INTERNATIONAL BUSINESS SERIES

LEGAL ASPECTS OF DOING BUSINESS IN EUROPE

PORTUGAL

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The Establishment of a Business

Stock Corporations

Shareholders

As a general rule, a stock corporation (SA) must be incorporated with a minimum of five individual or corporate founding shareholders. However, a single corporate shareholder — not an individual — may hold an SA's entire share capital if the corporate shareholder has been incorporated in Portugal or another EU Member-State,[2] resulting in that single shareholder being liable for all the subsidiary's debts.

Only two founding shareholders are required where either the State or a public company owns more than 50 per cent of its share capital.

Capital and Shares

A minimum share capital of 50,000 is required for the incorporation of an SA. An SA can be formed either by direct incorporation, in which case there must be private subscription of the entire share capital, or through public subscription of its shares.

The share capital of an SA must be paid up by means of contributions in cash or in kind (non-monetary assets). SA companies do not accept labor or the provision of services as a means of paying up their share capital.

In an SA, the capital is divided into shares, which can either be represented by share certificates or kept in book-entry form.

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1. This material was prepared 15 August 2004. Readers should be aware that the laws and other regulations cited may meanwhile have been amended. Moreover, it should be noted that the information included in this chapter is necessarily of a general nature and does not constitute legal advice. Morais Leitão, J. Galvão Teles is pleased to assist in providing specific legal advice.
2. Although the letter of the law (articles 481, Number 2, and 489, Number 4, a)) excludes foreign corporate shareholders from benefiting from this possibility (i.e., creating out of its own assets a one shareholder corporation), the practice of Portuguese notaries and Commercial Register officers seems to extend this benefit to EU Member State companies.

The minimum nominal value for each share is one cent of one Euro. Unless otherwise provided in the law or in the company's articles of association, shares can be either nominative or issued to bearer. Shares must be nominative, if:

- They are not fully paid up;
- There is any restriction on transferability; or
- Shareholders are required to provide additional cash or contributions in kind to the company. Bearer shares may be converted into nominative shares at any time.

Nominative shares may be converted into bearer shares only if the law or the company's articles of association do not prohibit the conversion.

The share capital in an SA must be fully subscribed at all times. However, in an SA, the share capital does not need to be fully paid up at the time of subscription, instead only a minimum of 30 per cent of each share's nominal value must be paid up at that time. Within five years of incorporation, however, the remaining part of an SA's share capital must be fully paid up. Shares may be issued at par or with a premium. It is generally accepted that the premium must be paid up in full when the relevant shares are subscribed.

Corporate Bodies

Although Shareholders of SA companies pass resolutions in General Shareholders Meetings, management and supervision must be organized either on a traditional two-tier basis consisting of a board of directors (*conselho de administração*) and a single auditor or audit board (fiscal único or conselho fiscal), or in accordance with a three-tier structure consisting of a supervisory board (*conselho geral*), a management directorate (*direcção*) and a certified chartered accountant (*revisor oficial de contas*). In addition, SA companies whose shares are listed on the stock market must appoint a secretary (secretário) and a deputy secretary. Other SA companies may also do so, if they so choose. Smaller SA companies (those with a maximum registered share capital of 200,000) may choose to be managed by a single director (*administrador*) rather than a board of directors, if such is provided for in the articles of association of the company.

General Shareholders Meetings. Shareholders pass resolutions in general meetings, which are convened at least once a year in accordance with certain formalities.

However, shareholders may take unanimous resolutions in writing, without attending a general meeting. In addition, a general meeting may be convened without observing any prior formalities, provided that all shareholders are present or duly represented and unanimously express their agreement to meet and take resolutions on a particular subject. Only the minutes of those meetings, or other written documents, constitute effective legal evidence of the shareholders' resolutions.

In an SA, there must be a minimum presence of voting share capital for the shareholders' meeting to be allowed to pass valid resolutions — the quorum.

Resolutions are taken by a simple majority of votes of all those attending the shareholders' meeting, although certain special decisions require a majority of two thirds of the votes cast.

Board of Directors. The articles of association of an SA shall define the way it should be managed. Management may rest with a board of directors (*conselho de administração*) elected in a shareholders' meeting, or with a supervisory board (conselho geral), which in its turn will elect the members of the managing directorate (*direcção*). The former structure is by far the most common.

Directors are not legally required to be shareholders. Corporate entities can be appointed directors of an SA, but must nominate an individual to perform those functions. The director so appointed will perform his duties on his behalf.

Minority shareholders in an SA listed on the stock exchange have the right to appoint one or more directors (their number always representing a minority on the Board). This right is subject to specific regulation. Non-listed SA may also include this right in their articles of association.

Limited Liability Companies

Quota-Holders

As a general rule, limited liability companies (LDA) must be incorporated with a minimum of two individual or corporate founding quota-holders. Once incorporated, the number of an LDA's quota-holders may not drop below that legally prescribed minimum for more than one calendar year, in keeping with the similar regime applicable to SA companies in this situation.

The liability of the quota-holders is, in principle, limited to the amount of their individual quotas. However, quota-holders are jointly and severally liable to pay the amount of all quotas, which form the capital of the company. The transferor of a quota is jointly liable with the transferee for the amount of the subscribed quotas, which are still unpaid at the time the company is notified of the transfer.

Capital and Quotas

A minimum share capital of 5,000 is required for the incorporation of an LDA and each quota's nominal value must be at least 100.

The share capital of an LDA must be paid up by means of contributions in cash or in kind (non-monetary assets). LDA do not accept labor or the provision of services as a way of paying up their share capital.

Corporate Bodies

Although Shareholders of SA companies Shareholders pass resolutions at General Shareholders Meetings, management and supervision must be organized by a director or board of directors and an auditor or supervision board, when required.

General Shareholders Meeting. The same rules as described above regarding the stock corporation apply to the limited liability company.

Board of Directors. LDA companies may be managed either by a single director (*gerente*) or if expressly set forth in the articles of association, by a board of directors (*gerencia*). In either case, directors must be individuals, whether quota holders or not.

Supervisory Board. An auditing board or an auditor is not required, but the company is allowed to have one. A LDA need not be certified by a certified chartered accountant unless, for two consecutive years, any two of the following limits are exceeded:

- Balance sheet value of 1,500,000;
- Total turnover (excluding VAT) of 3 million; and
- Average annual workforce of 50.

'Unipersonal' Limited Liability Companies

A 'unipersonal' limited liability company (*sociedade unipessoal por quotas* — SUQ) is a limited liability company, which is held by a single quota holder. The sole quota holder may be either an individual or another company, but not another SUQ. An individual may not be the quota-holder of more than one SUQ. To make the sole proprietorship known to the public the word 'Unipessoal' must be added to the company's name.

The SUQ may be incorporated as such or may result from the concentration of all the quotas of a regular LDA in a single quota-holder, if this quota-holder so wishes. A SUQ may later be converted into a regular LDA, when a new quota-holder is allowed to enter into the company.

Contrary to a regular LDA or SA, the incorporation of a SUQ or the conversion of a regular LDA into a SUQ does not require the execution of a notarial deed (unless real estate assets are transferred to the company by way of capital contributions). In fact, the incorporation of a SUQ only requires a private written document to be executed by the sole quota-holder, with mandatory registration at the Commercial Registry Office.

The rules applicable to the regular LDA are also applicable to the SUQ.

Incorporation Procedure of SA and LDA Companies

Incorporation of companies under Portuguese Law is subject to the following procedures, whether such company is an SA or an LDA.

