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Portugal: Law & Practice

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Uría Menéndez

PORTUGAL

Law and Practice

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Uría Menéndez covers all the main areas of practice in the banking and finance sector, such as acquisition finance, corporate lending, real estate finance, project finance, direct lending, debt issuances and restructuring. Through the firm's "best friends" network and its participation in PPU, the practice extends beyond the Iberian Peninsula, taking part in many cross-border transactions in Europe and Latin America. There has been an increase in the volume and complexity of acquisition finance transactions in the context of competitive tenders and takeover bids.

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1. Market

1.1 Major Lender-Side Players

The key players on the lenders' side remain local or international banks granting funds to the buyers. However, there has been an increase in the number of debt funds taking the role of financiers of companies in Portugal.

Decree-Law No 144/2019, of 23 September 2019, created the legal regime establishing loan funds in Portugal, which main purpose is to grant and acquire loans to corporates on a professional basis. This legal regime was then replaced by Decree-Law No 27/2023, of 23 April 2023 (the "Asset Management Legal Regime"), which further densified the rules applying to the activity of loan funds in Portugal. These loan funds are regulated vehicles required to be registered with the competent supervisory authority (*Comissão do Mercado de Valores Mobiliários*) (CMVM).

The creation of the loan funds aimed to foster the capital markets in Portugal and diversify the funding sources of companies that are of great importance to small- and medium-sized enterprises seeking alternatives to bank financing.

This is an important breakthrough under Portuguese law, given that the activity carried out by the loan funds constitutes an exception to the principle of exclusivity (*princípio da exclusividade)*, according to which only credit institutions and financial companies may grant credit on a professional basis. Furthermore, one important feature of the legal regime applying to the loan funds is that the lending activity is subject to the same rules as the banking lending activity in some key aspects, such as interest capitalisation, interest rates and late payments.

Nevertheless, the legal regime applying to these loan funds is still pending clarification on the taxation regime applicable to the activity of these funds, which may be holding back some players in the market from incorporating and using these debt funds. In any case, this clarification is expected to be issued very soon.

1.2 Corporates and LBOs

The financing of acquisitions can be made in many ways and structures, but the most common are banking loans, either through syndicated loans or a traditional loan secured with shares of the special purpose vehicle (SPV) and/or the future shares to be acquired in the target.

Other types of security or funding structures may be used, depending on the specific characteristics of the target and its business sector and, naturally, the acquirer. A relevant sector to take note of is that relating to tourism and the financing of hotels and other accommodation facilities, where either a traditional loan agreement format with a comprehensive security package or a bond issuance format also backed by a comprehensive security package, combined with the appointment of trustee-like representative investors or lenders, is used.

2. Documentation

2.1 Governing Law

Portuguese law is usually the governing law of acquisition financing agreements, although English law may be used in certain transactions in the market (especially in situations where the purchaser is a foreign investor). Security packages tend to be governed by Portuguese law, due to specific legal provisions on security and registration and formalisation requirements. Additionally, acquisition finance transactions governed by a foreign law require significant input from Portuguese lawyers in many critical areas, such as corporate law and insolvency regulation, among others.

2.2 Use of Loan Market Association (LMA) Agreements or Other Standard Loans

There is not a general rule in the Portuguese market for financing agreements to follow an industry standard format, such as the LMA documentation used in the UK market. However, LMAs are becoming more and more frequently used in the Portuguese market and many of the customary features of Portuguese acquisition financing documentation replicate LMA standards but are adapted to Portuguese law standards and requirements, especially in transactions of syndicated loans.

2.3 Language

The majority of acquisition financing agreements are drafted in English due to the international dimension of the transactions currently taking place in Portugal. This does not generally cause an issue, except for (i) notarial documents, which must be in Portuguese, and (ii) documentation that must be submitted to the land or commercial registry offices, in which case it is often necessary to provide translations into Portuguese.

2.4 Opinions

The issuance of legal opinions in acquisition finance transactions is carried out by the lender's legal counsel on the legality, validity and enforceability of the finance documents, whilst the borrower's legal counsel is required to issue a legal opinion on the capacity and authority of the borrower.

3. Structures

3.1 Senior Loans

Senior loans typically comprise:

- a term facility used to fund the acquisition; and
- a working capital facility in the form of a revolving credit facility.

3.2 Mezzanine/Payment-in-Kind (PIK) Loans

Mezzanine financing is also commonly used in Portugal as subordinated debt. However, this type of loan is typically secured.

