

PORTUGAL

# Investment rules of the world



## About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

## Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please [contact us](#) if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via [investmentrules@dlapiper.com](mailto:investmentrules@dlapiper.com).



# Portugal

*Last modified 06 December 2019*

## Capital markets and structured investments

### Issuing and investing in debt securities

#### *Are there any restrictions on issuing debt securities?*

There are restrictions on offering and selling debt securities under both Portuguese and EU law.

Unless certain exclusions or exemptions apply, the offering of debt securities to the public in Portugal and the request for admission to trade debt securities on a regulated market operating in Portugal requires disclosure to the public by way of an approved prospectus.

*Last modified 6 Dec 2019*

#### *What are common issuing methods and types of debt securities?*

The most common types of debt securities issued in Portugal are bonds, notes and commercial paper issued on a stand-alone basis or under a programme. Many different types of debt securities are offered in Portugal. Some common forms include:

- debt securities characterized by a fixed rate of interest plus the right to a supplementary interest rate or a reimbursement premium, either fixed or dependent on the profits of the issuer;
- debt securities with an interest rate and repayment plan dependent on profits;
- debt securities convertible into shares or other securities;
- debt securities giving the right to subscribe one or more shares;
- debt securities giving subordinated credit rights over the issuer;
- debt securities convertible into other credits of shareholders or third parties over the issuer;
- debt securities providing special guarantees over assets or profits of the issuer or a third party;
- debt securities issued at a premium;
- cash bonds;
- equity securities;
- mortgage securities; and
- perpetual securities.

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## *What are the differences between offering debt securities to institutional / professional or other investors?*

According to Portuguese law the offer of debt securities to qualified investors (credit institutions, investment firms, insurance firms, pension funds and managing firms etc.) is classified as a private offer. On the other hand, the offer of debt securities to an undetermined pool of investors is a public offer, provided the offer is not addressed to qualified investors only. Portuguese law only imposes requirements for disclosure by way of an approved prospectus for public offers.

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## *When is it necessary to prepare a prospectus?*

According to Portuguese law, unless an exemption applies, it is necessary to publish a prospectus where there is an offer of securities to the public or an application for securities to be admitted to trading on a regulated market.

An offer is deemed to have been made to the public if:

- it is made solely to an undetermined pool of investors or to the generality of the shareholders of a listed company, even if the share capital is represented by nominal shares;
- the offer is preceded or followed by a solicitation addressed to an undetermined pool of investors or general advertising promotion; or
- it is offered to more than 150 persons (other than qualified investors) per European Economic Area state.

If the offer is deemed not to be made to the public, a prospectus may still be required if an application is made for the securities to be admitted to trading on a regulated market. An exemption from both the offer to the public and the admission to trading on a regulated market is needed to avoid having to publish a prospectus.

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## *What are the main exchanges available?*

### **Regulated markets**

The regulated markets in Portugal, for the purposes of the Markets in Financial Instruments Directive II (MiFID II) are:

- Euronext Lisbon (*Sociedade Gestora de Mercados Regulamentados, S.A.*);
- futures and options markets, managed by Euronext Lisbon (*Sociedade Gestora de Mercados Regulamentados, S.A.*); and
- OMIP Derivatives market, managed by OMIP - *Operador do Mercado Ibérico de Energia.*

These markets are subject to the requirements of several EU directives, including the Market Abuse Directive and the Transparency Directive.

### **Multilateral trading facilities**

In Portugal there are the following multilateral trading facilities:

- Euronext Lisbon (*Sociedade Gestora de Mercados Regulamentados, S.A.*); and
- Alternext, managed by Euronext Lisbon (*Sociedade Gestora de Mercados Regulamentados, S.A.*).

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## *Is there a private placement market?*

Portugal has an active private placement market.

There is no dominant standard for documentation but it is usual to adopt internationally accepted models.

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## *Are there any other notable risks or issues around issuing or investing in debt securities?*

### Issuing debt securities

Issuers are required to take responsibility for prospectuses for debt securities. Misleading statements in, or omissions from, any applicable offering document can give rise to administrative liability under Portuguese law and additional public sanctions.

### Investing in debt securities

Debt security terms and conditions typically contain provisions which allow for modification without the consent of all investors and without regard to the individual interests of particular investors. The conditions also provide for meetings of investors to consider matters affecting the investors. These provisions typically allow defined majorities to bind all investors including investors who did not attend and vote at the relevant meeting and investors who voted against the majority.

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## Establishing and investing in debt / hedge funds

### *Are there any restrictions on establishing a fund?*

#### Generally

The establishment of investment funds and commercialization of investment funds' units is supervised by the Portuguese Securities Market Commission and the Bank of Portugal, under the terms of the [Legal Regime on Undertakings for Collective Investment in Transferable Securities](#).

Funds are one form of collective investment undertaking (which may be structured as a public limited company which are subject to further regulation). The conditional documents and proposed activities of funds require prior authorization from the Portuguese Securities Market Commission.

#### Collective investment schemes

In Portugal, there are two types of collective investment schemes.

##### **INVESTMENT COMPANIES (SOCIEDADES DE INVESTIMENTO)**

Investment companies are typically structured as public limited companies and are generally governed by the Commercial Companies Code and the [Legal Regime on Undertakings for Collective Investment in Transferable Securities](#) (except for certain activities that may conflict with typical activities of a collective investment scheme such as mergers, demergers or transformation regimes). Investment companies may be self-managed.

##### **INVESTMENT FUNDS**

Investment funds consist of an autonomous pool of assets. They do not have any legal personality and must be managed by a management entity. Investment funds are comprised of participation units and governed by the [Legal Regime on Undertakings for Collective Investment in Transferable Securities](#). Unlike investment companies, investment funds may not be self-managed.

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### *What are common fund structures?*

Funds may be established as open-ended funds (with a variable number of units that may be redeemed at any time at the request of the unit holder) or closed-ended funds (with a fixed number of units).

There is a prescribed list of types of investment funds. The qualification of each fund is determined by the type of assets the fund holds, management of the fund and the characteristics of the units comprising the fund. Examples of funds include money-market funds which invest in money-market instruments and guaranteed funds in which an investor's income is guaranteed.

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## ***What are the differences between offering fund securities to professional / institutional or other investors?***

An offer of fund securities to qualified investors such as credit institutions, investment firms, insurance firms, pension funds and fund managers is considered a private offer. Conversely, an offer of fund securities to undetermined investors is considered a public offer, provided the offer is not addressed to qualified investors. Disclosure of an approved prospectus is only required for public offers.

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## ***Are there any other notable risks or issues around establishing and investing in funds?***

There are no other notable risks or issues to reference here for the purposes of this site. Possible additional risks would better be assessed on a case by case basis.