Anyone who wishes to incorporate a Portuguese company must apply for the approval of the company's proposed name and for the granting of a provisional tax identification number with the National Registry for Corporate Entities (*Registo Nacional de Pessoas Colectivas*, or RNPC) and the Tax Administration.

In general, the company's incorporation must be executed by means of a notarial deed. Before the execution of the company's deed of incorporation, which is legally required, the paid up part of its share capital must be deposited in a Portuguese Bank, and its articles of association must be drafted to be included as a part of the incorporation public deed.

The person or entities which are incorporating the company must state in the public deed that the share capital of the company has been duly deposited in accordance with the applicable legal provisions in an account at a Portuguese Bank If the company's capital consists partly of contributions in kind, the relevant assets should be subject to prior evaluation by an independent chartered accountant, whose report must also be presented to the Public Notary.

Once the company has been incorporated, and within ninety days of the granting of a provisional tax identification number, the company must register of its start of business with the competent Tax Authority. The auditor who shall henceforth be responsible for the company's accounts must sign this application.

The company must also notify the Portuguese Labor Department of its business activities and register itself with the National Social Security Service (*Segurança Social*) within 30 days of its start of business.

The company's deed of incorporation must then be registered at the Commercial Registry Office (*Conservatória do Registo Comercial*) closest to its place of business. On this registration, the company becomes a separate legal entity capable of having its own assets, rights and obligations.

It is the Registrar's duty to have a company's deed of incorporation published in either the mainland's Official Gazette (*Diário da República*) or the Madeiran or Azorean Official Gazettes (JORAM — *Jornal Oficial da Região Autónoma da Madeira* and JORAA — *Jornal Oficial da Região Autónoma dos Açores*).

The company's books of minutes should then be prepared and legalized by the Tax Authority and the Commercial Registry Office.

In Portugal, companies are not, as a consequence of incorporation, required to have any insurance policies. However, if the company has or will have any employees, it must have a workers accident insurance policy. Moreover, the carrying out of certain activities will render companies subject to specific mandatory insurance requirements.

Directors' Liability

A company's directors are liable towards the company itself for any loss the company may suffer as a result of any acts or omissions that violate their legal or contractual duties, except where they can prove that their breach was neither negligent nor deliberate. Should the company or its shareholders not exercise their right to be compensated for that loss, the company's creditors have a right to exercise it in their place.

Whenever the assets of a company are insufficient to pay up all its debts, its directors are also liable towards the company's creditors for any negligent or deliberate violation of a legal provision aimed at protecting the creditors' best interests. The same applies to similarly designed provisions that may be contained in the company's articles of association.

Finally, directors are also generally liable towards third parties for any direct loss suffered as a consequence of the directors' actions in that capacity.

Acquisition of Enterprises

Acquisition of Shares in Corporations

Shares in a corporation (SA) are freely transferable, except where its articles of association set forth restrictions on their transferability. These restrictions may consist of a right of first refusal or pre-emption right in favor of the remaining shareholders and right of prior agreement.

With respect to the transfer of shares, a distinction must be made between the transfer of nominative shares and the transfer of bearer shares. The former may be transferred by written declaration of the owner addressed to the keeper of the SA's share registry. Bearer shares may be transferred by simple delivery of the share certificates, possession of which confers on the holder all a shareholder's rights. The articles of association may not prohibit the transfer of shares otherwise permitted by law and transferability may only be restricted within the terms of the relevant legal provisions.

From a tax point of view, the transfer of shares of an SA is, in no case, subject to property transfer tax (IMT).

Acquisition of Quotas in Limited Liability Companies

Quota titles are not freely negotiable. They can only be transferred by notarial deed or under court order. The transfer of quotas is subject to the LDA's express consent unless the prospective transferee is another quota-holder or the transferor's spouse or next-of-kin. This is the regime arising under law, which can be rendered either stricter or more flexible by the articles of association. Quotas cannot be traded on the stock exchange.

From a tax point of view, please note that, if an LDA owns real estate, the transfer of quotas representing more than 75 per cent of its equity capital is subject to property transfer tax (IMT), which in general, for corporate purposes, will be 6,5 per cent over the tax value of such real estate.

The transfer of quotas must be registered at the Companies Registry Office once the respective public deed is executed.

Acquisition of Realty

Title to Property

Property Registry Certificate and Tax Certificate

According to Portuguese law, in general, all real estate must have:

- A Property Registry Certificate, and;
- A tax registry certificate. Both the above-mentioned records are accessible by the public.

The Property Registry Certificate contains the specific description of the plot or building, including area, definition of type of property (urban, rural or mixed), and the registration of rights or restrictions on the property, including any acquisitions, liens, mortgages or encumbrances.

The tax registration certificate is a document certifying the registration of the property with the Tax Administration.

Access to these public records when acquiring real estate is essential, not only for confirmation purposes, but also to assess if there are any registrations that may have an influence on the transaction, such as any rights, restrictions or charges including mortgages, easements or encumbrances on the property.

License of Use

Apart from the above mentioned documents, which are essential for any operation concerning the property, buildings are still subject, in general, to a Municipal License, designated 'License of Use'. Without this license, no property may by sold or leased, except in specific cases provided for by law, where properties are exempt from the license of use.

Recent legislation (Decree law 281/99, of 26 July) has enabled buildings without a license of use to be sold by public deed, if the following requirements have been met:

- The construction license has been duly issued;
- The License of use was requested at least 50 days before;
- The transferor of the property states in the public deed that:
- The construction has been concluded;
- The construction has not been interrupted by the Municipality;
- The transferor has not been notified by the competent authorities that the license of use has been denied;
- The construction license has not been withdrawn; and
- The transferor has not given notice to pay the respective construction tax by the Municipality.

It is worth noting that the transferor of the property is liable towards the purchaser for the veracity of the statements made in the public deed concerning the construction of the building and license of use.

Furthermore, it is worthy to note that for purchase and sale purposes, buildings constructed before 12 August 1951 are exempt from the license of use, as the legislation that approved the need for the license of use only effects buildings constructed after that date.

Transfer of Real Estate

The transfer of real estate may be executed in several ways, such as by purchase and sale or barter agreement, either through direct transfer of the same, or purchase and sale of shares of a company, which owns real estate.

Under Portuguese law, the transfer of real estate must be executed by public deed before a notary. Subject to being considered null and void. The transfer of real estate may also be preceded by a promissory agreement, as described below.

Promissory Purchase and Sale Agreement

It is the custom in Portugal for the execution of the purchase and sale agreement, by public deed, to be preceded by a promissory purchase and sale agreement. These promissory agreements are usually entered into in cases where the parties wish to have a binding agreement in place although they are not in a position to execute the agreement immediately (for whatever reason), or wish to impose certain conditions to be met by the other party before the public deed is executed.

The real estate promissory purchase and sale agreement must be executed by written document signed by the parties. The signatures of the parties must be certified by a public notary, who must also, in the case of purchase and sale of buildings, certify the existence of the relevant license of use, when required.

Public Deed of Purchase and Sale

As referred to above, the transfer of real estate must be executed by public deed. In order for the notary to execute the public deed, the following documents are required:

- Property registry certificate;
- Tax registry certificate;
- Evidence that the property transfer tax (IMT) has been paid, if required;
- Evidence that the municipality and other public authorities with pre-emption rights over the sale of the building have not exercised their right, when the property is located in a legal pre-emption right area; and
- License of use concerning the building, when required.

The above-mentioned documents are essential, as without them, the notary is not legally empowered to execute the deed.

