelines and regulations.

Listed and other large corporations may be subject to additional regulations, namely publicly traded listed companies, which are subject to the Portuguese Securities Market Code ("Código dos Valores Mobiliários").

High-value sectors (e.g. energy) are subject to fit-and-proper prior control.

General non-financial/reporting frameworks (e.g. ESG and CSRD-driven disclosure) may also be applicable, particularly in the case of larger groups. There is an increase in reporting effects being cascaded down to project company level, both as a result of internal compliance measures, and also as a factor of lender

requirements.

3. If applicable, what forms of credit support from sponsors or host governments are typically provided?

State sponsorship is limited in a free market scheme, with regulated sectors and with regulated income and revenues providing for additional stability with positive impacts in bankability. With political risk being usually valued as low, with high trust in stability of the political system and of long-term core policy, the Portuguese jurisdiction is typically sufficiently mature to allow for business to flourish without specific credit support.

Sponsors typically use equity commitments, shareholder loans (which are subordinated by nature and by law) and debt service undertakings as stand by equity and other types of credit profile enhancement mechanisms.

4. What types of security interests are available (and suitable) for a project financing in your jurisdiction? Are direct agreements used?

The jurisdiction is highly flexible for securitization, with legal privileges being generally limited to tax contingencies, social security contributions, and worker compensation. Both liens over property (e.g. mortgages over immovable assets and pledges over other assets) are commonly used, as well as pledges over shares in the project company itself, and of present and future accounts and receivables. These are usually set-up in specific financial collateral arrangements such as security agreements.

Direct agreements are standard in project finance structures and would regulate lender step-in, assignment of receivables and allocation of indemnifications to repayment of debt, and enforcement rights vis a vis the main counterparties of the project company (e.g. EPC and O&M contractors, key suppliers, etc.).

5. How are the above security interests perfected?

In general any security liens in rem, such as security over real estate (as well as specific moveable property

security) must be executed in notarial form, and registration with the land (or other) registry is mandatory. Whilst registration is generally not legally required for interparty validity (with the important exception of mortgages), it is nonetheless condition for erga omnes knowledge and enforceability against bona fide third-parties. Priority between liens and securities is generally defined by registration ranking, which is a factor of registration date (and not of execution of security agreement), as standard in European jurisdictions.

Other security liens are usually executed in written form, and are mostly perfected via book-entries and notices to debtors and custodians.

Stamp duty is applicable to guarantees created as security for performance of payment obligations, subject though to an "exemption" applicable under the Stamp Duty Code ("Código do Imposto de Selo") whenever the timing for creation of the security and the underlying secured loan is simultaneous, given that both are subject to the same tax and tax rates, to avoid a double taxation effect, or in any specific legislation. Evidence of payment of stamp duty is generally a requirement for registration. Importantly, security granted in favour of the EIB is also exempt from stamp duty.

6. Please identify how security is enforced (notably the enforcement options available for secured parties) both pre and post insolvency/bankruptcy of the project company?

Acceleration upon default is standard, leading to enforcement. Enforcement of different types of security is made in a coordinated manner, which is typically preset within the security agreement itself in order to allow for enforcement with the minimum possible depreciation of the asset.

Depending on the type of asset / security, non-insolvency enforcement may be performed through judicial sale processes or out-of-court processes, with pledges being typically tradeable and enforceable in the terms and conditions of the security agreement itself. Appropriation is allowed for financial collateral and other commercial pledges, subject to the verification of some legal requirements, including rules on valuation of assets and return of surplus of enforcement.

Irrevocable powers of attorney are commonly used as a mechanism to expedite enforcement through the transfer of ownership of assets, appropriation and registration.

Insolvency enforcement may be requested by any

creditor, and is universal, with all enforcement being conducted within those proceedings. All creditors are ranked within the insolvency proceedings, with secured creditors being paid from proceeds of their collateral, immediately subordinated to tax and social security authorities and, in general, the workforce of the insolvent company.

7. What are other important considerations in relation to the security regime in the jurisdiction that secured parties should be aware of?

Parallel debt or agency constructs are common, but untested in litigation, which may be, and in certain cases effectively is, a challenge as it may be highlighted as a qualification or reserve in legal opinions. Trusts are not existent nor recognized in the jurisdiction.

Floating charges are also not existent, and thus careful consideration must be given in securitization of future assets.