Payment-in-kind (PIK) loans are relatively uncommon in Portugal due to the legal restrictions on the capitalisation of interest due and payable. Despite these restrictions, there has been a noticeable increase in the popularity of PIK interest within the Portuguese market in recent years. This trend is largely driven by the growing interest of foreign loan funds in investing in Portugal. Looking ahead, there may be potential for greater utilisation of such finance structures. The Asset Management Legal Regime, in particular, offers increased flexibility regarding the capitalisation of interest by regulated loan funds, which could pave the way for more widespread adoption of PIK loans in the future.

3.3 Bridge Loans

Bridge loans are becoming increasingly more popular in Portugal in recent years, especially among loan funds which are available to finance the initial stages of projects (eg, real estate projects) which typically traditional lenders are not willing to fund from a risk perspective. These bridge loans are then refinanced through a term loan facility provided by banks and other institutional lenders.

3.4 Bonds/High-Yield Bonds

In recent years, bonds with private placement and complex structures have become more common in M&A transactions in Portugal. This trend can be mainly explained as being for tax reasons, as these structures may benefit from important tax exemptions (eg, withholding tax) provided that the relevant requirements for such exemptions are met (for a more detailed explanation, please see **8.2 Withholding Tax/Qualifying Lender Concepts**).

3.5 Private Placements/Loan Notes

Loan notes are not common in Portugal.

3.6 Asset-Based Financing

Asset-based financing is very common in Portugal. This type of financing is typically structured through a term loan facility secured by a comprehensive security package, including mortgages over real estate properties, pledges or financial pledges over shares, pledges over bank accounts and pledges over receivables.

4. Intercreditor Agreements

4.1 Typical Elements

Intercreditor arrangements aim to establish the rights and liabilities of each creditor and determine priorities regarding payments or distributions in cash, enforcement of securities and proceeds of enforcement. These arrangements are sometimes entered into in acquisition finance deals in Portugal, especially in financing structures that involve numerous lenders and investors and where an intercreditor agent is responsible for taking action on behalf of the creditors. Intercreditor arrangements are usually subject either to Portuguese law or English law.

Contractual Subordination

Contractual subordination provisions are usually included in intercreditor arrangements entered into in Portugal. Under these provisions, certain (junior) creditors agree to rank behind other (senior) creditors in the priority for collecting repayment from the debtor.

In the case of default or insolvency of the debtor, credit claims must be ranked according to statutory rules (eg, secured claims rank above common and subordinated claims). However, the Portuguese Insolvency Law (Decree-Law No 53/2004, of 18 March 2004, as amended) allows parties to agree on the subordination of certain credit claims.

Structural Subordination
Structural subordination is not common in Portuguese acquisition transactions. Structural subordination refers to a financing structure where senior creditors lend funds directly to the target company and junior creditors lend to a holding of the target company so that junior creditors only have access to the assets of the target after all the target's direct creditors (including senior creditors) have been paid and the remaining assets have been distributed to the company as the equity-holder.

Payment of Principal
Liabilities are typically categorised into senior and junior liabilities. Junior or subordinated liabilities are subordinate to senior credits and must be paid after all senior credits have been paid. Within these categories, liabilities can rank pari passu without preference or according to priority rules agreed between the parties.

Interest
The rules are the same as for repayment of principal (see Payment of Principal above).

Fees
The rules are the same as for repayment of principal (see Payment of Principal above).

Sharing Arrangements
Sharing arrangements are not very common in Portugal, although some lenders require to include LMA-based sharing provisions in the finance documents (typically either in the facility or intercreditor agreements).

Subordination of Equity/Quasi-equity
Equity or quasi-equity financing is not typically subject to contractual subordination in Portugal.

4.2 Bank/Bond Deals
The intercreditor agreements are of major importance when there are different types of creditors, particularly when the acquisition is simultaneously financed by bank financing and bond issuance. As the latter usually has a longer maturity, the intercreditor agreement plays a crucial role in setting forth priorities regarding payments or distributions in cash.

4.3 Role of Hedge Counterparties
Typically, the hedging liabilities are treated as senior liabilities and benefit from the security package granted to secure the senior loan associated with the hedging. Moreover, the hedging agreement typically provides hedging termination rights, which are, however, limited to major events of default (eg, insolvency).

5. Security

5.1 Types of Security Commonly Used
There are different types of security, with different formal requirements and execution processes depending on the assets to which they relate.

Shares
Under Portuguese company law, shareholdings can refer to both:

- shareholdings in limited liability companies by quotas (*sociedades por quotas*); and
- shareholdings in limited liability companies by shares (*sociedades anónimas*) that are nominative and can be represented by certificates or book entries.

The shareholdings above can be encumbered and granted as security by means of a pledge. Shareholdings in limited liability companies by quotas may be subject to transfer restrictions.