Registration of Real Estate Transfers

Once the public deed of purchase and sale is executed, the transfer must be registered in the name of the new owner at the Property Registry Office.

Registration of the transfer of real estate is essential, as the transfer shall only be legally effective *vis-à-vis* third parties, when the registration is concluded.

Fees and Taxes

The notarial fees for the execution of the purchase and sale by public deed are fixed and are currently set at 175, plus additional administrative costs.

Apart from the notary fees, stamp duty, in the amount of 0.8 per cent of the transfer price is also due on execution of the public deed.

Purchase and sale of real estate is still subject to property transfer tax (IMT). The tax rates will vary from 2 per cent to 8 per cent according to the transfer price for urban properties for housing purposes, 6.5 per cent for urban properties for other purpose than housing and 5 per cent for rural properties, paid before the execution of the public deed.

It is worth noting, however that taxation law sets out some property transfer tax exemptions. This is the case, for example, for real estate companies whose purpose is the purchase and sale of real estate.

In general, the amount of 125 shall be due for each property transfer registration in the Property Registry Office.

Lease Agreements — Urban Leases

Introduction

Another important aspect of real estate investment in Portugal is the legal regime for real estate leasing. The urban lease regime is established in a specific law, designated the 'Urban Lease Regime', which contains specific provisions for real estate leases, apart from the general provisions contained in the Civil Code for lease agreements.

Portuguese law currently establishes two types of lease agreements:

- A 'traditional' lease agreement; and
- A limited duration lease agreement.

Lease agreements must be executed in writing, and signed by the parties. The execution of a public deed is no longer required by law. It should be noted that if the lease is for a period of more than six years, the agreement is subject to registration in the Property Registry Office, in conjunction with the costs described above for registration fees.

The main differences between the legal regimes established for the above-mentioned types of leases are as follows.

Term. One of the most significant differences between these two types of leases is the fact that the limited duration lease must have a minimum initial period of five years. There are, however, specific cases (when the landlord is a real estate investment company or vehicle) where the minimum period is reduced. Both types of leases have a maximum initial legal period of 30 years.

Renewal. Unless otherwise agreed by the parties, traditional lease agreements are automatically renewed for one-year periods. Limited duration leases have a different regime, where the lease is automatically renewed for equivalent periods, unless otherwise agreed. In any case the lease agreement will not be renewed if the parties terminate the agreement in accordance with one of the procedures described below.

Termination. Both types of lease agreements have three different kinds of termination procedures: i) termination at the end of the contractual term (*denúncia*); ii) termination by breach (*resolução*); and iii) termination during the term of the agreement by mutual agreement of the parties (*revogação*),

Termination at the End of the Term. In traditional lease agreements, termination at the end of the initial period or at the time of its renewal is always a possibility for the tenant, if minimum written prior notice is given to the landlord. However, such termination will only take effect at the end of the respective contractual period. Conversely, the landlord may only terminate the lease agreement in a very few specific and limited cases. In practical terms, this makes termination at the end of the term of the agreement almost impossible for the landlord in traditional leases. In practice, these leases are renewable '*ad eternum*', at the tenant's will (during his life and, in principle, of his spouse's and children's lives as well).

As for limited duration leases, the tenant may terminate the agreement effective at the end of the contractual period, with minimum written prior notice. However, in contrast with traditional leases, the landlord may also freely terminate the limited duration lease agreement at the end of its term, with prior notice to the tenant.

In both types of lease agreements, minimum legal prior notice will vary depending on the period of the lease. However, as long as such minimum legal period is respected, the parties may agree the prior notice period in the lease agreement.

Termination by Breach. In both types of agreements, termination for breach of the agreement by either party is always possible. However, grounds for breach are expressly and specifically provided for by law. The landlord may only terminate the lease agreement due to breach by the tenant in those cases provided for by law. This means that any clauses in the agreement concerning causes of termination by breach other than the ones provided for by law will be deemed null and void.

Finally, termination by the Landlord must always be backed by a court notification, after acknowledgement that a breach of contract has been committed by the tenant.

Termination by Will of the Parties. In traditional lease agreements, termination by will of the parties may occur by agreement of both parties. Neither the landlord nor the tenant may terminate the agreement unilaterally.

Nevertheless, in limited duration leases, the tenant has the right to unilaterally terminate the agreement at any time, on 90-days prior notice, with no penalty for the earlier termination.

Pre-Emption Right. In traditional lease agreements, the tenant whose lease has lasted for more than one year has a legal pre-emption right over the sale of the leased property by the Landlord. This right is not provided for with limited duration leases, where such pre-emption rights have been expressly deleted.

Taxation

Tax on Corporations

Introduction

The only tax levied by the state on the profits of companies is the corporate income tax (*Imposto sobre o Rendimento das Pessoas Colectivas* — IRC). In addition, companies are subject to a surcharge (*derrama*) on the corporate income tax, which is levied by some municipalities.

Taxable Persons and Income

Corporate Income Tax is levied on all corporate bodies that are resident in Portugal or have a permanent establishment in Portugal. Moreover, non-residents that obtain income in Portuguese territory are also subject to IRC. As a rule, corporate taxpayers are all types of resident commercial companies and civil companies in commercial form, such as the corporation (SA), the limited liability company (Lda), any partnership, whether a general or limited partnership or a partnership limited by shares, cooperative societies and any other corporate body under public or private law.

Residents. To qualify as a resident, a company or other entity must have its seat or its place of effective management in Portugal. The seat of a legal entity is the place of its registered office. The place of its effective management is the location where the management takes the most important corporate decisions.

Non-Residents, Including Offshore Companies. Any body corporate or other entity, which does not have its legal seat and place of effective management in Portugal, is treated as a non-resident company for corporate income tax purposes.

Non-resident companies that have a permanent establishment in Portugal are liable for corporate income tax and the municipal surcharge with respect to income and gains attributable to the permanent establishment. Non-resident companies without a permanent establishment in Portugal are generally liable for corporate income tax separately with respect to their Portuguese-sourced income.

Subsidiaries of Foreign Companies. Portuguese subsidiaries of non-resident corporate entities are resident legal entities for tax purposes, being taxed on their worldwide taxable income in the same way as any other Portuguese resident legal entity.

Taxable Income

Computation of Taxable Income. The taxable base is made up of the net profit for the year plus certain changes in equity not included therein, less allowable prior year losses and tax incentives. Profit is defined in balance sheet terms as representing the difference in net equity at the beginning and end of the accounting period, adjusted in accordance with the IRC Code rules.

The determination of taxable profits is effected, whenever possible, under a direct method of computation based on the corporate taxpayer's return and accounting records; and, if this is not possible, under an indirect method of computation based on circumstantial evidence.

Deductions

The general rule on business expenses is that a deduction is allowed for all expenses necessary for the production of taxable income or for the maintenance of the productive assets. To be deductible, expenses must be substantiated.

Capital Gains

General. Capital gains realized by resident companies, including Portuguese permanent establishments of non-resident companies, are generally included in taxable profits and are taxed at the normal rate. Capital gains include both voluntary capital gains, ie, gains realized from the sale or exchange of fixed assets or the appropriation of a company's fixed assets for any purpose unrelated to the operation of the business, and involuntary capital gains, ie, gains realized on compensation for expropriation and on indemnification for a disaster or theft.