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## **Managing and marketing debt / hedge funds**

### ***Are there any restrictions on marketing a fund?***

An offer of securities is generally governed by the Securities Act and [Legal Regime on Undertakings for Collective Investment in Transferable Securities](#).

Under the Securities Act, a firm is considered to market securities when an offer of securities:

- is directed at undetermined addressees;
- is preceded or accompanied by the gathering of investment intentions of undetermined addressees or marketing campaigns;
- is directed at a minimum of 150 investors; or
- is not exclusively directed to qualified investors.

Four types of entity are permitted to market funds:

- management entities;
- depositaries;
- financial intermediaries registered or authorized by the Portuguese Securities Market Commission to conduct the relevant activities, the placement, reception and transmission of orders on behalf of third parties; and
- other entities as authorized by Portuguese Securities Market Commission regulations.

Foreign funds may also be marketed in Portugal if duly authorized. Management entities authorized by another EU member state and which are subject to regulation by the relevant authority of that member state may, in principle, freely market funds under the principle of the free movement of services. Management entities not authorized by a EU member state are subject to a previous tight authorization process from Portuguese Securities Market Commission to market funds in Portugal.

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## *Are there any restrictions on managing a fund?*

Investment fund managing companies are considered financial intermediaries under the Securities Act. They must be registered with the Portuguese Securities Market Commission and are subject to rules regarding financial intermediaries.

Apart from self-managed funds (which is a possible management structure for investment companies):

- open-ended funds must be managed by investment fund managing companies (*sociedades gestoras de fundos de investimento*); and
- closed-ended funds must be managed by investment fund managing companies or certain credit institutions.

Investment fund managing companies must have a minimum share capital of EUR1250,000 and comply with the legal requirements governing their own funds. Credit and financial institutions that want to manage a closed-ended investment fund must hold at least €7.5 million in own funds.

Foreign management companies authorized by another EU member state and which are subject to supervision by the regulator of another member state may, in principle, freely operate in Portugal under the principle of the freedom of movement of services.

Foreign management companies from non-EU member states that wish to manage investment funds in Portugal must apply for prior authorization from Portuguese Securities Market Commission.

Investment fund managing companies are prohibited from conducting certain types of activity such as granting loans and credit, including granting guarantees, on their own account.

All investment fund management companies must act exclusively in their investors' best interests and, observe the principle of risk sharing and act according to high standards of professional competence and special diligence.

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## Entering into derivatives contracts

### *Are there any restrictions on entering into derivatives contracts?*

Derivatives may be traded over the counter or on an organized exchange.

Derivatives traded on an organized market are regulated according to general contractual clauses imposed by the respective fund managers. However, such contractual clauses must be subject to prior communication to the Portuguese Securities Market Commission and the prior approval of Bank of Portugal if the underlying asset of the transaction is an instrument of the money markets or foreign exchange market.

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### *What are common types of derivatives?*

The main types of derivatives traded in Portugal are:

- forwards;
- futures;
- swaps (such as interest rate or currency swaps);
- options (call options and put options);
- credit derivatives;
- contracts for differences; and
- caps, floors and collars.

The value of the derivative contracts is based on the value of the underlying assets. The main classes of underlying asset seen in Portugal are:

- transferable securities;
- monetary instruments (eg savings certificates, commercial paper and cash bonds);
- interest rates (eg Euribor, Libor, Ester – applicable in 2020);
- foreign currency (eg euro/dollar and dollar/yen);
- financial ratios (eg PSI 20 and S&P 500);
- economic factors (eg inflation rates, unemployment rates and national product); and
- other derivatives.

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### *Are there any other notable risks or issues around entering into derivatives contracts?*

Since the global financial crisis in 2007-to-2008, derivatives and particularly over-the-counter derivatives have attracted significant regulatory attention. The European Commission has sought in particular to:

- enhance transparency by requiring the provision of comprehensive information on over-the-counter derivative position;
- reduce counterparty risk by increasing the use of central counterparty clearing; and
- improve the management of operational risk by increasing the standardization of derivatives contracts.

As a result, the derivatives market has seen and continues to see the introduction of a significant amount of new regulation and this has led to substantial compliance costs for market participants.

Portuguese courts have reviewed several cases relating to derivatives since the financial crisis of 2007-to-2008. In general, Portuguese courts tend to uphold these types of agreements. However, where derivatives are traded with non-qualified investors, certain issues should be considered carefully, namely the provision of pre-contractual information, contracts subject to foreign law and usage of standard form documentation as these are issues that are considered by the courts in order to nullify or uphold such agreements.

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## Debt finance

### Lending and borrowing

#### *Are there any restrictions on lending and borrowing?*

##### Lending

Under Portuguese law, home mortgage loans and consumer lending are regulated activities. Only credit institutions and financial companies can carry out such credit operations and therefore the lender (credit institution or financial company) will need to be authorized by the Bank of Portugal to conduct such business.

Home mortgage loans are subject to specific rules (eg early repayment rules). Credit institutions have the obligation to inform consumers about the calculation of the effective interest rate (TAE), any promotional conditions and early repayment conditions.

Regulated credit agreements are subject to specific requirements regarding the terms of the agreement. Prior to the execution of a regulated credit agreement, the lender must assess the solvency of the consumer borrower.

##### Borrowing



While borrowers are generally not regulated, it is advisable for borrowers to consider whether either the mortgage or consumer lending regimes apply to them, as they may benefit from the protections mentioned above.

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## ***What are common lending structures?***

Lending in Portugal can be structured in several different ways to include a variety of features depending on the commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders each providing parts of the overall facility).

Syndicated facilities by their nature involve more parties (such as agents and trustees which fulfill certain roles for the finance parties), are more highly structured and involve more complex documentation. Larger financings will typically be done on a syndicated basis with one of the syndicates taking the lead in coordinating and arranging the financing.

Loans will be structured to achieve specific objectives, eg term loans, working capital loans, equity bridge facilities, project facilities and letter of credit facilities.

## **Loan durations**

The duration of a loan also varies between:

- a short-term loan, with a maturity date not exceeding one year;
- a medium-term loan with a maturity date exceeding one year but not exceeding five years; or
- a long-term loan, with a maturity date exceeding five years.

## **Loan security**

A loan can either be secured, unsecured or guaranteed. For more information, see [Giving and taking guarantees and security](#).

## **Loan commitment**

A loan can also be:

- committed, meaning that the lender is obliged to provide the loan if certain conditions are fulfilled; or
- uncommitted, meaning that the lender has discretion whether or not to provide the loan.

A breach of a loan commitment will only create a contractual liability by the breaching party, which gives the innocent party the right to call for a contractual remedy or to be indemnified.

## **Loan repayment**

A loan can also be repayable upon demand, on an amortizing basis (in installments during the life of the loan) or scheduled (usually meaning the loan is repayable in full at maturity).