With regard to the registration requirements applicable to the pledge of shares and the pledge of quotas, see **5.3 Registration Process**.

The shares of limited liability companies by shares can be tendered as transferable securities.

Inventory

Inventory can be granted as security for financing agreements using a pledge. A pledge must meet the following conditions to be valid:

- it must be granted by means of a written agreement; and
- the possession of the asset must be transferred to the beneficiary (pledgee) or a third party on its behalf.

Bank Accounts and Receivables

Under Portuguese law, different types of security can be granted, depending on the type of receivables in question. In most cases, receivables can be considered credit rights to be paid off under specific agreements, in which case security can be granted by means of a pledge over the credits. A pledge over credit rights must comply with the two following formalities:

- the pledgor's debtor must be informed of the credit transfer and identity of the pledgee; and
- the legal documents required for the credits' enforceability must be delivered to the pledgee.

The credit rights arising from bank accounts are pledged in a similar way. The credit institution where the account is domiciled must be notified to block the account and, in the case of enforcement of the pledge, to retain the specific pledged amount of funds. This process used to be burdensome, but the reform of the Portuguese Civil Code has simplified the formalities and requirements for enforceability of pledges over bank accounts.

Under Portuguese law, two other types of security are usually used in facility agreements and take into account a different definition of the concept of "receivable". Receivables can also be considered as one of the following.

- Income of the debtor/third party itself – this income can be allocated by means of an assignment of income agreement (*consignação de receitas*).
- Income generated by an asset belonging to the debtor/third party – this income can be the object of an assignment of revenues agreement (*consignação de rendimentos*), under which a person can allocate to the repayment of any of its obligations the proceeds generated by an immovable or movable asset subject to registration (Article 656, Portuguese Civil Code).

Intellectual Property Rights

Intellectual property rights can be granted as security by means of a pledge. A pledge must be registered with the Portuguese National Intellectual Property Institute.

Real Property

Real estate property can be encumbered by a mortgage. A mortgage is a special guarantee granted over an immovable asset.

Movable Assets

As for inventory, most movable assets (except those subject to registration) can be granted as security to financing agreements by means of a pledge. For movable assets subject to reg-

istration (such as boats, cars and aircraft), the appropriate security instrument is a mortgage.

Financial Collateral Arrangements

Financial collateral arrangements are governed by Decree-Law No 105/2004 of 8 May 2004, as amended, which implemented Directive 2002/47/EC of the European Parliament and the Council of 6 June 2002 on financial collateral arrangements. The collateral granted under financial collateral arrangements can relate to:

- cash;
- financial instruments; and
- credit claims.

Financial collateral arrangements cannot be declared invalid, void or be reversed because those arrangements have come into existence on the date of opening of winding-up proceedings. In the event of the opening or continuation of winding-up proceedings or the adoption of reorganisation measures in relation to the collateral provider, the financial collateral agreements remain in force vis-à-vis third parties, provided that the collateral taker provides evidence that it was not and should not have been aware of the opening of the winding-up proceedings or adoption of reorganisation measures.

5.2 Form Requirements

Mortgage Over Real Estate Property

A mortgage must be granted in a written agreement, which shall be in the form of a notarial public deed or a certified private document (*documento particular autenticado*).

Pledge Over Shares

The form requirements for the creation of a shares pledge depend on the type of securities. A pledge over shares represented by certificates must be registered in the share certificates and the company's share registry book, while a pledge over shares represented by certificates deposited with credit institutions or shares represented by book entries must be registered in the individual ownership account where the securities are deposited.

In respect of the financial collateral arrangements, the only form requirement is that the security document must be evidenced in writing.

Since 2017, Portuguese law (Decree-Law No 75/2017, of 26 June 2017) has also allowed the creation of a commercial pledge (*penhor mercantil*) with appropriation rights of the pledged assets, provided that certain legal requirements are met. In this case, the security document must be in writing, and the signatures placed in the document must be certified in person (*reconhecimento presencial de assinaturas*).

5.3 Registration Process

Mortgage Over Real Estate Property

The registration of a mortgage over a real estate property must be filed before the land registry office. After the parties enter into a valid mortgage agreement, the mortgage is only effective upon registration with the land registry office. Once created, a mortgage is ancillary to the secured obligation and typically only ceases to exist on the discharge of the secured obligation.

A provisional registry can be filed even before the contract is executed, based on:

- a declaration by the property owner, whose signature must be duly certified in person; or
- a promissory sale contract.

After the contract is executed, the public deed certificate must be presented to the land registry office to file for a definitive registration.

Without prejudice to any updates or amendments, there are no filings or procedures required to register mortgages over real estate property with the land registry office to remain perfected over time.