Formalities and registry-induced delays are usually taken into account in drafting representations and warranties, as well as conditions precedent. Many special legal frameworks in highly regulated sectors (e.g. PPPs, health, energy, and transport) require administrative control for the granting of security and for actions taken in the context of ordinary enforcement measures, namely change of control limitations, which require special mechanisms and measures to structure securitization of finance deals.

8. What key project risks should lenders be aware of in project financings in your jurisdiction? This may include, but may not be limited to, the following risks: force majeure, political risk, currency convertibility risk, regulating or permitting risk, construction/completion risk, supply or feed stock risk or legal and regulatory risk).

Jurisdiction-specific risks are somewhat limited.

Public administration may be highly inefficient, with lengthy delays in essential permits making project development burdensome and affecting revenue timing; adequate flexibility to repayment schedules is often sought, or limiting funding under project finance schemes to ready-to-build stages, are common strategies to minimize risk exposure of all parties whilst allowing for the necessary funding flows to exist.

Courts are heavily backlogged, and thus arbitration (under national or ICC rules) is sometimes recommendable. Enforcement of arbitration decisions is admissible, provided that the arbitration agreement conforms to national public interest rules and regulations, which are mostly standard.

Regulatory risk is present for all concession based or tariff based projects, whereas change in law and change in tax have been commonly disputed in courts, aimed at financial rebalancing of those agreements and/or projects, including under *fait du prince* doctrine.

9. Are any governmental / regulatory consents required and are any financing or project documents requirement to be filed with any authority in order to be admissible in evidence in a court of law, valid or enforceable?

Facility agreements and project documents are generally not required to be filed with the authorities. Due care and consideration must be given to confidentiality covenants, especially when not subjecting disagreements to arbitration, as court proceedings are always public.

Enforcement is usually sought in specific forms of agreement which are enforcement friendly, and usually notarized.

Especially in what regards placing or enforcing securities over regulated assets (within concessions) or directly over permits, licenses, and authorizations (whenever those are classified as assets and thus able to be pledged), administrative authorization is usually required.

FDI screening is limited to strategic infrastructure or critical assets. Merger control follows European-based competition rules.

10. Are there any specific foreign exchange, royalties, export restrictions, subsidies, foreign investment, that are relevant for project financings (particularly in the natural resources sectors)?

None, other than stamp duty. Royalties are ordinarily present in natural resources, where a concession is held for the exploitation of public domain goods (namely oil & gas, and mineral resources).

Export restrictions are present in critical sectors, such as defense, and may be imposed in economically strategic sectors such as natural resources (i.e. lithium).

11. Please set out any specific environmental, social and governance issues that are relevant. For example, are project companies subject to certain ESG laws, reporting requirements or regulations?

EU taxonomy standards and the Equator Principles standards are ever more ubiquitous in agreements with funding parties.

Large entities and listed corporations and financial institutions are subject to CSRD and ESRS requirements as per EU-wide legislation.

12. Has any public-private partnership models or laws been enacted in the jurisdiction, and if so, are they specific to certain industry sectors?

PPP structures are common within the Portuguese jurisdiction and have been used since the late 90s. The first PPP specific law was enacted in 2003 and the model was subject to widespread adoption in the transportation sector (namely bridges, roadways and more recently the high-speed rail developments) and in the health sector.

Traditional public procurement is subject to the Public Procurement Code ("Código de Contratação Pública") and within the EU public procurement rules.

Risk allocation traditionally follows international practice, with specialist government entities leading the design and implementation of PPP models.

13. Will foreign judgments, arbitration awards and contractual agreements to arbitrate be upheld?

Yes.

Portugal is a party to both the New York Convention and the ICSID Convention. Arbitral awards are enforceable and subject to *exequatur*, with the Portuguese jurisdiction not re-examining the merits.

Foreign judgements are accepted under the Brussels regime for EU awards, and multilateral or bilateral agreements, if any, and/or the rules contained within the Code of Civil Procedure ("Código do Processo Civil"), for checks on due process and for validation on public policy acceptability of the award.

Arbitration can be seated in institutional or *ad hoc*, nationally or internationally, with the choice generally

being of the parties. Specific mandatory arbitration and/or arbitration seat exists for specific sectors and disputes (e.g. sports, administrative and tax matters).

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

Yes: choice of forum is generally admissible. Normal exceptions apply, such as rights in rem over local immovable property, and incorporation / dissolution of Portuguese entities.

State entities are also permitted to waive immunities provided that their engagement is commercial in nature, and not as a state-actor under ius potestas, which is not waivable.

