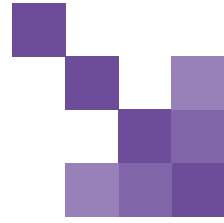


Doing business in Portugal



Filipa Arantes Pedroso and Filipe Freitas da Costa
Morais Leitão, Galvão Teles, Soares da Silva & Associados
(Lex Mundi Member Firm)

www.practicallaw.com/6-376-3347

LEGAL SYSTEM

1. What is the legal system (civil law, common law or a mixture of both)?

Portugal has a civil law system and most legal provisions are contained in statutes.

Custom and usages have legal force only if provided for by statute and to the extent that they are not contrary to the principles of good faith.

EC law is also directly applicable in Portugal.

FOREIGN INVESTMENT

2. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

Foreign investment operations do not need to be registered with, or authorised by, the Portuguese central or local authorities.

Foreign investments made directly in Portugal in an amount equal to or exceeding PTE50 million (about EUR249,400 or US\$341,250) must be reported to the Portuguese Central Bank (*Banco de Portugal*) within ten business days after the completion of the transaction or operation by the Portuguese resident interested parties or by the intervening Portuguese bank, in accordance with the relevant Portuguese Central Bank instructions.

3. Are there any exchange control or currency regulations?

There are no legal restrictions on international capital movements and foreign exchange transactions, except in international embargo circumstances.

Contracting and the settlement of economic and financial operations with foreign entities can be freely made if payments between residents and non-residents, in relation to economic and financial operations with foreign entities, can be effected directly through any means of payment expressed in a foreign currency (*Decree Law 295/2003, 21 November*).

Persons travelling into Portugal from a non-EU country carrying amounts in excess of EUR10,000 (about US\$13,705), must report that fact to the Portuguese custom authorities (*Decree Law 61/2007, 14 March*).

Banks must report to the Portuguese Central Bank any operations involving a payment made to, or received from, a foreign account if the payment is for more than EUR12,500 (about US\$17,131) (or the equivalent in foreign currency) by the tenth business day of the month following the completion of the transaction or operation, in accordance with the relevant Portuguese Central Bank instructions.

4. What grants or incentives are available to investors? Are any of these aimed specifically at foreign investors?

The Portuguese government may grant large investment operations benefits, to both national and foreign inves-

tors (*Decree Law 203/2003, 10 September*), such as:

- Financial incentives.
- Tax benefits.
- Public funding.
- The provision of relevant infrastructures by the Portuguese government.

The following qualify as large investments for these purposes:

- Investments of more than EUR25 million (about US\$34 million).
- Investments made by a company with a consolidated turnover of more than EUR75 million (about US\$103 million).
- Investments made by a non-commercial entity of more than EUR40 million (about US\$55 million).

The availability of these benefits is subject to any applicable EC rules on state aid.

BUSINESS VEHICLES

5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction? In relation to this vehicle, please provide details on:

- **Registration formalities (including timing).**
- **Minimum (and maximum) share capital.**
- **Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities).**
- **Any restrictions on the rights that can attach to shares.**
- **Any restrictions on foreign shareholders.**
- **Management structure and any restrictions on foreign managers.**
- **Directors' liability.**
- **Parent company liability.**
- **Reporting requirements (including filing of accounts) and cost of compliance.**

The most common form of business vehicle used by foreign companies are:

- Joint stock public companies (*sociedade anónima*) (SAs).
- Private limited liability companies (*sociedades por quotas*) (known as Ldas).

Foreign companies can also conduct business in Portugal by creating branches.

- **Registration formalities.** Companies can, in certain circumstances, be incorporated in 24 hours. This procedure restricts the choice of the company name and the contents of the articles of association (articles). Companies can also, in certain circumstances, be incorporated online in two business days without these restrictions. Otherwise it can take up to a month. The stages of the longer process of incorporation are:

- a request of the company name at the National Companies Registry (*Registo Nacional de Pessoas Colectivas*);
- the incorporation of the company by signing a written contract containing its articles, followed by registration at the Commercial Registry Office (a public deed is required if immovable assets are to be transferred as an entry in kind to the company's capital);
- registration of the company with the tax authorities and social security services;
- publication of the articles on a publicly available internet site (www.mj.gov.pt/publicacoes).

- **Share capital.** The minimum share capital of an:
 - SA must be EUR50,000 (about US\$68,524);
 - Lda must be EUR5,000 (about US\$6,852).