However, even though mortgages secure interest resulting from the loan, under Portuguese law, mortgages cannot cover interest beyond three years. This mandatory rule does not prevent the parties from registering a new mortgage in relation to outstanding interest.

Pledge Over Shares

Pledges over shares of limited liability company by shares (*sociedades anónimas*) and financial collateral arrangements do not require any registry or procedure with the commercial registry office to perfect security interests. However, to be valid and enforceable, pledges over shares represented by certificates must be:

- recorded on the share certificate by means of a declaration stating the number of shares pledged and in favour of whom they are pledged; and
- registered in the issuing company's share registry book.

However, shares represented by book entries must be registered in the securities account, which any of the following can hold:

- a financial intermediary in a centralised system;
- a financial intermediary appointed by the issuer; or
- the issuer itself.

Pledge Over Quotas

Pledges over quotas (the shares of limited liability companies by quotas (*sociedades por quotas*)) must be registered with the commercial registry office. This can be fully executed online at any given moment, for instance, by a lawyer on behalf of the company whose quotas are being pledged. The applicant of this registry must attach the private document or deed evidencing the creation of the pledge. Without prejudice to any updates or amendments, there are no filings or procedures required for the registry of pledges over quotas with the commercial registry office to remain perfected over time.

5.4 Restrictions on Upstream Security

In acquisition finance transactions, the major restriction on the provision of upstream securities relates to the financial assistance rule, as explained in **5.5 Financial Assistance**. Furthermore, the justifiable corporate benefit criteria must also be assessed, especially when the company which provides the security has minority shareholders or when such security is provided to cover third-party liabilities.

5.5 Financial Assistance

Limited liability companies by shares cannot grant loans or by any other means grant funding or security to a third party to acquire or by any other means subscribe to its own shares (Article 322 of the Portuguese Companies Code, which implements Article 23 of Directive 77/91/EEC of 13 December 1976, as amended). Additionally, limited liability companies by shares cannot grant financial assistance to third parties to acquire the shares of a company within the same group of companies. Any actions that fall within the restrictions on financial assistance must be deemed null and void. These restrictions aim to:

- protect the company's creditors;
- avoid market manipulation; and
- protect the interest of minority shareholders.

However, and as in most jurisdictions, exceptions apply in the case of financial assistance provided either:

- to a company's employees; or
- by banks and other credit entities within their ordinary course of business.

Some Portuguese scholars argue that financial assistance prohibition rules only apply to limited liability companies by shares and not to limited liability companies by quotas, as there is no specific prohibition of financial assistance for this type of company, but the matter remains debatable.

As a result of these rules, leveraged acquisitions of limited liability companies by shares are generally not permitted. Specifically, and similarly to other European countries, there is some debate between scholars on whether leveraged buy-out (LBO) transactions qualify as financial assistance. Some argue that LBOs qualify as financial assistance since the SPV has typically no significant activity that can provide economic justification for the merger. Other scholars state that, due to the complex corporate procedure required in the case of a merger to safeguard the positions of minority shareholders and creditors (eg, creditors have a period of opposition before the merger is completed), an LBO transaction would not qualify as financial assistance. There are no relevant court decisions on this matter that can help to resolve this issue.

To avoid the problems related to financial assistance rules, the following structures may be implemented:

- the creation of specific tranches under the financing agreement to segregate the amounts that can be guaranteed or secured by the Portuguese target company (eg, transaction costs or working capital requirements) from the funds raised to acquire the shares of the target;
- a pledge of the target shares (since the Portuguese target company is prohibited from providing security or guarantees, its shareholders can pledge the shares of the Portuguese target company); and
- financing the reimbursement of shareholder loans or other forms of quasi-equity instruments by the target company.

All parties must take into consideration the rules on financial assistance. Buyers who intend to conduct leveraged acquisitions and LBO-type transactions cannot rule out the risk of the application of these rules.

5.6 Other Restrictions

Corporate Benefit

Pursuant to the Portuguese Companies Code, the granting of any guarantees or security by a Portuguese company to secure the obligations of third parties shall only be considered included within the corporate power of said company if: said third parties are in a group or control relationship with the security grantor, as set out in the Portuguese Companies Code; or the grantor of the guarantee or security has a justifiable corporate interest (*justificado interesse próprio*) in granting the guarantee or security. The law does not define the concept nor exemplifies what may be considered a justifiable corporate interest of a given company. Portuguese courts and scholars tend to use as criteria to determine the existence of justifiable corporate interest in specific situations, inter alia, the fact of whether the granting of the guarantee or security is necessary for the relevant company to obtain a potential economic benefit/advantage or to avoid a loss.