Computation of Capital Gains. The gain is the amount by which the proceeds from the alienation exceed the cost of acquisition. The acquisition cost of fixed assets (including shares and comparable interest in companies and real estate, but excluding other financial investments) is deducted from the depreciation and amortizations made for tax purposes and, if alienated after an ownership period of more than two years, may be adjusted for inflation in accordance with the indexation coefficient for the year of acquisition.

Partial Exemption of Tax on Capital Gains. Capital gains from tangible fixed assets held for more than one year are partially exempt from tax if the total consideration received is reinvested within two years of such disposal in the purchase, manufacture or construction of other tangible fixed assets, provided that they are not purchased from entities with whom a special relationship exists (*relações especiais*). If only part of the consideration is reinvested, then only the corresponding part of the gain qualifies for exemption.

This relief also applies to gains on the sale of shares or other rights in any company (ie, resident or non-resident) and Portuguese government bonds by a resident company if;

- The total consideration received is reinvested in the acquisition of other holdings or Portuguese government bonds or in the acquisition or construction of tangible fixed business assets; and
- The sold holding represents at least either 10 per cent of the participated company's capital or an acquisition value of 20-million and both the sold holding or bonds and the acquired holding or bonds are retained for at least one year; and
- The holdings do not involve entities that are related parties, unless they are capital formation contributions, or residents of listed tax havens.

Moreover, holding companies (SGPS) qualify for a full exemption in respect of capital gains realized on the disposal of shares of other corporate rights held for at least one year. This regime does not apply to capital gains or corporate rights that have been held for less then 3 years and were acquired from a related party or a taxpayer resident in a tax haven.

Losses

Capital losses are defined as losses from the sale or other disposal of business property. The CIRC makes no distinction between ordinary losses and capital losses. Therefore, capital losses are deductible in computing taxable income for purposes of corporate income tax.

Rates

The general rate of corporate income tax for resident companies and Portuguese permanent establishments of non-resident companies is 25 per cent.

Withholding Taxes

Payments between corporate taxpayers are generally subject to withholding of corporate income tax, which is either:

- A payment on account of a resident recipient's corporate income tax; or
- A final tax for non-resident corporate recipients.

Dividends. The withholding rates applicable to dividends and similar distributions to non-resident corporate taxpayers are:

- 25 per cent for dividends from unquoted shares in an SA or a partnership limited by shares and distributed by companies whose capital is not divided into or represented by shares (eg, limited liability company, limited partnership); and
- 12.5 per cent for dividends from quoted shares and shares of newly privatized corporations during the first five years after the privatization process is concluded (in that only 50 per cent is taxable).

These rates may be reduced in accordance with double tax treaties or rules that implement the Parent-Subsidiary Directive.

Interest. The withholding rate applicable to interest payments to non-resident corporate taxpayers is, as a rule 15 per cent for interest on corporate bonds issued after October 15 1994, repurchase agreements and assignments of debt-claims, other securities, public bonds and deposits. However, there are specific exemptions in accordance with domestic provisions (eg, interest from public bonds) or double tax treaties rules that reduce this rate.

Royalties and Fees. The withholding rate applicable to royalty payments and payments of rents of immovable property to non-resident corporate taxpayers is 15 per cent. Royalties include fees for technical assistance, know-how and leasing of agricultural, commercial, industrial or scientific equipment. Double tax treaties provisions, if applicable, may reduce this rate.

Tax on Individuals

Introduction

Individuals are subject to individual income tax levied at a national level throughout the Portuguese territory. Other taxes imposed on individuals are the 10 per cent rate Stamp duty on inheritance (although transfers in favor of spouses, descendants and ascendants are tax exempt) or gifts and the annual municipal real estate tax. No net wealth tax is imposed. Resident employees and self-employed individuals are required to pay social security contributions.

Rate

The tax rates applicable to the aggregate net results in the year 2004 run from 12 per cent for a taxable income up to 4.266, to 40 per cent for a taxable income higher than 53.322. In the Azores, the above progressive rates are reduced by 20 per cent. In Madeira, the progressive rates run from 10 per cent (on the initial 4.182.12) to 39 per cent (on the excess of 52.276.51).

Partial Exemption System

From 1 January 2002 the partial imputation system has been abolished and replaced with a partial exemption system under which resident individuals must include 50 per cent of the gross domestic dividends received in their taxable income for progressive income tax purposes.

Value Added Tax and Customs Regulations

Value Added Tax

General Description

Portugal adopted a value added tax system in 1984 by approving the Portuguese VAT Code (*Código do Imposto sobre o Valor Acrescentado* — CIVA) to fulfil a condition of entry into the European Union. Pursuant to Decree-Law 195/89, of 12 June 1989, amendments to the VAT Code were introduced to bring domestic legislation into line with the Sixth EC Directive on VAT.

VAT is an indirect tax on the consumption of goods and services and is normally paid by the final consumer. This, in general, is accomplished by imposing a tax (referred to as an 'output tax') on each stage of production, wholesaling, retailing, etc., but allowing the supplier to offset, against the output tax for which he must account, an amount equal to the tax (referred to as 'input tax') which he has paid on his own supplies.

VAT also applies to the importation of goods by any person, although a taxable person may be able to treat such VAT as input tax and offset it against the output tax payable on any subsequent supply of those goods.

VAT Rates

VAT is levied at a standard rate of 19 per cent. In addition, an intermediate rate of 12 per cent and a reduced rate of 5 per cent are applicable to a range of goods and services. In the Azores and Madeira, the rates are levied at 13 per cent, 8 per cent and 4 per cent, respectively, on the same supplies.

Taxable Persons

In principle, a taxable person for VAT purposes is any individual or corporate entrepren who is subject to corporate income tax (IRC) or individual income tax (IRS) on their business or professional activities.

Taxable Transactions

VAT liability is incurred on the following transactions:

- Supplies of goods and services by an entrepren within the Portuguese territory in the course of his business enterprise or during the exercise of his professional practice or artistic activity; and
- The importation of goods into Portugal by any person. Importation is in itself a taxable event and is liable to VAT regardless of whether or not the importer of the goods is an entrepreneur.

Customs Regulation & Excises Taxes

Introduction

Portugal, by adopting the EU common customs tariff, was required to remove all tariff and non-tariff barriers to other Member States and to set up the common customs tariff uniformly applied in the EEC.

Portugal also adopted Commission Regulation Number 2454/93 of 2 July 1993 that laid down provisions for the implementation and establishment of the Community Customs Code.

The implementation of the internal Community markets led to free movement within the EU territory of manufactured tobacco, alcohol, alcoholic beverages and petroleum, although these products are subject to excise taxes.

The EU harmonization of legal provisions concerning the holding, movement and control of products subject to Excise Taxes (ET) has led to the establishment in Portuguese law of:

- The juridical-fiscal notion of 'fiscal warehouse' to be applied to any place where the taxable products are produced, processed, held, received or dispatched by the authorized depositary in the exercise of his activity, under the ET procedure scheme, according to the conditions established in the Portuguese Excise Taxes Code); and
- The obligatory registration for all professional operators of the sectors concerned (authorized depositary; registered and unregistered operator and fiscal representative) as well as for the fiscal warehouses.

Also, for control purposes the law also provides for a number of provisions aimed at:

- Subordinating the opening and operation of fiscal warehouses to an authorization to be granted issued by the Directorate General of Customs and Excise Taxes (DGCET);
- Requiring from the authorized depositary a guarantee concerning the holding and movement of products under a tax procedure scheme (covering only store warehouses) and the obligation to keep an accounting of stocks and movement of products;
- Defining the obligations imposed on the registered and unregistered operator and the fiscal representative both in respect of a guarantee for payment of ET payable on products received under a tax procedure scheme and accounting thereof;

- Establishing that every product subject to ET circulating in the domestic territory under a tax procedure scheme shall be accompanied by a document issued by the dispatcher as designated by the accompanying document.