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## ***What are the differences between lending to institutional / professional or other borrowers?***

Lending to institutional/professional borrowers is subject to less regulatory oversight and so less burdensome from a compliance perspective.

By contrast, lending in the context of mortgages and to consumers is a regulated activity. For more information, see [Lending and borrowing – restrictions](#).

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## *Do the laws recognize the principles of agency and trusts?*

Portuguese law recognizes the principles under which one person or entity may act on behalf of another as attorney.

The Portuguese legal system does not recognize the concept of a trust.

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## *Are there any other notable risks or issues around lending?*

### Generally

Loan agreements and other finance documents are subject to general contractual principles. However, it is important to note that interest rates are capped by law and therefore, loans provided to institutional/professional entities are subject to the limit established for commercial interest rates which is updated every six months and is currently set at 7%.

The [Legal Regime on Credit Agreements for Consumers](#) establishes a number of requirements on lenders when dealing with consumers, including the need to:

- conduct affordability tests before lending; and
- provide standard information about a mortgage to enable borrowers to compare products.

### Standard form documentation

Bilateral finance transactions are more likely to be documented on bank standard form documentation prepared in-house but which usually tend to follow the form of the Loan Market Association (LMA) adapted to Portuguese standards and legal requirements.

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## *Are there any other notable risks or issues around borrowing?*

Borrowers should be aware of the potential implications of the Banking Act, which outlines certain measures for dealing with failing financial institutions.

The Banking Act gives the Bank of Portugal the power to 'bail in' obligations of failed Portuguese financial institutions. 'Bail in' describes a variety of write-down and conversion powers, such as the power to convert certain liabilities into shares or cancel debt instruments. In the case of Portuguese contracts, such powers override what the parties have agreed at a contractual level.

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## Giving and taking guarantees and security

### *Are there any restrictions on giving and taking guarantees and security?*

Some of the key areas affecting the giving of guarantees and security are as follows.

#### Capacity

It is important to check the constitutional documents of a company giving a guarantee or security to ensure it has an express or ancillary power to do so and there are no restrictions on the directors' powers that would be preventative. Under Portuguese law, directors have a

general duty to promote the success of the company for the benefit of its members as whole; as such, they will need to be able to show that adequate corporate benefit is derived from the company giving the guarantee or security. This is often more difficult in the case of upstream or cross-stream guarantees or security provided by a subsidiary to its parent or sister company. The safe approach is often to have the members of the company approve the giving of the guarantee or security by resolution.

## Insolvency

Guarantees and security with a determined term prior to the onset of insolvency may be at risk of being set aside under Portuguese insolvency laws. Guarantees and security might also be challenged on other grounds relating to insolvency.

## Purchase of own shares

It is unlawful for a public company to grant loans or issue guarantees or to provide financial assistance for the purchase of its own shares (however the law expressly provides for limited exceptions).

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## What are common types of guarantees and security?

### Common forms of guarantees

Guarantees can take different forms, as follows.

#### PERFORMANCE GUARANTEE

A third party (guarantor) personally undertakes the obligation of the debtor if the debtor fails to fulfill its obligations.

#### PROMISSORY NOTE (*FIANÇA*)

The guarantor promises in writing to pay a determinate sum of money to the creditor if the debtor fails to fulfill its obligations.

### Common forms of security

There are two basic types of security interest that can be created under Portuguese law:

- a pledge; and
- a mortgage.

Different types of security are suitable for securing different types of assets (eg financial pledge and a fiduciary alienation/transfer of collateral).

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## Are there any other notable risks or issues around giving and taking guarantees and security?

### Giving or taking guarantees

Depending on the type of guarantee provided, specific requirements may apply. For instance, personal guarantees (*fiança*) need to be in writing and signed by the guarantor and the obligation guaranteed must be determined or determinable.

### Giving or taking security

A security document may need to be executed as a deed if it contains a mortgage over land or other assets subject to registration (eg cars, airplanes and boats).

There are no notarization requirements for security documents under Portuguese law.

Like guarantees, security granted during a period of time prior to the onset of insolvency may be at risk of being set aside under Portuguese insolvency laws and may also be challenged on other grounds relating to insolvency.

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## Financial regulation

### Law and regulation

#### *What are the main laws and regulations that apply to entities that are involved in finance and investments generally?*

##### Generally

Banking Act (*Regime Geral das Instituições de Crédito e Sociedades Financeiras*) (establishes the general regulatory framework for banks and other financial entities)

Legal Regime on Payment Institutions and Electronic Currency (*DL n.º 91/2018, de 12 de novembro*) (regulates the activity of payment institutions and the provision of payment services)

Securities Act (*Código dos Valores Mobiliários*) (establishes the general legal framework applicable to securities and to the activity of financial intermediation)

Legal Regime on the Taking-Up and Pursuit of the Business of Insurance and Reinsurance (*Lei 147/2015, de 9 de setembro*) (regulates access to the insurance and reinsurance business, the procedures applicable to special crimes involving the insurance sector and pension funds, as well as the administrative offences supervised by the Portuguese insurance authority *Autoridade de Supervisão de Seguros e Fundos de Pensões (ASF)*)

Legal Regime on the Taking-Up and Pursuit of the Activity on Insurance and Reinsurance Mediation (*DL n.º 144/2006, de 31 de julho*) (regulates the regime applicable to insurance and reinsurance brokerage activities in the EU territory, by natural or legal persons resident or having their registered office in Portugal)

Legal Regime on Insurance Contracts (*DL n.º 72/2008, de 16 de abril*) (that sets out the legal framework applicable to insurance contracts)

##### Consumer credit

Legal Regime on Credit Agreements for Consumers (*DL n.º 133/2009, de 2 de junho*) (transposes the European Directive 2008/48/CE of the European Parliament and of the Council regarding consumer credit agreements)

##### Mortgages

Legal Regime on Housing Credit (*DL n.º 74-A/2017, de 23 de junho*) approves the legal framework of housing credit agreements and sets out the applicable rules for consumer credit when secured by mortgage or by other types of security over real estate – partially transposes Directive 2014/17/UE relating to housing consumer credit)

Legal Regime on Mortgage Obligations and Mortgage Credit Institutions (*DL n.º 59/2006, de 20 de março*) (sets out the legal regime on mortgage obligations and mortgage credit institutions)

##### Corporations

Companies Act (*Código das Sociedades Comerciais*) (establishes the general legal framework applicable to the incorporation and organization of commercial companies)

##### Funds and platforms



Legal Regime on Undertakings for Collective Investment in Transferable Securities (*Lei n.º 16/2015, de 24 de fevereiro*) (partially transposes European Directives 2011/61/EU and 2013/14/EU on collective investment undertakings and establishes framework applicable to collective investment undertakings)

Legal Regime on the Setting Up and Operation of Pension Funds and Managing Entities of Pension Funds (*DL n.º 12/2006, de 20 de janeiro*) (regulates the setting up and operation of pension funds and the managing entities of pension funds)