In this case, on the assumption that the liabilities to be secured by the security being provided by the Portuguese entities are liabilities of a company which is in the same corporate group as the Portuguese entities, the justifiable corporate interest of the security providers in the granting of such security should be established and sufficiently substantiated.

This justifiable corporate interest is usually confirmed in the relevant corporate resolutions of the Portuguese entities approving the participation of an entity in a financing transaction.

Directors – Loyalty Duties

The directors of commercial companies are bound to a duty of loyalty. They must act for the exclusive benefit of the company, taking into account the long-term interests of the shareholders and other stakeholders relevant to the company's sustainability, such as employees, clients and creditors.

This duty of loyalty notably comprises:

- a duty to refrain from self-dealing;
- a prohibition against receiving advantages from third parties in connection with dealings of those third parties with the company; and
- a duty not to take advantage of corporate opportunities.

5.7 General Principles of Enforcement

According to Portuguese law, the enforcement of security would depend on the relevant contractual arrangements. However, the secured party (beneficiary) must file a court procedure to enforce security due to default.

In order to avoid judicial procedures, it is common that the secured parties (beneficiaries) try to establish contractual arrangements, to the extent permitted by law, to try to sell the assets granted as security to a third party and offset the amount of debt with the proceeds of the sale. This sale to third parties requires the consent of the owner of the asset (which in certain cases may be previously established under the security agreement).

If a debtor fails to comply with a payment obligation, the creditor may declare an event of default and bring enforcement proceedings against the former to be paid against its assets. Moreover, the parties may agree to other default and acceleration events in the loan agreement.

As a general rule, creditors need to hold an enforceable title (*título executivo*) to bring judicial enforcement proceedings against a debtor. In order to be granted enforceability before the court in the case of judicial enforcement proceedings, loan agreements should be entered into in the form of a public deed or a private certified document (*documento particular autenticado*).

When the relevant requirements are fulfilled, the sale of seized assets within a judicial enforcement proceeding may be performed by means of a private sale and purchase agreement. Furthermore, a secured creditor is generally not entitled to appropriate the secured asset.

Two exceptions should be highlighted, as set out below.

- Commercial pledges governed by Decree-Law No 75/2017, of 26 June 2017, pursuant to which the parties to a commercial pledge become entitled to appropriate the pledged collateral by an amount determined by an evaluation made after the relevant debt is enforced, provided that, on the relevant

pledge agreement (which should be made in writing and with the signatures certified by a notary or a lawyer), parties have agreed on such a possibility and the type of evaluation and its criteria.
- Financial pledges governed by Decree-Law No 105/2004, of 8 May 2004, which enable the pledgee, among other matters, to appropriate the pledged assets or rights upon acceleration, provided that, on the relevant pledge agreement (which should in writing and signatures certified by a notary or lawyer), parties have agreed on such a possibility and the type of evaluation and its criteria. Alternatively, the pledgee is entitled to sell the pledged assets to obtain payment without resorting to a court.

The enforcement of security interests may be made through (judicial) declaratory or enforcement proceedings.

6. Guarantees

6.1 Types of Guarantees

There are two main categories of special guarantees:

- personal guarantees (*garantias pessoais*); and
- in rem security (*garantias reais*).

Personal guarantees involve the allocation of a third party's assets, as a whole, as a guarantee for compliance with obligations under a facility agreement. The lenders can, therefore, have their credit rights guaranteed by an additional set of assets different from the debtor's assets.

In rem guarantees are normally provided by both the debtor and a third party and entitle the beneficiary to be paid from the proceeds generated by the sale of the encumbered asset. The most common in rem guarantees are mortgages over real estate property and pledges over assets such as shares or receivables, as detailed in **5.1 Types of Security Commonly Used**.

There are different types of security/guarantee, with different formal requirements and execution processes depending on the assets to which they relate, as explained in **6.2 Restrictions**.

6.2 Restrictions

Same restrictions applying to in rem security; see **5.4 Restrictions on Upstream Security**, **5.5 Financial Assistance** and **5.6 Other Security**.

6.3 Requirement for Guarantee Fees

Portuguese law does not require the provision of guarantee fees. However, the granting of guarantees to secure debts of other companies should not be deemed "for no consideration" to comply with the requirement of a justifiable corporate benefit for the company granting the guarantee.

7. Lender Liability

7.1 Equitable Subordination Rules

Before an acquisition, the lender should confirm that the borrower has no outstanding debts to social security or the tax authorities. This is a serious risk, considering that the lender will become jointly and severally liable with the borrower for these debts.

