

Legal Framework for Shareholder Loans

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INTRODUCTION

On 12 January 2022, Decree-Law 11/2022 was published, establishing the shareholder loans regime in the national legal system.

The introduction of this new figure in our legal system aims, first and foremost, to diversify the financing sources of companies, but also to reduce their dependence on traditional bank financing and to promote the capitalisation of companies by increasing their level of equity capital.

Therefore, this new legal framework establishes the essential characteristics of equity loans, namely its definition, the identification of the financial sector entities qualified to its

commercialisation, the conditions to proceed with the remuneration or reimbursement of the credit or debt securities, the rules regarding the conversion of the equity loan into share capital, as well as the corporate provisions that regulate the relationship between the company, its shareholders and the financial sector entities or its investors.

This Decree-Law shall enter into force on 13 January 2022.

Definition

Decree-Law 11/2022 defines collaborative loan as an onerous credit contract, in the form of a loan or in the form of securities representing debt, which remuneration and repayment or amortization depend, even if partially, on the result of the borrower's activity and which outstanding amount may be converted into share capital of the borrower.

Framework

Shareholder loans are considered equity capital for the purposes of commercial legislation, whenever their remuneration depends on the borrower's results and their repayment or amortisation is subject to the limitations set out in the Commercial Companies Code regarding the distribution of assets, profits and reserves to shareholders.

It should also be noted that the equity loan contract or the issue of debt securities must expressly mention that it is subject to Decree-Law no. 11/2022.

Subjective Scope

Lending Entities

According to Article 3 of Decree-Law 11/2022 the entities that may grant participating loans or subscribe debt securities issued under Decree-Law 11/2022 are only the following:

- a) Credit institutions and financial companies;
- b) Specialised alternative credit investment, venture capital and social entrepreneurship organisations;
- c) Securities investment companies for the promotion of the economy (SIMFE);
- d) The Capitalisation and Resilience Fund;
- e) Other entities which are qualified to grant credit on a professional basis.

Mutual Entities

As far as lending entities are concerned, the diploma only clarifies that only commercial companies of the non-financial sector may contract participating loans or issue debt securities issued under this new regime.

Previous Formalities and Form

The contracting of participating loans, whether in the form of a loan or in the form of debt securities, depends on a prior express and favourable resolution of the borrower's general meeting.

Furthermore, in the case of participating loans in the form of a loan, these must be concluded in writing.

As for loans made by issuing debt securities, these must follow the regime applicable to the issue of securities.

As mentioned above, all documentation relating to both equity loans in the form of a loan and loans made through debt securities must expressly mention that the loan is subject to the regime set out in Decree-Law 11/2022.

Purpose

Participatory loans may have different purposes, which should be established in the contract itself or in the conditions of issue of the debt securities.

Thus, and under the terms of the applicable legislation, shareholder loans may have the following purposes

- a) The financing of investments;
- b) Reinforcement of working capital
- c) Repayment of previous debt; or
- d) Any other purpose agreed by the parties, compatible with the corporate purpose or investment policy of the lender and borrower, where applicable, and with the applicable legislation.

Remuneration

Concept and Determination

For the purposes of Decree-Law No. 11/2022, it is considered as remuneration any consideration indexed to the borrower's results that is agreed in the equity loan contract or in the conditions of issue of the securities representing debt.

According to Article 8, which regulates the remuneration, it may be determined in one of two ways:

- (i) By a fixed or increasing percentage of the results, through the analysis of financial indicators, such as the company's turnover, operating volume or net result; or

(ii) By determining the proportional value of the nominal value of the equity loan in the equity of the borrower.

Still within this scope, it should be noted that the remuneration may also have an additional interest rate component, payable under the terms defined in the contract, independently of the borrower's results.

Payment

The borrower will only pay the remuneration if it achieves distributable results, and, if established in the contract, after a prior resolution of the borrower's general meeting.

We further note that no remuneration will be paid if the borrower's equity is or would, as a result of the payment, become less than the sum of the share capital and reserves or if the profits of the financial year are required to cover losses carried forward or to form or reconstitute reserves imposed by law or the articles of association.

Non-Compliance

The present diploma further provides that, in the event the borrower fails to pay the remuneration due, the lender may

- (i) Call on the guarantees provided to secure the equity loan, or
- (ii) Proceed with the conversion thereof into share capital.

Reimbursement

The borrower may repay the equity loan or redeem the debt securities, at any time, at the nominal value, plus the remuneration established contractually or in the conditions associated with the debt securities and that which would accrue by the beginning of the quarter in which repayment occurs (by reference to the respective financial statements).

The lender may thus request total or partial repayment of the equity loan, including any remuneration due, provided that this is provided for in the contract or in the conditions of issue and respects the conditions laid down therein.

The limits on the payment of remuneration also apply to the payment of repayment.

Conversion into Share Capital

Requirements

Besides the circumstances which have been previously defined in the contract, the equity loans regime allows for the conversion of the loan into share capital, in the following cases:

- a) The loan has not been fully repaid, even after expiry of the repayment term established by the parties in the contract or in the conditions of issue of the debt securities;
- b) The borrower has not made the payment of the remuneration due for more than 12 months, consecutive or interpolated, in a period established in the contract or in the conditions of issue of the securities representing the debt;
- c) The borrower's management body has not presented the lender with proof of the approval of the accounts and deposit at the Commercial Registry after 12 months from the legal deadline for that purpose.

Submission of the Conversion Proposal

Once any of the previously described situations have arisen, the lender may present a proposal for conversion of the equity loan into share capital to the borrower, accompanied by a report prepared by a chartered accountant.