## Other key market legislation

Legal Regime on Prevention of Money Laundering and Terrorism Financing (*Lei n.º 83/2017, de 18 de agosto*)

Legal Regime on the Central Register of the Beneficial Owner (*Lei n.º 89/2017, de 21 de agosto*)

Bank Recovery and Resolution Directive (2014/59/EU) (recovery and resolution)

Capital Requirements Regulation (Regulation (EU) 575/2013) (capital requirements)

European Market Infrastructure Regulation (Regulation (EU) 648/2012) (derivatives)

Market Abuse Regulation (Regulation (EU) 596/2014) (market abuse)

Markets in Financial Instruments Directive II – MiFID II - (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014) (financial instruments)

Markets in Financial Instruments Regulation – MiFIR- (Regulation (EU) No 600/2014) (financial instruments)

PRIIPS Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) – adopted by CMVM regulation no. 8/2018, of 5 December 2018

Legal Regime on Securitisation (*Lei n.º 69/2019, de 21 de agosto*)

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## Regulatory authorization

### *Who are the regulators?*

The [Bank of Portugal](#) is responsible, among other functions, for ensuring the stability of the national financial system. To this end, it performs its functions as lender of last resort and the national macro-prudential authority. The Bank of Portugal also enacts general regulations and specific recommendations applicable to entities subject to its supervision. It also has powers to conduct investigations and apply penalties for infringement.

The [Portuguese Securities Market Commission](#) "CMVM" oversees the securities and derivatives market and is responsible for the supervision of investment services activities (known as conduct of business supervision) and the establishment of investment funds and the commercialization of units in investment funds. The Portuguese Securities Market Commission also issues general regulations and specific recommendations. It also has powers to conduct investigations and apply penalties for infringement.

The [Portuguese Insurance and Pensions Funds Supervising Authority](#) is the official body that controls and supervises the business of insurance and reinsurance, pension funds and brokerage activities.

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### *What are the authorization requirements and process?*

Depending on the type of activity, a firm must apply to the Bank of Portugal, Portuguese Securities Market Commission or Portuguese Insurance and Pensions Funds Supervising Authority for authorization.

## Bank of Portugal

The incorporation of a credit institution, financial firm (including a firm involved in the management of investment funds), payment institution and e-money institution is subject to prior authorization by the Bank of Portugal.

The Bank of Portugal must assess whether an authorization request meets the required threshold conditions within six months (in the case of applications for credit institutional or financial firms) or three months (in the case of payment institutions and electronic currency institutions) of submission of a completed application or submission of additional information requested (if later), provided that an assessment must be made not later than 12 months from the date of the submission of the completed application in any event.

Once authorized, the shareholders have 12 months to register the firm with the Commercial Registry.

The Bank of Portugal is also responsible for the approval of the appointment of key individuals (eg senior management, audit committee) for the supervised entities.

## Portuguese Securities Market Commission

The Portuguese Securities Market Commission is responsible for authorizing the creation and termination of regulated markets, including multilateral trading facilities, in Portugal. The activity of fund management is also subject to registration with the Portuguese Securities Market Commission.

Credit institutions which intend to carry on investment services and financial investment activities must, following authorization by the Bank of Portugal, register with the Portuguese Securities Market Commission. The Portuguese Securities Market Commission must assess whether an application for registration meets required threshold conditions within 30 days of the date of receipt of a complete application or the submission of complementary information requested (if later). An application for registration is deemed rejected if not accepted by the Portuguese Securities Market Commission within the applicable timeframe.

Appointment of key individuals (eg senior management, audit committee) in such entities is also subject to the approval of Portuguese Securities Market Commission.

The registration fee depends on the type of application.

## Portuguese Insurance and Pensions Funds Aupervising Authority

### INSURANCE AND REINSURANCE ACTIVITY

The incorporation of an insurance or reinsurance firm is subject to prior authorization by the Portuguese Insurance and Pensions Funds Supervising Authority. The Portuguese Insurance and Pensions Funds Supervising Authority must assess whether an application meets required threshold conditions within six months of the submission of a completed application or the submission of complementary information requested (if later), provided that such assessment must be made not more than 12 months from the date of the submission of the completed application in any event.

Once authorized, the shareholders must incorporate the firm within six months and initiate the activity for which the firm is authorized within 12 months.

### PENSION FUNDS MANAGEMENT ACTIVITY

The activity of managing pension funds is subject to the supervision of the Portuguese Insurance and Pensions Funds Supervising Authority, who must approve the constitution of pension funds.

The Portuguese Insurance and Pensions Funds Supervising Authority must assess whether an application for approval meets the required threshold conditions within 90 days of the submission of the complete application or the submission of complementary information requested (if later).

Following authorization of a firm carrying on the activity of managing pension funds, the shareholders must incorporate such firm within six months and initiate the activity for which they have been authorized within 12 months.

### INSURANCE AND REINSURANCE MEDIATION ACTIVITY

Both natural and legal persons domiciled in Portugal can operate the activity of insurance and reinsurance mediation provided they are registered as mediators at Portuguese Insurance and Pensions Funds Supervising Authority.

The Portuguese Insurance and Pensions Funds Supervising Authority must approve the appointment of key individuals (eg senior management) for the supervised entities.

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## ***What are the main ongoing compliance requirements?***

Threshold conditions (including solvency requirements) are ongoing compliance requirements for authorized firms.

Failure to comply with the threshold conditions and more detailed regulatory rules can result in sanctions for firms and regulated individuals, and loss of regulated status.

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## ***What are the penalties for failure to be authorized?***

A person undertaking banking activity or financial investment activity without being authorized commits a very serious administrative offense and is liable for the payment of penalties, and might be subject to additional material sanctions relating to the entity or to the carrying out of the activity.

A person undertaking insurance and reinsurance activity, reinsurance mediation activity or pension fund management activity without being authorized commits a very serious administrative and/or criminal offense and may be liable for the payment of penalties and/or imprisonment, as applicable.

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## **Regulated activities**

### ***What finance and investment activities require authorization?***

#### **Generally**

Regulatory authorization is necessary for the carrying out of financial, investment and insurance and reinsurance activities in Portugal.

- Investment activities include activities such as receiving and transmitting orders regarding financial instruments, executing orders in the name of third parties, portfolio management, registering and depositing transferable securities and investment advice.
- Banking activities include activities such as accepting deposits and other repayable funds, lending, financial leasing and money broking.
- Insurance and reinsurance activities include dealing in life insurance.

Generally, financial and investment activities may only be professionally rendered by authorized credit and financial institutions. However, certain consulting activities might also be provided by other authorized individuals.

#### **Consumer credit**

Activities involving consumer credit are considered as a regulated activity. Only credit institutions and financial companies can carry out credit operations and therefore they must obtain regulatory authorization.