Products shall be chargeable to tax from the point of production or importation into the domestic territory or the territory of another member State, provided that in the latter case they are dispatched into the domestic territory.

Also subject to tax in the domestic territory are those products that have already entered into consumption in another Member State, which are purchased for one's own consumption or for commercial purposes.

The circulation of such products between the territory of the other Member States and the domestic territory shall be subject to an accompanying document.

Liability to tax shall occur within the domestic territory on entry into consumption or verification of missing products that should be taxed.

Excise Tax on Alcohol and on the Consumption of Alcoholic Beverages

Tax is levied on beer, still and sparkling wines, other fermented beverages, any intermediate products and spirits, and on non-Venice ethyl alcohol produced in the domestic territory or imported thereto.

Tax on Petroleum Products

Tax shall be levied on products commonly used as a fuels, namely:

- Gasoline;
- Petroleum;
- Gas oil;
- Fuel oil;
- Gas used as a fuel;
- Mineral gases used, for sale or consumption as combustible.

Excise Duty on Manufactured Tobacco

The tax is levied on manufactured tobacco destined for consumption within the domestic territory.

Manufactured tobacco includes: cigars and large whiffs, cigarettes, smoking tobacco, including fine-cut smoking tobacco for hand-rolled cigarettes and all other smoking tobacco, snuff tobacco and chewing tobacco.

Investment Incentives

Tax Incentives

Incentives for Investments in Less Developed Regions

An incentive program is available to qualifying companies, other than those involved in agriculture, fisheries, the coal industry or transport, for the setting up of operations in listed less developed areas in mainland Portugal. To qualify for the incentives, a company must, *inter alia*, have its legal seat or place of effective management and more than 75 per cent of its payroll in listed areas and create net permanent jobs attached to the underlying investment.

The incentive program includes:

- A reduced IRC rate of 15 per cent for companies taxed under the simplified method. The tax incentives resulting from the application of the reduced IRC rate is limited to 100,000 per corporate investor over a maximum period of three years.
- Accelerated depreciation, calculated at 130 per cent of the applicable depreciation rate for investment expenditure not exceeding 498,798 incurred in respect of buildings and equipment and patents, licenses and technical know-how acquired by small and medium sized companies (as defined by EU law).
- An exemption from payment of the employer's social security contributions in respect of net permanent job increase in the first three years of a new employment. In the 4th and 5th years, the contributions are reduced by 66.66 per cent and 33.33 per cent respectively. The newly created jobs must be maintained for at least five years and either be attached to the underlying investment or involve individuals who are employed or working for the first time.

Contractual Tax Incentive

Contractual tax incentives are granted for industrial investment projects carried out by 31 December 2010 if they involve at least 4,987,978.97 and are deemed to be of a strategic interest to the domestic economy and encourage job creation, technological innovation and domestic scientific research. The incentives, granted by the central government on a case-by-case basis for a maximum period of 10 years, include a 5 per cent to 20 per cent investment tax credit and an exemption from, or reduction of, annual real estate tax, real estate transfer tax and stamp duty.

Also eligible for contractual tax incentives are direct investment projects in specific activities carried out by 31 December 2010 by resident companies abroad (excluding free-trade zones and tax havens) involving at least 249,398.95 and designed to internationalize the Portuguese economy. These incentives are granted for a maximum period of five years and include:

- A 10 per cent to 20 per cent investment tax credit, limited each year to the lower of 25 per cent of the taxpayer's IRC liability and 997,595.79; and,

- A full exemption for dividends received by a resident parent from its 10 per cent or more owned non-resident subsidiary, provided that the investment abroad resulted in a newly created non-resident company or in the acquisition of an existing non-resident company and that the 10 per cent holding is maintained without interruption for at least one year prior to the distribution.

Investment Credit for Research and Development

An investment credit against the IRC liability is available for qualifying research and development (R&D) expenses. It is granted to resident companies and Portuguese permanent establishments of non-resident companies, except for companies and permanent establishments whose taxable base is determined under the indirect methods.

Incentive Scheme for Madeira/Azores Free Zones

Portugal has two free trade zones (International Business Centers): Madeira and Santa Maria (Azores).

Under the state-aid rules of the European Union, Portugal was authorized to enact a socio-economic programmed aimed at overcoming the structural underdevelopment of the autonomous regions of the Azores and Madeira.

Qualifying industrial, shipping, international services and financial entities licensed to operate in the Madeira free-trade zone or within the Santa Maria Island (Azores) free-trade zone are eligible for specific tax exemptions.

In addition, non-resident participators without a permanent establishment in Portugal (excluding those in the free-trade zones) deriving income from their holdings are exempt from IRC withholding. Exceptions apply to holdings of residents in companies operating in the industrial park of the free-trade zones and or in shipping companies.

E-Commerce — Madeira Benefits From the Lowest VAT Rate in Europe

Madeira has the lowest VAT rate in the European Union (13 per cent), which turns this island into a very attractive location for business to consumer (B2C) E-Commerce transactions.

In fact, under the provisions of the E. Commerce Directive (2002/38/EC) of 7 May 2002, non-EU suppliers will be required to collect VAT on electronically supplied services purchased by non-taxable EU consumers. This services include website supply, web-hosting, distance maintenance of programmers and equipment, supply of software, supply of images, text and information, supply of music, films and games and supply of distance teaching.

For such purposes, a non-EU company supplying electronic services within the EU will be required to:

- Register for VAT in every Member State where its non-taxable customers reside.

- Register for VAT in a single Member State, under a special scheme, and to charge VAT at the rate applicable in the Member State where customers reside; or
- Set up a subsidiary or a branch within a single Member State and to charge VAT on sales to EU non-taxable customers at the rate applicable in the Member State where it is incorporated or established.

Therefore, by setting up a subsidiary or a branch in Madeira, a non-EU B2C supplier may use its tax competitiveness to supply its services at a VAT rate of 13 per cent, regardless of the tax rules of the Member State where its customers reside.

Some large EU Internet providers are also already relocating their activity to Madeira to benefit from the VAT rate of 13 per cent on their B2C digital supplies.

Large Investment Regime

To adopt the Portuguese reality to the most recent EU and OECD orientations, which aim the non-discrimination, in relation to nationality, of investment, Decree-law 203/2003, dated 10 September 2003, adopted a unified contractual investment regime in relation to large investments (Large Investment Regime). This new regime has eliminated the existing differences between foreign investment and national investment.

The Large Investment Regime is only applicable to investments that:

- Exceed an amount of 25 million, to be invested in a single moment, or up to three years phases, regardless of the sector in which it will be invested, the size, nature or nationality of the investor; and
- Do not exceed the amount previously referred, and belong to: (i) a company which has an annual consolidated invoicing which is superior to 75-million; or (ii) a non-corporate entity with an annual budget greater then 40-million.

The investments that may be subject to the Large Investment Regime do not only need to be quantitatively adequate, but also need to be merit wordy, ie, they must benefit the Portuguese economy. Such evaluation, as well the whole process (which includes the negotiation and execution of such large projects) will be headed by the Portuguese Investment Agency (API).

Further, the Portuguese State will grant the benefits it considers qualitative and quantitatively adequate to the merit of the relevant project/investment. Such benefits may be one or more of the following:

- In accordance with the applicable legislation, the concession of financial incentives which may be reimbursable or non recoverable;
- Tax benefits; and
- Co-financing of the project through public risk capital.