There is no maximum share capital.

- **Non-cash consideration.** Companies can issue shares for non-cash consideration in the form of assets (but not services).
- **Rights attaching to shares.** Company law can restrict rights depending on the type of shares issued.

- **Foreign shareholders.** There are no restrictions on foreign shareholders.
- **Management structure.** A board of directors (board) usually manages a company. The management of SAs can be structured according to one of three different models. Directors need not be shareholders and they are appointed for no more than four-year terms in the case of SAs. A company can be a director of an SA, but it must nominate an individual to perform directorship functions on its behalf. Sole directorship of an SA is allowed if the share capital does not exceed EUR200,000 (about US\$274,096) and the articles expressly allow it. An Lda's board can consist of one or more directors, who may or may not be shareholders, but must be individuals. There are no nationality restrictions imposed on company directors.
- **Directors' liability.** Directors are liable to:
 - the company for any loss suffered as a result of acts or omissions that violate legal or contractual duties, unless they can prove that the breach was not negligent or deliberate. Liability is also excluded if they can prove that they acted:
 - in an informed way;
 - free from any personal interest; and
 - in accordance with criteria of business rationality.
 - creditors for any negligent or deliberate violation of a legal provision aimed at protecting the creditors' best interests if a company's assets are insufficient to meet its debts;
 - third parties for any direct loss suffered as a result of actions taken in their capacity as directors.
- **Parent company liability.** Parent companies can, in certain circumstances, be liable for their subsidiaries. For example, parent companies that own 100% of a subsidiary's share capital can be liable for its debts if certain legal requirements are not complied with.
- **Reporting requirements.** A company must register at the Commercial Registry Office, among other things, the following information:
 - the incorporation details and articles;
 - the registered office;
 - details of shareholders in Ldas;
 - any increase or reduction in share capital;
 - the transfer of shares in Ldas;
 - the accounting reference date;
 - the annual statutory accounts (to be sent electronically together with other tax and statistic information).

Actions relating to the above only bind third parties once they are registered. Registration costs depend on the type of information or action registered.

EMPLOYEES

6. What are the main laws regulating employment relationships?

The main laws regulating employment relationships are the:

- Employment Code (approved by Law 99/2003 of 27 August).
- Employment Code Regulation (approved by Law 35/2004 of 29 July).

The Employment Code governs the formation, execution and termination of an employment contract. The Employment Code Regulation details some of the regimes included in the Employment Code.

These laws apply to both foreign employees working in Portugal and Portuguese employees (hired by a Portuguese company) working abroad, unless the employment contract or the applicable law (in the country of employment or chosen by the parties) are more favourable.

There may be mandatory rules that apply regardless of any choice of law in the employment contract.

7. Is a written contract of employment required? Are any agreements and/or implied terms likely to govern the employment relationship?

Written contracts are not required but employers must provide written information on employment conditions. Certain contracts (such as those with limited job security) and certain clauses (such as post-contractual non-compete obligations) must be agreed in writing.

Collective agreements and employers' internal regulations may also apply.

8. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

Employees' representatives (such as unions or works councils) must be informed of most corporate transactions and can issue a prior opinion on certain transactions (such as redundancies). Employees are individually consulted in the absence of representatives, but are not entitled to management representation.

9. How is the termination of individual employment contracts regulated?

The termination of individual employment contracts is only fair if justified. Grounds for fair dismissal are, among others, the employee's:

- Unjustified absences and abnormal reductions of productivity.
- Failure to adapt to the job position.

In most cases, a specific procedure must be carried out before the dismissal.

Depending on the cause for (fair) dismissal, statutory minimum notice periods (generally, of 60 days) and severance payment (generally, one month's remuneration plus seniority payments for each year of service) may be required.

If the dismissal is unfair, employees can appeal to the labour court and are entitled to both:

- Salary from the date of dismissal until the court's decision.
- Choose between reinstatement or an indemnity of 15 to 45 days' base remuneration (as determined by the court), plus seniority payments, for each year of service (starting at a minimum of three months' wages).

10. Are redundancies/mass layoffs regulated? If so, please give details.

Redundancies can be for market, structural or technological reasons. Employees' representatives and governmental authorities participate in redundancies, which is a complex process.

In certain cases, such as individual redundancy proceedings, the Employment Code sets out the criteria for determining the employees to be dismissed.