The lender can become liable for any damages caused to the borrower due to failure to provide funds to finance the acquisition (if it has previously agreed to assume this obligation towards the borrower).

Contractual subordination provisions are usually included in intercreditor arrangements. Under these provisions, certain (junior) creditors agree to rank behind other (senior) creditors in the priority for collecting repayment from the debtor.

In the case of the default or insolvency of the debtor, credit claims must be ranked according to statutory rules. However, the Portuguese Insolvency Code allows parties to agree on the subordination of certain credit claims.

However, structural subordination is not common in Portugal. This is the process whereby senior creditors lend directly to a company, and junior creditors lend to a holding of the company so that junior creditors only have access to the assets of the company after all the target's direct creditors (including senior creditors) have been paid, and the remaining assets have been distributed to the company as an equity holder.

7.2 Claw-Back Risk

Under Portuguese law, as a general rule, any acts detrimental to the insolvency estate carried out within two years prior to the declaration of insolvency can be clawed back, provided that the involved third party had fraudulent intent. Any act or transaction will be presumed to be detrimental, notably if executed without consideration.

Therefore, in the context of acquisition finance, the granting of upstream and cross-stream securities is likely to trigger the application of the claw-back rule, taking into account that the existence of a corporate benefit may be harder to demonstrate, and, as such, the security may be deemed a detrimental act.

8. Tax Issues

8.1 Stamp Taxes

According to the Portuguese Stamp Tax Code, and as a general rule, the granting of loans is subject to stamp tax if it is considered to take place in Portugal. This is deemed to occur if the relevant agreements are executed in Portugal or the relevant loan is granted to or by a resident entity, as well as if the relevant agreements are presented in Portugal for any legal purposes. A borrower is resident in Portugal for this purpose if it has its registered office or is acting through a branch or other permanent establishment in Portugal.

Stamp tax is due on loans made to a borrower resident in Portugal and on loans made by a lender resident in Portugal, unless the specific loan is exempt, and it can be a significant cost in financings in the Portuguese market. Stamp tax is levied on the value of the loans at a rate of up to 0.6%, depending on the loan maturity, and should be borne by the borrower.

Additionally, interest and fees charged by financial institutions are also subject to stamp tax at a rate of 4% (reduced to 3% for fees due for the granting of guarantees).

The exemptions from stamp tax on loans are few and primarily relate to loans between financial institutions or certain multi-lateral development banks and direct shareholder loans, provided that certain conditions are met.

However, neither bonds nor interest paid thereon are subject to stamp tax. As such, in addition to withholding tax payment, the use of bond-loan structures may also be more tax-efficient from a stamp tax perspective unless they involve Portuguese security or guarantees.

Guarantees/Security

As a general rule, stamp tax is due on guarantees and security granted in Portugal, which is deemed to occur if the relevant agreements are executed in Portugal, or the guarantees are given in favour of Portuguese resident entities, as well as on guarantees presented in Portugal for any legal purpose.

However, no stamp tax is due on guarantees/security when ancillary to a contract specifically taxed under the Stamp Tax General Table and granted simultaneously to the secured obligation, even if on a different document. Therefore, if a guarantee or security interest is granted to secure a loan in relation to which stamp tax is payable, and provided the documents whereby the relevant guarantee or security are granted are executed on the same day as the relevant loan documentation, no stamp tax is payable.

Stamp tax on guarantees/security is levied on the maximum secured value at a rate of up to 0.6%, depending on the term of guarantees/security and should be borne by the entity responsible for presenting the relevant guarantee (usually, the borrower).

Even if no stamp tax is initially due because a guarantee or security interest is deemed granted outside Portuguese territory, a stamp tax may be due later on if the relevant guarantee or security interest is enforced in Portugal or the documentation for that guarantee or security is presented in Portugal for any legal purposes, such as registration.

General

As a matter of law, resident lenders, guarantors and security providers are generally primarily liable for delivering the stamp tax due to tax authorities, even though the economic burden falls on the borrower.

In the case of loans granted to Portuguese resident entities by non-resident entities and interest and fees charged by non-resident financial institutions to Portuguese resident entities (in both cases, where the operations are not intermediated by Portuguese resident financial entities), stamp tax should be assessed and borne by the borrower.

8.2 Withholding Tax/Qualifying Lender Concepts

Interest

According to the Corporate Income Tax Code (CIT Code), interest due by a resident in Portugal to a non-resident entity is, as a general rule, subject to withholding tax at a final rate of 25% (or 35% if the income is obtained by non-resident entities located in a country, territory or region in the "blacklist" issued by the Portuguese Ministry of Finance (Tax Haven) or to bank accounts of which the beneficial owner is not disclosed).