Exceptionally, the following specific benefits may also be granted:

- Co-participation in vocational training costs;
- Compensation for the costs of having a shortage of qualified professionals;
- Compensation for the costs of being at an important distance from the sources of knowledge and innovation; and
- Execution by the Portuguese State of relevant infrastructures.

Nevertheless, the concession of any of the above-mentioned benefits is subject to the EU rules applicable to state aids.

The investment projects that by their nature, form or execution conditions may affect the public order, safety or heath, as well as those concerning the production and commercialization of weapons, ammunitions and war material, are subject to special laws.

Competition Law

Introduction

Already a business-friendly country with a successful track record of foreign investment inflow, Portugal has been undertaking competitiveness-enhancing reforms in a wide range of areas. Among them is market regulation in which, besides a new Competition Act (Law Number 18/2003), a new Competition Authority was created in 2003 (Decree-Law Number 10/2003) with a mandate to prevent anticompetitive practices and promote market transparency.

The Portuguese Competition Authority

The Portuguese Competition Authority was created by Decree-Law Number 10/2003 of 18 January 2003 as the successor to the Competition Council and the Directorate-General of Competition and Trade.

Its powers to apply the competition rules extend to the different sectors of the Portuguese economy, in co-operation with sectoral regulatory bodies. The Authority's mission is to ensure compliance with the competition rules in Portugal, with a view to guaranteeing respect for the principles of a market economy and free competition, to assure the operation of efficient markets, an efficient allocation of resources and the protection of consumer interests, according to the law and its statutes.

The Authority has regulatory, supervisory and disciplinary powers, namely, to:

- Propose laws to the competent institutions, and approve regulations required to enforce a competitive environment;
- Issue recommendations and general directives about restrictive practices;
- Propose and approve codes of conduct and best practices;
- Decide on notifications of mergers and acquisitions; and
- Identify and investigate anti-competitive practices.

The Portuguese Competition Act

The new Competition Act, Law Number 18/2003, 11 June 2003, which encompasses and reforms the prior competition act, gives to the new Portuguese Competition Authority the substantive and procedural legal powers of former Competition Council and Directorate-General for Commerce and Competition, accomplishing a much-awaited reform.

Examples of important changes include the widening of the scope of control of concentrations that either take place, or at least produce their effects, in the national territory and, as a general rule, the elimination of the legal exclusion concerning concentrations in insurance and banking sectors.

The Act is applicable, notably, to restrictive competition practices and concentrations between undertakings, which take place or have, or may have, effects in the territory of Portugal.

Prohibited Practices

The Competition Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, of which the object or effect is to appreciably prevent, distort or restrict competition in whole or part, in the national market. In particular it prohibits those practices which:

- Directly or indirectly fix purchase or selling prices or interfere with their establishment by free market forces, thus causing them to artificially rise or fall;
- Directly or indirectly fix other transaction conditions affected at the same stage or different stages of the economic process;
- Limit or control production, distribution, technical development or investments;
- Share out markets or sources of supply;
- Systematically or occasionally apply discriminatory pricing or other conditions to equivalent transactions;
- Directly or indirectly refuse to purchase or sell goods or services; or
- Subject the signing of agreements to the acceptance of additional obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Notwithstanding, the above referred practices may be considered justified when they contribute to improving the production or distribution of goods and services or promoting technical or economic development, provided that, cumulatively:

- The users of such goods or services a fair part of the benefit arising there from;
- They do not impose on the undertakings in question any restrictions that are not indispensable to attain such objectives; and
- They do not grant such undertakings the opportunity to suppress competition for a substantial part of the goods or services market in question.

These practices may also be the subject of prior assessment by the Competition Authority. Abuse of a dominant position and abuse of economic dependence are also prohibited by the Competition Act.

Whenever the investigation indicates that the practice which is the subject of the proceedings may cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for third party interests, the Authority may, at any moment in the investigation or evidence-taking, preventively order the immediate suspension of the practice or take any other provisional measures that are necessary to immediately re-establish the competition or are indispensable for the useful effect of the decision to be pronounced at the close of the proceedings.

Notice should be taken of the fact that prohibited practices may constitute an administrative offence sanctioned with a fine that may not exceed 10 per cent of the previous year's turnover for each of the undertakings participating in the infringement.

The *Tribunal de Comércio de Lisboa* (Lisbon Commercial Court) shall hear appeals against the Authority's decisions to apply fines or other penalties. Appealable decisions of the Lisbon Commercial Court may be challenged in the Lisbon Court of Appeal, from which the decision shall be final.

Concentrations between Undertakings

A concentration between undertakings is subject to approval by the Portuguese Competition Authority when one of the following criteria is met:

- Its implementation creates or reinforces a share exceeding 30 per cent of the national market for a particular good or service or for a substantial part of it; or
- In the preceding financial year, the group of undertakings taking part in the concentration have recorded in Portugal a turnover exceeding 150 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of these undertakings exceeds 2 million.

The concentrations that fulfill one of the above referred criteria must be notified the Authority within seven working days of the conclusion of the agreement or, where relevant, until the publication date of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest.

Notifications are submitted to the Competition Authority using the Notification Form, a legally approved model which is annexed to Regulation Number 2/E/2003, 25 July 2003.

The appraisal of a concentration between undertakings by the Competition Authority, is subject to the payment of a fee that may vary, depending on the turnover of the companies involved, between 7.500 and 25,000.

The Authority must deliver its decision on a notified concentration within 30 working days of the date on which the notification has effect.

If the Authority's decision regarding a concentration is to open an in-depth investigation, the time-limit for the final decision shall be a further 90 working days from the date of such decision.

The above-referred time limits are suspended in the cases laid down by the Act, in particular whenever the Competition Authority requests additional information from notifying parties.

Failure to notify a concentration subject to prior notification constitutes an administrative offence with a fine that may not exceed 1 per cent of the previous year's turnover for each of the undertakings.

The Lisbon Commercial Court can hear appeals against the Authority's decisions in relation to a final decision on a concentration. Judicial appeals against Lisbon Commercial Court's decisions are lodged with the Lisbon Appeals Court and, those against the latter court's decision, though limited to matters of law, with the Supreme Court of Justice.

State Aids

The Competition Act also states that aids granted to undertakings by the State or any other public body must not significantly restrict or affect competition in the whole or in part of the market or they will be considered incompatible with the Act.

In spite of this, compensatory payments made by the State in return for the provision of a public service, eg, a service of a general economic interest, whatever the form of such payments, shall not be considered aid.

International Cooperation

The Competition Authority, at the EU level, takes part in the ECN — European Competition Network, established by EC Regulation Number 1/2003.

In terms of international cooperation the Portuguese Competition Authority in April 2003, became a member of the International Competition Network, the informal forum in which competition watch dogs from around the world discuss the whole range of practical competition policy enforcement and policy issues.

The Competition Authority also takes part in the work of:

- The OECD Competition Committee;
- The WTO Working Group on the Interaction between Trade and Competition; and
- The UNCTAD Intergovernmental Group of Experts on Competition Law and Policy.

Intellectual Property Protection

International Treaties

Portugal is a party to most of the international treaties concerning intellectual property. Further, as a Member State of the European Union, Portugal has been implementing the applicable Directives and is bound by the other legislative acts approved within the European Union in this area of law.