#### **Issuance of means of payment and e-money**

The issuance of payment instruments and e-money are regulated activities and only firms authorized by the Bank of Portugal as payment and electronic money institutions are allowed to carry out such activities.

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## *Are there any possible exemptions?*

Some financial and investment activities ordinarily requiring authorization by the applicable regulator may not be subject to authorization if certain exemptions apply. For example, financial activities carried out on a professional basis may be exempt from authorization and certain investment activities, such as companies providing investment services exclusively to their subsidiary or controlling parent entity may be exempt from authorization.

Also, activities that are merely accessory to the main activity of the entity might in some cases be provided without previous authorization.

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## *Do any exchange controls or other restrictions on payments apply?*

There are no legal restrictions on moving money in and out of the country. However, where money is being transferred to or from non-EU member states, in some instances sums of foreign currency above EUR10,000 must be declared to customs authorities.

Compliance with the EU rules on payments (EU Payments Regulation and the Transfer of Funds Regulations) must be ensured.

There may also be anti-money laundering and tax considerations to take into account.

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## *What are the rules around financial promotions?*

### Rules

The promotion and advertising of investment and financial services is a regulated activity, unless they fall within one of the exemptions.

Promotion of investment services is considered a complementary activity to the investment service being carried out and therefore subject to the same regulatory regime applicable to such activities.

Promotion of other financial services that do not qualify as investment services may only be carried out by authorized persons/promoters, who can only carry out promotional activity provided that they do not enter into or execute agreements on behalf of the financial institution. The financial institution must draft and submit a code of conduct applicable to such promoters.

Unauthorized or unfit promotions of investment and financial services are offences punishable by fine.

### Exemptions

Exemptions include certain promotions to certified high-net worth individuals or overseas recipients, provided certain criteria are fulfilled.

*Last modified 6 Dec 2019*

## Entity establishment

### *What types of legal entity are generally used to undertake financial or investment activity?*

#### Generally

The most common type of legal entity are limited companies. A limited company is a corporate body with separate legal personality.

A limited company can either be a public company (denoted by the suffix SA) or a private company (denoted by the suffix Lda. or *Limitada*), depending on whether the identity of the shareholders is publicly known or not and on other legal aspects eg, amount and form of share capital required for constitution. Some activities require a legal entity to be used. For example, banking activity and insurance and reinsurance activity may only be carried out by public limited companies.



Members of a limited company have limited liability.

## Funds

Undertakings for collective investment in transferable securities are structured as a fund or corporate body. Undertakings for collective investment structured as corporate bodies corp include (public) real estate investment companies and (public) securities investment companies and might be open or closed (to participation).

Fund managers are typically financial institutions constituted for such effect.

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## *Is it possible to conduct lending or investment business through a branch or establishment?*

Yes, a firm can conduct lending or investment business in Portugal through an establishment or a branch. A firm operating through an establishment or a branch will not have separate legal personality.

EU firms must notify the relevant regulator prior to establishing a branch while non-EU firms require prior authorization from the relevant regulator.

In relation to some specific activities as follows.

### **Credit institution, financial firm, payment institution and e-money institution**

The establishment of a branch in Portugal of an EU firm is subject to prior notification by the competent regulation in the firm's home member state to the Bank of Portugal. The branches of such firms may only carry on activities in Portugal for which they have been authorized in their home member state. The establishment of a branch in Portugal of non-EU firms is subject to prior authorization by the Bank of Portugal.

### **Insurance and reinsurance activities**

The establishment of a branch in Portugal of an EU insurance firm requires prior communication between the supervising authority in the firm's home member state and the Portuguese Insurance and Pensions Funds Supervising Authority. Non-EU insurance and reinsurance firms must obtain the prior authorization of the Portuguese Insurance and Pensions Funds Supervising Authority before establishing a branch in Portugal.

### **Insurance and reinsurance mediation activities**

An insurance or reinsurance mediator registered in another EU member state can operate in Portugal one month after confirmation from the competent authority of its home country that it has notified the Portuguese Insurance and Pensions Funds Supervising Authority of the mediator's intention to operate in Portugal. Non-EU insurance or reinsurance mediators must obtain the prior authorization the Portuguese Insurance and Pensions Funds Supervising Authority.

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## FinTech

### FinTech products and uses

*What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?*

### Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a specialist corporate or special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform rather than applying funding arising from a wider deposit-based relationship.

Although there is still not a very active market in Portugal, marketplace lending is available to address most forms of traditional bank funding products. Recently products have included:

- virtual credit cards;
- consumer loans;
- student lending products;
- small and medium-sized enterprises (SME) lending; and
- residential property and commercial property mortgage lending.

## Blockchain, smart contracts and cryptocurrencies

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a peer-to-peer mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features, such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by several nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the blocks using sophisticated algorithms and add the verified blocks to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process. This process requires vast amounts of computing power, making it practically impossible to insert fake transactions into a block.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as bitcoin) or providing an indisputable record for example, relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

### WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced, more-complex interactions with the outside world using so called 'Oracles'. With Oracles, the contract code consults with a service outside of the blockchain network to decide. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

#### **WHAT IS A CRYPTOCURRENCY?**

The European Central Bank definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

### **Initial coin offerings (ICOs) and token-based products**

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO as an unauthorized offering of securities is illegal and may result in criminal sanctions in several jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a project;
- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and

- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

## Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

## Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are several applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

*Last modified 6 Dec 2019*

## *Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?*

### General financial regulatory regime

The Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* or CMVM) and the Bank of Portugal (*Banco de Portugal* or BdP) are the regulatory authorities for firms providing financial and banking products and services, respectively.

#### GENERAL

Regulated activities must not be carried out in Portugal without a previous authorization.

### Electronic payments platforms and regulation of peer-to-peer lenders

#### ELECTRONIC PAYMENT PLATFORMS

The Bank of Portugal promotes the compliant operation of payment systems through the operation, regulation, oversight and development of payment systems and instruments. It currently operates four payment systems in Portugal:

- **SICOI** – the retail payment system that processes day-to-day payments by checks, bills of exchange, direct debits, credit transfers and bank cards;
- **TARGET2-PT** – the Portuguese component of TARGET2 (which is the Eurosystem's large value payment system);
- **AGIL** – which is the Bank of Portugal's deposit account management system and allows institutions not participating in TARGET2 to conduct specific transactions with Bank of Portugal, namely cash deposits and withdrawals; and
- **TARGET2-Securities** – which links the Portuguese community to the Eurosystem's securities settlement system where securities transactions are settled, notably shares and bonds against the central bank's money.

Decree Law no. 317/2009, of 30 October and Decree-Law no 298/92, of 31 December (as amended) contain the rules applicable to payment and e-money institutions. Payment institutions and e-money institutions must obtain the Bank of Portugal's authorization prior to incorporation.