However, the withholding tax may be reduced under a double tax treaty (DTT) if, prior to the interest payment, the beneficiary of the interest provides the paying entity with a specific form duly certified by the tax authorities of their country of residence. The reduced DTT withholding tax rates usually vary between 10% and 15%.

Additionally, certain withholding tax exemptions may apply to the payment of interest, provided that certain conditions are met, the most important of which are:

- interest payable by Portuguese credit institutions to a foreign lender qualifying as a financial institution;

- interest payable by Portuguese banks or branches of foreign banks on term deposits by foreign credit institutions;
- interest on bonds issued by a Portuguese borrower and payable to a foreign lender, provided the lender has no permanent establishment in Portugal and is not tax-resident in a tax haven (unless this tax haven has an agreement for exchanging information on tax matters in force with Portugal), and as long as the bonds are integrated in a central securities depositary (*sistema centralizado*) managed by a Portuguese resident entity or by a managing entity of international securities settlement systems established in another member state of the EU or in another member state of the European Economic Area which has agreed to administrative co-operation on taxation matters equivalent to those established by the EU are exempt from withholding tax under Decree-Law No 193/2005 of 7 November 2005, as amended; and
- interest payable by a Portuguese borrower (issuer) to non-residents on securitised bonds or units, provided that the non-resident beneficiary is not held in more than 25% by Portuguese resident entities and is not resident in a tax haven.

The interest payments made through Interbolsa to non-resident investors regarding bonds and securitisation transactions (when integrated in Interbolsa, Clearstream or Euroclear) are exempt from withholding tax under Decree-Law No 193/2005 of 7 November 2005, as amended.

The concept of "qualifying lender" is usually contractually construed on the basis of the above-mentioned reductions of withholding tax rate/exemptions, which are relatively limited.

Currently, the most common solution used in the Portuguese market to try to avoid the withholding tax issue is the bond-loan structure, whereby the loan is granted by way of a bond issuance, which is subscribed for by the original lenders. Instead of using the terms and conditions common in capital markets transactions, the terms and conditions of these bonds will typically include provisions that are akin to standard loans, particularly those concerning covenants and events of default.

Nonetheless, adaptations are required to the language used in various provisions. There are certain limitations as to how far it is possible to emulate in a bond issuance the terms and conditions applicable to standard loans, in view of the fundamental conceptual differences between contracts and securities. Moreover, using a bond loan structure gives rise to certain additional transactional costs, such as the fees charged by the clearing system and by the paying agent appointed by the borrower.

Fees

As a general rule, fees paid by Portuguese resident companies for services rendered by non-resident companies are subject to Portuguese withholding tax at 25%.

However, whenever the beneficiary of the income is resident in a country with a DTT with Portugal, no Portuguese withholding tax should be due if, prior to the date on which the relevant fees are paid, the services' supplier provides the paying company with a specific form (Form 21 RFI), duly signed by the paying company, along with a tax residence certificate issued by the tax authorities of their country of residence.

The foregoing notwithstanding, it should be noted that, as a general rule, under Portuguese law,

fees due by resident entities for the rendering of financial services by non-resident entities are not subject to Portuguese withholding tax.

8.3 Thin-Capitalisation Rules

According to the CIT Code, there are no rules on thin capitalisation. However, interest-stripping rules apply, and transfer-pricing rules may affect the deductibility of financing expenses whenever arm's length conditions are not duly observed.

As a general rule, the CIT Code specifically provides that only interest on loans incurred to generate or guarantee income subject to CIT are tax deductible. This means, for example, that the interest paid on the financing obtained to refund equity or proceed with dividend distributions tends to be considered not related to the activity of the company (ie, not incurred to generate or guarantee income) and, therefore, as not deductible for tax purposes.

Furthermore, net financing expenses are only deductible for CIT purposes up to the highest of the following amounts:

- EUR1 million; or
- 30% of the EBITDA (the tax concept of EBITDA used to calculate this limit corresponds to a company's taxable income or tax losses subject to and not exempt from CIT, with the addition of net financing expenses, depreciation and amortisation that are tax deductible).

For the purposes of the above-mentioned limits, net financing expenses are defined as the difference between the financial expenses and the income derived from financing in a given tax year that is subject to taxation.

This limitation to the deductibility of financial expenses applies to all companies subject to CIT, except:

- companies subject to the Bank of Portugal and Portuguese Insurance Institute supervision;
- Portuguese branches of credit institutions, other financial institutions or insurance undertaking; and
- securitisation companies formed pursuant to the Decree-Law No 453/99, of 5 November 1999.