Specific Regimes of the Industrial Property Code

In terms of national legislation in the field of intellectual property (excluding copyrights), we highlight Law 16/95 of 24 January 1995, which approved the Industrial Property Code of 1995 (1995 Code) and Decree-Law 36/2003 of 5 March 2003, which approved the most recent Industrial Property Code (Industrial Property Code).

Patents

National patent applications are filed at the Portuguese Industrial Property Office (INPI) by:

- The interested party if resident in Portugal;
- An official agent; or
- An attorney.

National applications must be in Portuguese and must contain:

- Complete identification of the applicant and the inventor, if not the same;
- Description of the invention;
- Summary of the invention;
- Claims;
- Drawing explaining the description;
- Title with the objective of the invention; and
- Any claim to a possible priority right under article 4 of the Paris Convention.

Once the patent application has been filed at the INPI, the corresponding abstract will be published in the Bulletin of Industrial Property 18 months after the filing date of application or priority claimed. An examination report on compliance with the formalities and patentability conditions established by law will be drawn up, including the opinion of the examiner, within three months from the publication of the abstract. In case of opposition, the report will be drawn up within three months from the opposition (or from the response to the opposition, if any). The applicant may reply to the examiner's observations within two months. If the patent is granted, notice will be published in the Bulletin, marking the beginning of a 2-month term in which oppositions may be filed.

The Industrial Property Code also defines the requirements for European Patent applications and applications for the protection of European patents in Portugal. Applications filed under the terms of the Patent Cooperation Treaty are also accepted, with complementary provisions, when the INPI acts as the receiving administrative body or appointed administrative body. Patents are valid for 20 years counted from the date of application.

Trademarks

Application for registration of a national trademark is filed with the INPI. It must be in Portuguese and must contain the following:

- Complete identification of the applicant;
- Identification of the trademark and its graphic representation;
- Description of the products/services;
- Indication of any claim in relation to colors; and
- Priority claim, if any.

It is important to note that a foreign entity may register any trademark in the same terms and conditions as any Portuguese entity, provided that any foreign documents are translated and, where applicable, legalized before a Portuguese Consulate or with the Hague Apostille.

The application is published in the Bulletin of Industrial Property. Opposition may be filed within two months of such publication. The decision to grant or refuse registration must be issued within a maximum of 12 months from the publication. The grant of a trademark may be total or partial, in respect of goods and/or services. The Industrial Property Code provides for a provisional refusal. In such case, the applicant has the right to reply to the provisional refusal within two months from the date of the corresponding notice. A final decision must be taken by the INPI within two months from the applicant's reply.

It is important to note that a special protection is provided for 'widely known' trademarks and for trademarks of 'great prestige'. In the first case, the owner has the right to oppose any registration by a third entity of the same or similar trademark which intends to use this trademark in similar products or services or an adaptation of the same that may lead to confusion, provided it first files the necessary registration request. In the second case, the owner can oppose a registration of the same or similar trademark by a third entity, even if it is intended for different products or services (provided that the owner files the registration for the products and services that afforded such great prestige to the trademark).

Portugal is a founding member of the 1891 Madrid Agreement and ratified the Protocol related to the Madrid Agreement on Trademarks International Registration adopted in Madrid on 27 June 1989 (Decree 31/96, of 25 October 1996). Thus, Portuguese law on industrial property observes the provisions of this Agreement, and the terms of the Paris Convention (Stockholm text), which implies that any Portuguese entity or individual is entitled to request through the INPI the registration of its trademark in any country which is a signatory to those treaties.

Finally, it is important to stress that, owing to Portugal's membership in the European Union, any Portuguese entity may request the registration of a Community Trademark under the terms and conditions of EC Council Regulation 40/94. The Industrial Property Code introduces the possibility of converting the application or registration of Community Trademarks into an application for registration of National Trademarks.

Trademark protection lasts for 10 years from the date of registration and is indefinitely renewable for additional 10-year periods, on payment of renewal fees.

Copyright Code

The Copyright Code has been approved by Decree-Law 63/85, of 14 March and has since then been amended several times, to adapt it to several European Union Directives and other international treaties ratified by Portugal.

The content of copyright is structured in Portugal in clearly dualistic terms. Indeed, article 9º of the Copyright Code states that 'Copyright encompasses rights of a patrimonial nature and rights of a personal nature, designated as moral rights'. This distinction is important at a practical level, since it relates to a separate framework, notably in what concerns duration and transferability.

The patrimonial content of a copyright is mainly defined as the exclusive right to economic usage of the work, whereby the author takes advantage of, and uses his work, by whatever means, securing for himself the material advantages resulting from such usage. Moral rights, on the other hand, are those more closely linked to the individual author, notably the right to claim authorship of the work, the right to ensure its authenticity and integrity, the right to disclose (or not) the work, and the right of withdrawal.

Works subject to protection under the Copyright Code are any intellectual creations of the literary, scientific and artistic domain. The copyright is granted in Portugal, irrespective of any prior registration, deposit or any other formality (except for titles of unpublished works and titles of newspapers and other periodicals, which must be registered), although it is strongly advisable to proceed with such registration with the General Inspection of Cultural Activities, by filing an appropriate form and delivering two copies of the work.

In what concerns the patrimonial right, the holder of rights to a protected work is entitled to use it by whatever means, notably through licenses and, in general, it can be assigned or subject to any encumbrance, wholly or partially. In the case of global transfer of copyright, the same must be executed through a public deed. However, the moral rights are inalienable, non-renounceable and non-prescribable.

A patrimonial copyright in Portugal is granted for a specific period of time, after which the work falls into the public domain and can be used by any person. Currently, the general period of copyright protection is 70 years counted from the death of its author. In what concerns 'neighboring rights', the period of protection is in general 50 years counted from the performance (artists), fixation or broadcasting (phonogram or video producers and broadcasting organizations).

Employment Law

Introduction

On 1 December 2003 the Portuguese Labor Code entered into force replacing most of the Employment legislation by bringing existing provisions together in a single text.

At the same time, former provisions were amended in several areas, in terms that will contribute to increase corporate competitiveness and productivity, by allowing labor law, collective bargaining agreements and individual employment contracts to be more flexible.

Fixed Term Employment Contracts

Fixed term contracts may only be entered into in the event of situations:

- Where the company faces a temporary need;
- The launching of a new company or enterprise; or
- The hiring of individuals looking for their first employment, or long-term unemployed individuals.

Provided that the temporary need that gave rise to the agreement subsists, fixed term contracts may, in certain circumstances, have a maximum duration of up to six years.

The compensation due to the employee at the expiration of the fixed contract at the end of the respective term is in the amount of two or three days of base remuneration and seniority premiums, depending if the contract lasted for less or more than six months, respectively.

Working Time

The maximum weekly and daily periods of work are 40 hours and eight hours, respectively.

However, by virtue of collective bargaining agreements, it is possible for employees to work 60 hours per week (equivalent to 12 hours per day) and, by virtue of individual labor agreements, for employees to work 50 hours per week (equivalent to 10 hours per day), provided that, in both cases, the average of 40 hours per week and eight hours per day are maintained over a four or six month reference period.

In cases where adaptability was agreed, the work rendered by the employee during this reference period that exceeds the average period of work will not be paid with the salary increase correspondent to overtime work.

In general terms, only work rendered from 10 pm to seven am is considered as night work and entitles the employee to the respective salary increase.

Holidays

Employees are entitled to 22 business days of vacation per year.

This period may be increased to 25 business days in the event the employees do not have unjustified absences or have no more than a certain number of justified absences.