Certain employees cannot be dismissed without first seeking the opinion of a specific body. For example, employers must consult the Commission for Equality in Work and Employment (*Comissão para a Igualdade no Trabalho e no Emprego*) to dismiss pregnant women.

A statutory minimum notice period of 60 days and a severance payment of one month's remuneration, plus seniority payments, for each year of service (starting at a minimum of three months' wages), are required.

11. Do foreign employees require work permits and/or residency permits? If so, how long does it take to obtain them and how much do they cost?

Except for special regimes agreed by either the EU or Portugal, employees from outside the EU and the European Economic Area must obtain a temporary stay permit or a residence permit before entering Portugal. Permits can take up to six months to obtain and cost a minimum of EUR65 (about US\$89).

EU citizens can work in Portugal but must obtain a registration certificate within three months of entry into Portugal, plus 30 days.

TAX

12. In relation to employees, what constitutes tax residency in your jurisdiction?

Employees are considered resident in Portugal if, among things, they either:

- Stay in Portugal for more than 183 days in any calendar year.
- Visit Portugal for shorter periods and have a home in Portugal, where, in the circumstances, it may be implied that they intend to permanently reside.

13. What income tax or social security contributions must the following pay:

- Tax resident employees?
- Non-tax resident employees?
- Employers, in relation to their employees?

Tax resident employees

Tax is payable on employees' worldwide income, at the rate of between 10.5% and 42%.

Portuguese residents must pay monthly social security contributions, amounting to 11% of their gross salary.

Non-tax resident employees

Non-resident employees must pay tax on their Portuguese-sourced income. Seconded employees of foreign companies are taxed at 25% of their gross salary (which is deducted at source). Relief may be available under a double tax treaty or the domestic law of the employee's country of residence.

Employers

Employers must withhold tax at variable tax rates of up to 40% (depending on the employees' specific status) and make monthly social security contributions of up to 23.75% of an employee's gross salary.

14. In relation to business vehicles, what constitutes tax residency in your jurisdiction?

A company is deemed to be resident in Portugal if it has its registered office or place of effective management in Portugal.

15. Please give details of the main taxes that potentially apply to a tax resident business vehicle (including rates).

Resident business vehicles must pay tax on their worldwide income (*Imposto sobre o Rendimento das Pessoas Colectivas (IRC)*). The company's taxable income is determined by deducting the previous year's losses and tax incentives from the current year's profits. The following taxes apply to companies:

- IRC, at the rate of 25%.
- A municipality surcharge on IRC of up to 2.5%.
- Social security contributions for employees.
- A municipal tax on transfers of real estate (up to 8% for offshore companies).
- An annual real estate tax ranging from between 0.2% and 5%.
- Value added tax (VAT). This is usually charged at a rate of 21%. Different rates apply for certain goods and services and in the regions of Azores and Madeira.

16. How are the activities of non-tax resident business vehicles taxed?

Non-resident business vehicles with permanent establishments in Portugal must pay tax on:

- Income and capital gains derived from the permanent establishment.
- Other income derived from activities carried out in Portugal that are identical or similar to those carried out by the permanent establishment.

Non-resident companies without a permanent establishment in Portugal must pay withholding tax on income derived in Portugal.

17. Please explain how each of the following is taxed:

- **Dividends paid to foreign corporate shareholders.**
- **Dividends received from foreign companies.**
- **Interest paid to foreign corporate shareholders.**
- **Intellectual property (IP) royalties paid to foreign corporate shareholders.**

- **Dividends paid.** Dividends (other than stock dividends) paid to a non-resident company without a permanent establishment in Portugal are subject to a 20% withholding tax. Dividends paid by Portuguese subsidiaries to EU parent companies are exempt from withholding tax (*Decree Law 123/92, July 22*). Companies licensed to operate within the free-trade zones of Madeira and Santa Maria (Azores) are also exempt from withholding tax.

- **Dividends received.** Dividends received from foreign companies are added to the company's taxable income for IRC purposes (*see Question 15*).
- **Interest paid.** Interest paid to foreign corporate shareholders is subject to a 20% withholding tax (or 25% for interest on corporate bonds issued before 16 October 1994).
- **IP royalties paid.** All IP royalties are subject to a 15% withholding tax. Exemptions apply if royalties are paid within a tax regime for a group of companies, provided that the payment relates to a tax period in which the regime applies. Interest and royalties paid by a Portuguese associate company to another EU associated company are subject to a 10% withholding tax between 1 July 2005 and 30 June 2009 and a 5% withholding tax between 1 July 2009 and 30 June 2013 (*Decree Law 34/2005, 17 February*).

18. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)? If so, please give details.

Interest paid on excessive debt by a resident company to a non-resident related party, other than a EU resident company, is not deductible unless the taxpayer

can prove that the loan conditions are comparable to those agreed by non-related parties in comparable transactions under the same circumstances. Excessive debt is the part of a debt (including a loan, guarantee or trade-related credit) which both:

- Is owed to a non-resident related party.
- Exceeds, at any date in the tax period, twice the amount of the corporate borrower's net worth held by the non-resident related party.

19. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

Yes. Under the controlled foreign company regime, a foreign subsidiary's profits (whether or not distributed) must, if certain requirements are met, be attributed to a parent company resident in Portugal. The controlling company must include a share of the subsidiary's after-tax profits (in proportion to its holding) in its own taxable income for IRC.

20. Are there any transfer pricing rules? If so, please give details.

An ordinance of the Minister of Finance regulates transfer pricing and procedures for corresponding adjustments. There are no provisions for advance pricing agreements. The tax authorities can make the necessary pricing adjustments to determine the taxable profit of a resident entity where, because of special relations between the parties, the conditions deviate from those that would be agreed by unrelated trading parties in comparable transactions under the same circumstances.

21. How are imports and exports taxed?

Outside the EU

Exports of goods are subject to VAT but are generally zero rated. Imports are subject to VAT, which is payable by the importer at the same rate as if the goods were supplied within Portugal. Customs duty and excise duty may also be payable on imports.

Within the EU

The supply of goods between VAT registered traders is generally zero rated. Where VAT is payable, the customer must pay VAT at his country's rate. VAT is charged in the normal way on sales to non-VAT registered customers.

22. Is there a wide network of double tax treaties? If so, please give details.

Portugal has double tax treaties with more than 50 countries, including the US, the UK and most of Western Europe.

COMPETITION

23. Are restrictive agreements and practices regulated by competition law in your jurisdiction? If so, please give brief details.

Restrictive agreements and practices of any nature which have, as their object or effect, the prevention, distortion or restriction of competition in the whole or a part of the national market, are prohibited, and are both, in accordance with *Law 18/2003, 11 June*:

- Null and void.
- Punishable with a fine of up to 10% of the previous year's turnover for each of the undertakings participating in the infringement.

INTELLECTUAL PROPERTY

24. Please outline the main intellectual property rights that are capable of protection in your jurisdiction. In each case, please state:

- **Nature of right.**
 - **How protected.**
 - **How enforced.**
 - **Length of protection.**
-

Patents

- **Nature of right.** For an invention to be patentable, it must:
 - be new;

- involve an inventive step; and
- be capable of industrial application.

The patent holder has the exclusive right to exploit the invention and prevent others from using it without his consent.

- **How protected.** Patent applications can be filed with the Portuguese Industrial Property Office (*Instituto Nacional da Propriedade Industrial*) (INPI) by:
 - an interested party resident in Portugal;
 - an official agent;
 - a lawyer.
- **How enforced.** The right holder can enforce its right through a court action against the breaching party. Preliminary injunctions are also possible. The breaching party is liable to the right holder for any damages caused as a direct result of the infringement.
- **Length of protection.** Protection lasts for 20 years from the date of application.

Trade marks

- **Nature of right.** To be registered, trade marks must be capable of both:
 - graphic representation;
 - distinguishing the goods or services of one entity from those of others.

The right holder has the exclusive right to exploit the mark and prevent others from using it without his consent.

- **How protected.** Trade mark applications can be filed with the INPI by Portuguese and foreign entities (although foreign documents must be translated and, where applicable, authenticated by a Portuguese consulate or the Hague Apostille).
- **How enforced.** Trade mark rights are enforced in the same way as patent rights (*see above, Patents*).
- **Length of protection.** Protection lasts for ten years from the date of registration and is renewable every ten years, subject to renewal fees.

Registered designs

- **Nature of right.** To be registrable, a design must:
 - be new;
 - relate to the appearance of all or part of a product resulting from certain features of the product or its ornamentation; and
 - have individual character.

The right holder has the exclusive right to exploit the design and prevent others from using it without his consent.

- **How protected.** Design applications must be filed with the INPI to be protected.
- **How enforced.** Registered designs rights are enforced in the same way as patent rights (*see above, Patents*).
- **Length of protection.** Protection lasts for five years, subject to five-year renewals up to a maximum of 25 years.