The amount of net financing expenses which is not deductible as it exceeds the maximum limit for the relevant tax year can be carried forward and deducted in the following five years (after the deduction of the net financing expenses incurred in the respective year and always subject to the limit applicable in each year).

If, during a given year, the amount of the net financing expenses is lower than the limit of 30% of the tax-EBITDA of that year, the excess amount within this limit (ie, the difference between 30% of the tax-EBITDA and the net financing expenses) may be offset against the net financing expenses of the following five years.

9. Takeover Finance

9.1 Regulated Targets

Regulated Industries

The acquisition of a target does not usually require any regulatory consent or licences under Portuguese law. However, there are special supervision rules and licensing requirements if the target operates in certain regulated sectors, such as:

- banking and financial markets;
- insurance;
- telecommunications;
- energy;
- healthcare; and
- state-owned companies or companies subject to an equivalent legal regime.

Effects on the Transaction
The main effect on the transaction is that it must be structured and documented so that all authorisations and licences required are obtained before closing (usually set out as a condition precedent).

9.2 Listed Targets
Specific Regulatory Rules
Listed companies can only be acquired through a tender offer, made publicly and in accordance with the Portuguese Securities Code (*Código de Valores Mobiliários*) (CdVM), which imposes specific legal requirements for tender offers, especially with regard to transparency and publicity.

The legal obligations applicable in the case of tender offers include:

- a prospectus outlining the main terms and conditions of the transaction;
- registration of the prospectus in compliance with the formalities required for its approval by CMVM;
- provision of an equitable price for the acquisition of the target (Article 188 of the CdVM);
- the consideration provided for the acquisition of the target must be in place for the transaction to occur, either by depositing it in a bank account or by securing it through proper guarantees; and
- transparency must be ensured throughout the transaction through compliance with obligations of information towards the general public, the company's employees and participants in the transaction – these obligations are particularly imposed on the target's board of directors (Article 181 of the CdVM).

Methods of Acquisition
There are two main methods of acquisition of a listed company, mandatory tender offers and voluntary tender offers (Article 187 of the CdVM). Voluntary offers are legally defined as offers that are not mandatory. Mandatory tender offers must take place when a shareholder acquires either:

- shares carrying more than one third of the voting rights of the company; or
- shares carrying more than one half of the voting rights of the company.

The relevant shareholder can present adequate evidence to the CMVM that, despite holding more than one third of the voting rights of the company, it does not exercise effective control over the company and is therefore exempt from the obligation to submit a tender offer.

Funding
The consideration to be offered for the acquisition of the target must be either deposited in a bank account or secured through proper guarantees.

Additionally, in the case of a mandatory tender offer, Portuguese law provides for certain minimum requirements regarding the consideration offered. The consideration of a mandatory tender offer must not be lower than either of the following (Article 188 of the CdVM):

- the highest price paid or offered by the tenderer (or by any person related to the tenderer) for the acquisition of the same category of securities in the six months preceding the

publication of the preliminary tender offer announcement; or
- the weighted average price of these securities on the regulated markets during the same period.

Squeeze-Out Procedures

Under Portuguese law, the acquisition of more than 90% of a target grants the right to acquire the remaining shares in the company and to squeeze out the remaining minority shareholders, who are legally forced to sell. Conversely, once a 90% stake is acquired, the remaining minority shareholders can demand the purchase of their shares.

10. Jurisdiction-Specific Features

10.1 Other Acquisition Finance Issues

Under Portuguese law, holding companies (SGPS) are subject to a specific regime and shall have as sole corporate purpose the ownership of shares in other companies as an indirect form of carrying out an economic activity.

In particular, holding companies are prevented from granting credit, except in the following events, namely:

- to companies in a relationship of control (*relação de domínio*); and
- to companies in which they hold (directly or through subsidiary companies) at least 10% of the share capital and voting rights, provided that the corresponding shares are kept for more than one year.

In regard to SGPS, it is discussed in which situations and to what extent these companies can provide guarantees in favour of subsidiary companies' loans.

As explained in **6.2 Restrictions**, the granting of personal or in rem guarantees to secure debts of other companies is considered to be against the interests of the company unless either:

- there is a justifiable corporate benefit (*justificado interesse próprio*) for the company granting the guarantee; or
- the companies are in a "control or group relationship".

However, it could be argued that holding companies can only provide guarantees in those events where Portuguese law admits that they can be granted credit.

Following this viewpoint, and although it appears to be an isolated ruling, the Appeal Court of Lisbon has already decided that when a holding company issues a guarantee on behalf of a company held by the former, it is "granting credit". This ruling concluded that no room existed for the justifiable corporate benefit test because the guarantee was in breach of a specific provision limiting the activity of holding companies and thus should be deemed null and void.

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