For the purposes of preparing the proposal, the borrower's management body should provide the lender with any information requested by the latter. It should be noted that if this information is not provided within 10 days of the date it is requested, the value of the participation will be assessed by the statutory auditor.

In this sense, as soon as the conversion proposal is received, the borrower must call a General Meeting with the intention of approving the proposal, within a maximum period of 60 days from the date the request is received.

We have amended the fact that, in the event the proposal is refused, the General Meeting is not convened or any of the resolutions provided for therein are not approved or implemented, within 90 days of the date of receipt of the proposal, the lender may apply for judicial suppression of the resolution to amend the company.

Pre-emption Rights

Under the terms foreseen in the applicable legislation, the borrower's shareholders or shareholders always enjoy preference in the capital increase.

Consequently, if they exercise their pre-emptive right, the increase must be paid up in cash, which must be applied to repay the credits that would otherwise be converted into share capital.

If the pre-emptive right is not exercised by any of the partners or shareholders, the preferential shareholders may subscribe the part of capital that would fit to the others, in proportion to their shares.

Effectiveness

The conversion into capital reduces proportionally the participations of the holders of shares in the share capital of the borrower who have not previously participated in the capital increase of the borrower.

The participation in the share capital of the borrower resulting from the conversion of the equity loan is proportional to the value of the unpaid loan, plus the nominal value of the unpaid remunerations, in relation to the equity of the borrower in the last approved accounts, which should include, for the purpose of this calculation, the total value of the equity loans taken.

After the share capital increase, the borrower's equity must be greater than the share capital at the date of the proposal.

Alternatives

If the borrower's articles of association so permit or, alternatively, if a resolution is passed at a general meeting of the borrower to issue bonds convertible into shares, the lender and the borrower may provide in the agreement that the lender has a potestative right to convert the equity loan into share capital of the borrower, in the circumstances and on terms expressly defined by the parties.

Transferability

Under the terms defined in this Decree-Law, the credits arising from participation loan agreements may be transferred to third parties, including, within this scope, credit securitisation companies.

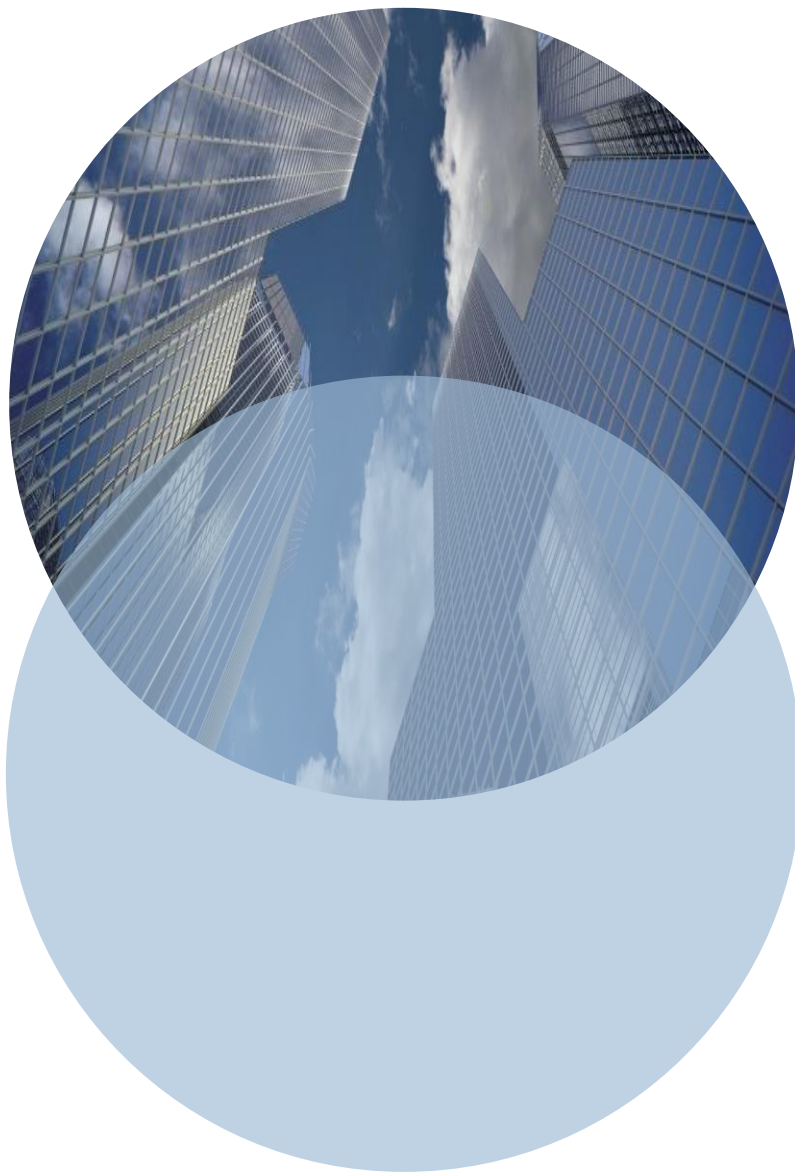
Articulation with the insolvency regime

In the event of insolvency of the borrower, equity loans are considered subordinated credits, ranking above the credits of the partners and other individuals especially related to the debtor.

CONCLUSIONS

From the above, it is important to emphasise that the great new feature of the equity loans regime is the possibility of converting the capital of equity loans contracted in the form of a loan.

From the list of entities that may grant participating loans, we also highlight the recently created Capitalisation and Resilience Fund managed by the Banco Português de Fomento. We therefore await the possibility of equity loans being granted under the support programmes of this Fund, as well as other similar ones.



Thinking about tomorrow? Let's talk today.

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