## PEER-TO-PEER LENDERS

According to the Portuguese Banking Act only institutions authorized by the Bank of Portugal may carry out lending activities as a regulated activity. Peer-to-peer (P2P) lending would only be permitted if not carried out on a professional basis. Although P2P lending implies that a platform provides lending on behalf of others (investors) it is not clear if the Bank of Portugal accepts that this should not be a lending activity on the basis that P2P lenders are not carrying out such activity by themselves, but on behalf of such investors.

## Regulation of payment services

Where a Portuguese business provides payment services as a regular occupation or business activity in Portugal, it will require authorization by the Bank of Portugal to become an authorized payment institution under Decree-Law No 91/2018 of 12 November 2018. Failure to obtain such authorization is a criminal offence. This Decree-Law implements Payment Services Directive II.

In order to become authorized by the Bank of Portugal, a payment services business will need to meet certain criteria, including, in relation to initial capital, processes and procedures in place for safeguarding relevant funds, sensitive payment data and money laundering and other financial crime controls.

## Application of data protection and consumer laws

The General Data Protection Regulation (GDPR) is the legal regime applicable to the protection of individuals with regard to the processing of personal data and the free movement of such data. The GDPR implements Regulation (EU) 2016/679 (General Data Protection Regulation). Whenever a business is required to process personal data in order to operate, a significant set of rules pertaining to notification and compliance obligations must be complied with.

Law no. 41/2004, of 18 August (as amended) regulates the processing of personal data and the protection of privacy in the electronic communications sector, including unsolicited direct marketing by electronic means.

The Portuguese Consumer Protection Act (CPA) was approved by Law no. 24/96, of 31 July (as amended) and provides for wide ranging protections in respect of consumers' rights, notably information rights.

## Money laundering regulations

Law no. 83/2017, of 18 August gives the Bank of Portugal responsibility for supervising the anti-money laundering controls of businesses that offer certain services, such as lending, providing payment services and issuing other means of payment. This Law implements the European Union's Fourth Money Laundering Directive.

Where a firm is authorized and supervised by the Bank of Portugal, it will generally also be supervised for compliance with anti-money laundering requirements, particularly since electronic currencies tend to represent a higher money-laundering risk.

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## What type of funding arrangements and incentives are available to FinTech businesses?

### Early stage

#### SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

#### CROWDFUNDING

The crowdfunding sector is well established and may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through an intermediary platform, such as PPL.

There are four types of crowdfunding in Portugal:

- Equity crowdfunding involves company shares being given in exchange for investment in the business.
- Donation-based crowdfunding involves investing through a donation that may or may not have a non-monetary return.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or application that the business is developing.
- Loan-based crowdfunding involves the financed entity repaying the obtained financing through the payment of interest determined on the moment of the funding.

Crowdfunding offers many private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access.

The legal framework regarding crowdfunding has been recently approved:

CMVM Regulation on Crowdfunding (loan based and equity based) (*Regulamento da CMVM n.º 1/2016*)

Legal Framework on Crowdfunding (*Lei n.º 102/2015, de 24 de agosto*)

Sanctioning regime applicable to crowdfunding Activities (*Lei n.º 3/2018, de 9 de fevereiro*)

#### **ACCELERATORS**

There are various incubators or accelerators in the Portuguese market which offer support, facilities and funding for startups. Dedicated to FinTech, the most relevant accelerator in Portugal is SIBSPAYFORWARD.

## **Venture capital and debt**

Venture capital funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. Venture capital provides a viable alternative to traditional lending, given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

Corporate venture capital (CVC) is a type of venture capital and involves an equity investment by a corporate fund. The benefit of having a CVC as an investor for a FinTech startup is that the fund can share its knowledge and expertise of the FinTech sector with the company and act as an advisor.

In Portugal, venture capital is the main source of funding for technological firms and startups of all sizes.

## **Warehouse and platform funding**

Warehouse financing may be suitable for FinTech companies which own a portfolio of assets. Funding is often provided by way of a loan from a small number of lenders to a special purpose vehicle (SPV). The loan is secured on the assets acquired by the SPV from the originator. The lenders will only fund a portion of the assets, with the remainder being financed by way of subordinated lending from the originator.

## **Senior bank debt and capital markets funding**

#### **SENIOR BANK DEBT**

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis depending on the creditworthiness and asset base of the business. In contrast to capital markets funding, which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft, accounts management and general liquidity purposes.

#### **CAPITAL MARKETS FUNDING**

In Portugal, the most popular way for funding arrangements in the capital markets is by way of Initial Public Offering (Oferta Pública de Venda), when a company or an investor proposes to the general public to buy certain transferable securities and wishes to trade the stocks in the stock market. However, this is not a common form of funding arrangement for growing FinTech businesses.

## Incentives and reliefs

There are a number of investment incentive programs in Portugal in co-partnership with the European Commission, their applicability depending on the size and dimension of the applicant company, focused on stimulating economic development and competitiveness. The most relevant investment incentive program in Portugal is Portugal 2020, and although not specifically directed to FinTech, these types of companies may be eligible, if they meet the requirements.

The Seed Initiative is designed to help small, early-stage companies raise equity finance by offering individuals who invest in the shares of qualifying startups an income tax relief of 25% of the eligible amount invested, up to 40% of the investor's Individual Income Tax, up to a maximum investment of €100,000 per year.

In addition, according to the Investment Tax Code, the activities of research and development (R&D), high-tech and information and communication technology are eligible for tax credits as an incentive designed to encourage companies to invest in those fields. Investment projects in such fields may benefit from a certain amount of tax credit (10% to 25% of the relevant applications of the investment project) in Corporate Income Tax, an exemption or reduction in Municipal Tax on Real Property and Municipal Tax on Real Estate Transfer, as well as an exemption in Stamp Tax regarding all contracts necessary for the investment project.

The Enterprise Investment and Development Tax Incentives Scheme (SIFIDE) offers a Corporate Income Tax deduction of 32.5% of the expenses incurred on research or development (and additionally the possibility to deduct 50% of the increase of expenses in R&D). In the case of micro, small and medium-sized enterprises the deduction rate applicable, in certain circumstances, is 47.5%.

Finally, the Patent Box Scheme enables companies to exclude 50% of the profits earned from its patented inventions from Corporate Income Tax, within certain limits and provided certain conditions are met.

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## Portfolio sales

### Loan transfers and portfolio sales

#### *What are common ways of buying and selling loans?*

A loan can be sold on an individual basis or as a portfolio. The most common ways of selling loans are as follows.

#### Credits Assignment

Credits assignment is a transfer of rights only and of not obligations. Subject to any contractual restrictions, credit assignments can be done without the consent of the debtor, but the contractual relationship between the debtor and the lender will continue.