Legal Minimum Wage

The monthly Portuguese minimum wage during 2004 is set at 365.60.

Termination of Employment Contracts

According to Portuguese law the termination of a labor agreement depends on very strict rules that demand the gathering of grounds and several formal procedures. We highlight the most common termination manners.

Termination by Both Parties During the Probation Period

Termination of a labor agreement by either of the parties during the probation period does not require the allegation of ground and no indemnification is due.

The maximum terms for the probation period vary between 15 and 240 days, according to the type of activity and the nature of the agreement (for a permanent employment contract, the average probation period is 90 days).

Termination during the probation period require the employer to give a 7-day prior notice in cases where such period has lasted for more than 60 days.

Termination by Mutual Agreement

The employee may revoke the termination agreement within seven days from the date on which the termination agreement was entered into except where the agreement was signed in the presence of a notary.

Dismissal by the Employer for Disciplinary Grounds

The dismissal, which must be preceded by a disciplinary proceeding, is only lawful if the employee has committed a serious error with guilt (just cause), which makes it impossible to maintain the labor relationship.

Collective Dismissal

The closing down of a company or of one or more of its departments and the reduction of personnel caused by market, structural or technological motives provides grounds for a collective dismissal, provided that those grounds affect at least two to five employees, depending on whether the company has at least 50 or more than 50 employees.

The employees subjected to the collective dismissal are entitled to compensation equal to one month of base salary and seniority premiums per year of service (fractions of seniority are to be calculated on a proportional basis), for a minimum of three months. There is legal relative presumption that employees accept the termination of the employment contract when they receive the compensation at the termination date.

Extinction of Labor Position

This regime is applicable only when the company lacks grounds to proceed with a collective dismissal a result of an insufficient number of employees involved (for example, the company has more than 50 employees and the closing of the section affects only three employees). Law regulates which employees will be dismissed, namely those with less seniority.

The employees subjected to the extinction of labor position are entitled to compensation equal to the one set for collective dismissal situations.

Dismissal Based on the Employee's Failure to Adapt

The employer may terminate the labor agreement if:

- The employee's productivity decreases;
- The employee causes damage to job-related equipment;
- The employee is a risk to himself, other employees or third persons; or
- The employee developing management functions or functions of technical complexity has failed to comply with objectives previously determined and expressly accepted, provided that it implies the impossibility of maintaining the labor relationship.

The grounds identified above depend on the gathering of several requirements, namely: the introduction within the company of new production or commercial procedures, technologies or equipment; the employee having been given professional training and time to adapt to the new technologies; the employer's inability to provide an alternative labor position adjustable to the employee's professional qualifications; and the failure to adapt has not been caused by a lack of conditions regarding safety, hygiene and health at work.

The employees subjected to the termination of their employment agreement for failure to adapt are entitled to compensation equal to the one set for collective dismissal situations.

Unlawful Dismissal Consequences

Should the basis for the decision to dismiss be non-existent or should the employer fail to comply with the procedural requirements, the termination of the labor agreement is unlawful and the employee is entitled:

- To the payment of his salary from the date of dismissal until the final court decision; and
- To choose one of the two following compensations: his reintegration in the company or the indemnity to be set by the court which may vary between 15 and 45 days of the base salary plus the seniority premiums for each year (or fraction of year) of seniority with a minimum of three months of remuneration.

If the dismissed employees used to have managing responsibilities or if the company has less than 10 employees, the employer may oppose their reintegration on the grounds that their return is too damaging for the company. If the court decides in favor of the employer, ruling against reintegration, the indemnity to be granted to the employee will be calculated between 30 and 60 days of the remuneration as referred above, with a minimum of six months remuneration.

Banking Law

Introduction

For the past decade, the Portuguese banking and financial system has been regulated by Decree-law 298/92, dated 31 December 1992, as amended from time to time. Such Decree-law enacted the Portuguese Credit Institutions and Financial Companies Legal Framework (Legal Banking Framework).

Types of Institutions

The Legal Banking Framework basically distinguishes between two types of institutions:

- Credit Institutions; and
- Financial Companies.

Article 2 of the Legal Banking Framework defines Credit Institutions as companies whose main activity is to receive deposits or other reimbursable funds from the public to apply them on their own account through the concession of credit. Companies that have as their object the emission of e-money as a form of payment are also considered to be Credit Institutions. Nevertheless, it is important to highlight that, although under the legally implemented principle of exclusivity, only Credit Institutions can engage in the activity of receiving deposits or other refundable funds from the public, E-money Credit Institutions are prohibited from engaging in such activity.

The following entities are considered, among others, to be Credit Institutions: banks, investment companies, factoring companies, e-money companies and the recent financial institutions of credit.

Since banks are by far the most relevant type of Credit Institutions, they can develop and engage in all kinds of activities, which include not only long-established banking operations, but also activities such as financial leases, the participation in issues and placements of securities, or enter into money market and FX instruments, medium and long term interest rate instruments and other securities and commodities transactions. It is also possible for banks to develop other activities that are not expressly provided for in the list established in article 4 of the Legal Banking Framework, as long as such activities are not prohibited by law. This ‘open’ structure allows banks to keep up with every financial innovation that takes place.

Financial Companies are defined in the Legal Banking Framework as those companies that are not Credit Institutions, but carry out financial activities very similar to those exercised by these latter types of institutions. However, and considering the above-mentioned principle of exclusivity, Financial Companies are not allowed to receive deposits or other refundable funds from the public.

Among the different kinds of Financial Companies, we can point out managing companies of securitization funds, managing companies of investment funds, brokers and credit card issuing or managing companies.

The establishment of Credit Institutions in Portugal depends on the authorization from *Banco de Portugal* (Central Bank), which is given on a case-by-case basis.

The Legal Banking Framework has been influenced by applicable EU legislation, which adopted the EU's main principles on banking co-ordination. Therefore, according to such EU principles, credit institutions of other EU Members States do benefit from the 'European Passport' and are allowed to perform banking activities in Portugal under the 'freedom to provide services' and 'right of establishment' principles, which allow for their presence in the Portuguese market, provided only that such companies are authorized in their home-country and perform an activity listed in the appendix of the said EU Directive.

However, taking in consideration that the EU principles are only applicable to EU national entities, the incorporation of Credit Institutions that are subsidiaries of non-EU Credit Institutions must be authorized by the Minister of Finance.

After the authorization is given by the Central Bank or the Minister of Finance, as applicable, notification must be given to the European Commission.

The Central Bank — Supervision of Credit Institutions

The Central Bank supervises the Portuguese financial system. As in the other EU Countries that have been integrated into the European System of Central Banks (ESCB), the Portuguese Central Bank's powers and responsibilities have been substantially reduced and no longer include powers such as the definition and implementation of the country's monetary and exchange rate policy, the management of official currency reserves, the promotion of the efficiency of payment systems and the issuing of legal tender bank notes, which are now controlled by the ESCB, to which the Bank of Portugal belongs.

However, the Central Bank retained some important legal functions, particularly the powers of supervision of the solvency and the professional behavior of Credit Institutions within the Portuguese market. In fact, these powers that have been granted to the Central Bank by, among other laws, the Legal Banking Framework, include the ability of this institution to:

- Control the activities of the Credit Institutions;
- Supervise the compliance with the rules that discipline their activity;
- Iissue recommendations so that the irregularities that have been detected are corrected;
- Take extraordinary measures of reorganization (such as restrictions on the exercise of specific activities and restrictions on the granting of credit); and
- Punish any infractions.