15. Please identify what you consider to be (a) the key current issues for project financing in your jurisdiction; and (b) any emerging trends or topics which should be considered or focused on by project financing stakeholders in this jurisdiction.

(a) Main current issue would be regulatory bodies acting as a significant bottleneck for projects at permitting stages.

(b) Emerging topics would be aligned with global trends. Renewable energy deployment at scale poses challenges in price risk analysis, as higher penetrations tend to depress revenue streams; the slow but steady disappearance of regulated tariffs in the energy generation subsector further increases risks. Additionally, rapid deployment of new technologies tends to follow the core principles of innovation regulation: law lags behind, and as such emerging markets have greater regulatory uncertainty levels.

(c) A consistent decrease of stability of cash flows due to inter alia the evolution to merchant models (with cash flow risks) and EU constraints on State Aid.

16. Please identify in your jurisdiction what key legislation, subsidy regimes or regulations have been implemented (or will / plan to be) for projects in connection with the energy transition and/or specific projects due to energy security?

Portugal has a longstanding tradition of support schemes for deployment and operation of renewable energies,

using regulated tariffs at request for nascent markets, and competition-based schemes (e.g. auctions or capped-capacity on-demand schemes) for more established demand.

More modern European wide legislation provides for lower opportunity for administrative tariffs and highly favours market and competition based approaches.

Portugal has recently (2019-2022) held several auctions for solar and hybrid solar/battery facilities, granting grid access with an associated tariff. Grid access is awarded in perpetuity.

Auctions for renewable gases are being tendered for gas flows, with a public counterparty, which then resells it to industrial corporations. Those guarantee offtake capacity at a specified price, with a low-risk counterparty.

Otherwise, incentives are in place for repowering of legacy assets, although with total market exposure. A centrally-managed marketplace for cPPAs has been announced and is under deployment, without any mandate for usage.

Offshore wind capacity auctions have been inscribed in national strategies, but limited details as to effective implementation have been made public; those are expected to be tendered closer to the end of the decade.

17. Please identify if there are any material tax considerations which need to be taken into account for a project financing in your jurisdiction, and if so, how such tax issues can be mitigated.

In addition to stamp duty which generally applies to financing transactions and the granting of security (subject to the exceptions provided for by law), there is withholding tax on interest and dividends to non-residents and non-resident entities (in general 25%, with tax treaty and EU directives providing for limited relief), and the ordinary stamp duty on loans and security and VAT/customs on imports.

Careful structuring, namely around participation-exemption frameworks, treaty planning, and funding structures are typical mitigation tools.

18. What types of funding structures (e.g. debt, equity or alternative financing) are typical for project financing in your jurisdiction. For

example, are project bond issuances, Islamic finance and – in the context of mining deals – streams or royalties, seen as attractive (and common) options for stakeholders? Are you seeing private credit in project financing in your jurisdiction or other alternative financiers? If so, what types of projects are they looking to finance and what are the key structuring issues of such financings?

Whilst project funding under project financing structures (commonly resorting to the issuance of bonds/notes due to tax reasons) continues being the core funding source for development in the Portuguese jurisdiction, sustainable and green-bond type arrangements are growing in demand, due to their higher value vs. funders ESG and reporting obligations.

Refinancing actors present in the Portuguese market are infrastructure funds, private credit providers, and pension funds.

Administrative royalties are a mainstay in natural resource and mining agreements, but are uncommon in private financing agreements. Islamic finance is not prevalent.

19. Please explain if there are any regional development banks or export credit agencies,

and if so, what is their role in project financing in your jurisdiction and beyond.

The EIB and other European-level funding instruments (namely the Connecting Europe Facility) are omnipresent in Portugal for all large infrastructure projects. Banco Português de Fomento also manages state guarantees and export credit products.

20. Please explain if there are any important insurance law principles or considerations in connection with any project financing in your jurisdiction.

No specificities vs. European jurisdictions. Lenders are expected to demand high levels of construction and operational risk coverage, with their direct notice as payees or assignment of receivables. There is no general requirement for national underwriters of said risks, however there may be tax barriers to specific coverages.

21. Please explain if there are any issues with entering into any hedging arrangements in this jurisdiction.

No specificities vs. European jurisdictions. ISDA hedging agreements subject to UK law are prevalent, with Portuguese law instruments providing security over hedging accounts and receivables, as well as rights in rem or other rights where public policy concerns so demand.

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