#### Assignment of the contractual position

An assignment of the contractual position will transfer both the rights and obligations of the lender. Although consent of the debtor is required, such an assignment terminates the contractual relationship between the debtor and the former lender.

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#### *What are the main considerations when transferring a loan and related security?*

There are a number of issues to consider before transferring a loan or portfolio of loans. These issues are often covered as part of a due diligence exercise by the seller's legal advisors. Some of the key considerations include:

- **confidentiality** – whether the seller of the loan can disclose information relating to the loan to a potential purchaser;
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser;

- **lender eligibility** – whether there are any restrictions around the type of entity to which the loan can be transferred;
- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee or reduce claims made by the transferee;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms; and
- **consent** – whether a transfer requires the consent or notification of any other parties.

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## Projects

### Financing / investing in energy / infrastructure

#### *To what extent are energy and infrastructure assets publicly or privately owned?*

##### Generally

The ownership of energy and infrastructure assets in Portugal varies according to the asset class. The main asset classes are usually considered to be:

- economic infrastructure (energy, aviation, rail, telecommunications, water, roads and waste); and
- social infrastructure (education, health and justice/prisons and housing).

Key sectors are considered below.

##### Energy

The gas and electricity industries in Portugal are privatized, with the generation, transmission, distribution and supply services provided by a number of private sector companies. The relevant private sector companies own the generation, transmission and distribution assets.

The energy sector has been a liberalized sector in Portugal since 2012, although the law has provided for a temporary transitional regulated regime. According to official data, the liberalized electricity market covered more than 4.7 million clients at the end of 2016 and both the liberalized electricity and gas tariffs amounted to approximately 91% of total electricity and gas consumption in Portugal. The transitional regulated tariffs have been decreasing over the years. *Entidade Reguladora dos Serviços Energéticos* (ERSE), the Portuguese regulator for the energy sector now only determines energy tariffs for the system tariffs (eg use of grids and infrastructures) and the transitional regulated consumer tariffs. This liberalization of consumer energy tariffs boosted free competition and the emergence of various retail energy sellers which has in turn provided a greater choice for consumers.

##### Telecoms infrastructure

The telecommunications networks (fixed and mobile) in Portugal are privately owned by a number of service providers. *Autoridade Nacional de Comunicações* (ANACOM) performs a dual role, as:

- the regulator of the Portuguese communications sector, regulating all electronic and postal communications; and
- as an independent administrative body of the Portuguese government.

##### Transport infrastructure

*Autoridade da Mobilidade e dos Transportes* (AMT) performs a dual role as:

- the regulator of the Portuguese transportation sector, supervising inland, fluvial transportation and railways, also the economic activity of trading ports and maritime transports; and

- an independent administrative body of the Portuguese government.

#### LIGHT RAIL

Typically, light rail assets (such as trams and associated tracks) are owned by local public sector promoting bodies. For example, *Carris* owns and operates the trams and supporting infrastructure in Lisbon. *Metro de Lisboa* owns and operates the metropolitan transport network in the Lisbon area. Outside of Lisbon there are a number of private companies operating supporting bus lines.

#### HEAVY RAIL

The heavy rail market in Portugal is operated by both private and public companies. Most of the Portuguese railway lines are operated by publicly owned companies, although there are some significant lines operated by private companies.

#### ROADS, BRIDGES AND TUNNELS

A state-owned company is responsible for designing, building, financing, exploring, preserving, requalifying and modernizing the motorways and railways across Portugal. It is supervised by the Ministry of Housing and Infrastructure and the Ministry of Finance.

#### PORTS AND AIRPORTS

Ports are operated by private companies.

The aviation sector is regulated by *Autoridade Nacional da Aviação Civil* (ANAC) and it is composed of both privately and publicly owned companies. Portuguese airports are operated by private companies, some under a concession scheme.

### Other infrastructure

The majority of social infrastructure assets (schools, hospitals, defense) in Portugal are directly financed by the State of Portugal. Subject to value-for-money considerations, private finance may also be used in the procurement of social infrastructure assets.

In relation to some of these specific sectors:

#### EDUCATION

Education establishments may be owned by public or private entities or a mixture of the two.

#### HOSPITALS

Ownership of hospitals may be both public or private (or public-private partnerships). The regulatory authority for the health sector in Portugal is *Entidade Reguladora da Saúde* (ERS).

#### DEFENSE

Typically, defense assets are owned by the public sector.

*Last modified 6 Dec 2019*

## Are there special rules for investing in energy and infrastructure?

### Generally

There is no specific regime governing or restricting investment in energy or infrastructure projects in Portugal over and above existing regulation for investors and funders more generally but a particular proposed investment may be subject to legislative or regulatory control (eg merger control rules). With regard to the planning and implementation of the underlying energy or infrastructure project (in which the investment is to be made), the legal/regulatory position relevant to that project must be considered.

### Energy

The energy markets in Portugal have a complex system of arrangements between suppliers, generators, transmission and distribution which are heavily regulated. In particular, there are complex arrangements in respect of licensing, subsidies and demand/charging mechanism with suppliers and customer and these are subject to change/regular updates meaning that investors will need to have a good understanding of the current framework and the potential directions in which the market may move. Investors need to understand how technology changes may impact on the overarching regulatory framework and vice versa.

Investors should also consider whether the acquisition of any interests in the energy sector (at an entity or asset level) would cause any issues with any license conditions or the granting of specific subsidies. In particular, if a breach of those conditions could lead to the revocation of a license/subsidy that might make the potential target less attractive or viable.

## Telecoms infrastructure

The industry is largely privatized; therefore investors should consider if any permits/consents/licenses will be affected by their interest.

## Transport and other infrastructure

Depending on the business activity, the investors should consider if any permits/consents/licenses will be affected by their interest.

*Last modified 6 Dec 2019*

## What is the applicable procurement process?

In Portugal, public procurement is governed by the [Portuguese Public Contracts Code](#) which transposes EU directives into Portuguese law. The award of contracts by public entities must comply with the principles of the Treaty on the Functioning of the EU and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In particular, for public contracts above a certain value, regulated procurement procedures with an element of competition are mandatory to ensure that those principles are given practical effect.

## Investing in energy and infrastructure

Public procurement is relevant where the Portuguese government or a public body is seeking to outsource delivery of a new project. On an infrastructure project, a potential investor would have to bid in its own capacity or as part of a consortium to deliver the overall deal which could include design, build, operation, maintenance and financing of the relevant energy or infrastructure asset.

A regulated procurement procedure is required where certain financial thresholds are met and on most major infrastructure projects (where limited exclusions do not apply), it is likely that those thresholds will be met so a regulated procurement would need to be run. In most cases, the awarding entity will need to publish a contract notice in the Office Journal of the European Union (OJEU) and typically run one of the following procedures:

- **Public Tender (*Concurso Público*)** – a procurement procedure open to any bidders; or
- **Restricted Tender by Prequalification (*Concurso Limitado por Qualificação Prévia*)** – a procurement procedure open to all bidders that meet requirements of technical capacity and/or financial capacity defined in the tender documents.

An investor may choose, however, to seek to invest in a project (by acquiring an interest in a private-sector partner) that has already been procured and is operational. Typically, such investments are controlled by contractual mechanisms (particularly on publicly procured projects) within the original awarded contract rather than procurement regulations themselves.

Depending on the structure of the deal, any acquisition of an interest or variation to the existing project may have procurement-related considerations that need to be borne in mind.

## Financing energy and infrastructure

On a publicly procured contract, the awarding entity may have prescribed requirements on the funding arrangements. Following entry into the contract, the main tool for controlling the financing is that, typically, on project-finance deals, a refinancing of the senior debt will require the consent of the public sector.

*Last modified 6 Dec 2019*



## *What are the most common forms of funding / investing in energy and infrastructure?*

### Funding

Common forms of funding in energy and infrastructure include:

- loans made on a corporate-finance basis;
- loans made on a project-finance basis (to a special purpose project company) on medium- to long-term bases – such loans may later be syndicated to other funders;
- bond finance;
- mezzanine debt (in some sectors);
- refinancing of the debt in operational projects; and
- asset financing (this is particularly relevant in the railway sector).

### Investing

Common forms of investing in energy and infrastructure include:

- 'equity' investment in special purpose vehicles or entities that may have a portfolio of interests, ie share capital and subordinated sponsor loans; and
- secondary market investment in operational projects (acquisition of 'equity').

*Last modified 6 Dec 2019*

## Restructuring

### Enforcement and sanctions

#### *When can there be regulatory investigations?*

Under their respective supervision powers, the Bank of Portugal, the Portuguese Securities Market Commission or the Portuguese Insurance and Pensions Funds Supervising Authority may perform the necessary inspections and investigations to the entities subject to their supervision. Such investigations may result in regulatory sanctions.

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#### *What regulatory penalties may apply?*

When a firm has committed a breach of regulation, the Bank of Portugal, the Portuguese Securities Market Commission or the Portuguese Insurance and Pensions Funds Supervising Authority may impose regulatory penalties and ancillary penalties. Penalties may include a temporary ban on a firm's operations and a publication of any penalties imposed.

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#### *What criminal penalties may apply?*

Regulators will co-operate with competent authorities to conduct criminal investigations where appropriate. The decision of a competent authority in respect of an investigation is subsequently communicated to the relevant regulator. When an entity commits a criminal offence, it may be liable to penalties including fines or the imprisonment of responsible persons.

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## Tax

### Tax issues

#### *Are stamp, registration, transfer or other similar taxes applicable?*

#### **Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?**

No stamp, registration, transfer or other similar taxes are payable on the advance of a loan.

The transfer or assignment of a loan triggers stamp duty only when the loan is transferred or assigned with recourse against the assignor (in the case of the borrower's default). This is on the basis that such transfer or assignment is an effective grant of credit to the assignee since the assignor retains exposure to the relevant default risk. Stamp duty is calculated on the amount of the credit and, depending on the maturity, the applicable rates are as follows:

- credit with maturity of less than one year – for each month or period – 0.04%;
- credit with maturity of one year or more – 0.50%;
- credit with maturity of five years or more – 0.60%; and
- credits used as a current account, bank overdraft or any other form of credit the period of use of which is not, or cannot be, determined – 0.04% on the monthly average balance (obtained from the sum of the balances owed calculated on a daily basis throughout the month, divided by 30).

#### **Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?**

Portuguese stamp duty is payable on the taking of security. The applicable stamp duty is calculated based on the secured amount at the applicable rates, depending on the security's maturity, as follows:

- up to one year (for each month or period) – 0.04%;
- one year or more – 0.5%; and
- five years or more – 0.6%.

In any event, stamp duty does not apply to a security interest that is materially ancillary to a contract already subject to stamp duty and which is granted simultaneously (eg loan contracts).

Specific registration requirements may apply depending on the type of security interest (eg mortgages will only be valid if duly registered) and/or asset over which the security is taken and on the specific effects which are to be achieved (eg effects on third parties). Thus security interests may be subject to registration at Companies House (*Registo Comercial*), eg a pledge over shares, or at the Land Registry (*Registo Predial*), eg real estate mortgages. Registration fees apply in such cases although they are generally not material in amount.

The transfer or assignment of a security interest is not subject to stamp duty.

#### **Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?**

The issuance, transfer or assignment of a debt security does not trigger stamp duty, registration, transfer or any other similar tax.

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## *Do tax authorities take priority on enforcement?*

### **On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?**

Portuguese civil law and tax procedural legislation establishes the rules for ranking creditors competing over the same asset, alongside the State Revenue, as follows:

- General preferential rights do not prevail over secured rights.
- Special preferential rights only prevail over secured rights if constituted first.
- General immovable preferential rights do not prevail over secured rights.
- Special immovable preferential rights prevail over secured rights, regardless of being constituted after those secured rights.

The State Revenue benefits from the general preferential right, and particular taxes benefit from preferential rights. Stamp duty (where the operation for which it would be levied involves real estate) and real estate transfer tax grant the State Revenue an immovable preferential right, and for that reason, tax authorities take priority on enforcement in such cases. As regards municipal property taxes, the State Revenue benefits from a special preferential right in its enforcement, only prevailing over secured rights if constituted first.

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## *Is withholding tax on interest payments applicable?*

### **Is there withholding tax on interest payments under a loan?**

In general, interest payments with a Portuguese source are subject to withholding tax in Portugal.

**If so:**

#### **What is the rate of withholding?**

The general rate of withholding tax applicable to interest payments by corporate taxpayers is 25%.

#### **What are the key exemptions?**

The most commonly relied on exemptions to ensure that interest payments made by Portuguese companies can be made free of Portuguese withholding tax (in whole or in part) include:

- the exemption applicable to interest received by banks and financial institutions that are resident in Portugal and subject to corporate income tax;
- the exemption applicable to interest on shareholders' loans when the lender holds, directly or indirectly, more than 10% of the share capital with voting rights in the debtor company, provided the shareholding has been held continuously during the year preceding the interest payment;
- the reliance on a double tax treaty entered into by Portugal and the country of residence of the lender to obtain an exemption (in whole or in part) provided that the requisite conditions are met; and
- the reliance on the EU Interest and Royalties Directive as implemented by Portuguese domestic law, provided that the requisite conditions are met.

### **Would the same analysis apply to interest payments under a debt security (eg a bond)?**

Yes, the analysis described above is applicable to both interest payments under a loan or other form of debt security.

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## *Are foreign lenders and debt security holders subject to tax on interest payments?*

Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?

No.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

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## Key contacts



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