Unregistered designs

- **Nature of right.** See above, *Registered designs*.
- **How protected.** A right of priority exists in a design during the registration process.
- **How enforced.** Enforcement is very limited, as there is no exclusive right to an unregistered design.
- **Length of protection.** Protection lasts for six months from the date that the design is first used.

Copyright and neighbouring rights

- **Nature of right.** Literary, scientific, artistic and intellectual creations can be protected. The right holder has the exclusive right to exploit the works and prevent others from using it without his consent.
- **How protected.** Protection arises automatically, although registration with the General Inspectorate of Cultural Activities is advisable.
- **How enforced.** Copyright and neighbouring rights are enforced in the same way as patent rights (*see above, Patents*).

- **Length of protection.** The length of protection is:
 - 70 years from the death of the author of a literary work;
 - 50 years from the first performance of an artistic creation, recording of a phonogram, or first broadcast of a video production;
 - 70 years from the death of the creator of a scientific work.

Confidential information

- **Nature of right.** The law does not define confidential information. However, any information that cannot be disclosed to third parties (as identified by law or agreement) is confidential.
- **How protected.** Protection is ensured by way of contract, unless it arises automatically under law, for example, under lawyer-client privilege.
- **How enforced.** Enforcement of confidential information rights is ensured through civil actions. The courts can order against the infringer:
 - damages;
 - fines.
- **Length of protection.** There is no limit on the duration of protection or the time in which an action for damages can be brought.

MARKETING AGREEMENTS

25. Are marketing agreements regulated in your jurisdiction? If so, please give brief details in respect of the following arrangements:

- **Agency.**
 - **Distribution.**
 - **Franchising.**
-
- **Agency.** The Agency Act of 1986, as amended in 1993 (*see Decree Law 178/86, 3 July, as amended by Decree Law 118/93, 13 April*) contains a number of mandatory provisions to protect agents, including:
 - minimum notice periods for indefinite contracts;

- the validity of post-termination restrictions;
- indemnity or compensation for the agent on termination of the agreement.
- **Distribution and franchising.** There is no specific law applicable to distribution or franchising agreements.
- A 14-day cooling off period.
- The imposition of strict duties on the seller to provide information about himself, the product and the contract of sale, which must be confirmed in writing.
- The regulation of door-to-door selling.

E-COMMERCE

26. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)? If so, please give brief details.

E-commerce is regulated by Decree Law 7/2004 of 7 January. In particular, restrictions apply to the general principle of free provision of services in certain circumstances. A service provider established in Portugal cannot provide services in or outside Portugal if there is a serious risk of harm to:

- Human dignity (for example, discrimination based on sex or religion).
- Public health.
- National security.

In addition, service provision must not breach consumer legislation.

The general principle governing the free execution of contracts cannot be compromised by the use of electronic technology (*Decree Law 7/2004, 7 January*).

Electronic signatures

Electronic signatures are governed by the following legislation:

- Decree Law 290-D/99 of 2 August.
- Decree Law 62/2003 of 3 April.
- Decree Law 165/2004 of 6 July.
- Regulatory Decree 25/2004 of 15 July.

Distance selling

Distance selling is governed by Decree Law 143/2001 of 26 April, which provides for, among other things:

DATA PROTECTION

27. Are there any data protection laws? If so, please give brief details.

Portugal has implemented Directive 2002/58/EC on the protection of privacy in the electronic communications sector with (Privacy and Electronic Communications Directive):

- Law 67/98 of 26 October (Data Protection Law).
- Law 41/2004 of 18 August (Data Protection Law on the Electronic Communications sector).
- Law 7/2004 of 7 January (Law that implements Directive 2002/38/EC amending Directive 77/388/EEC on the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services and Article 13 of the Electronic Communications Directive).
- Law 43/2004 of 18 August, which:
 - imposes duties on anyone who stores or has access to protected data;
 - established the National Data Protection Committee and defines its structure and powers.

PRODUCT LIABILITY

28. Are there any laws regulating product liability and product safety? If so, please give brief details.

Product liability is governed by Decree Law 383/89 of 6 November, as amended by Decree Law 131/2001 of 24 April. Product safety is governed by Decree Law 69/2005 of 17 March. Liability can also arise under civil and criminal law.

Consumer goods must be sold on the basis that they are fit for their purpose and correspond to their description (*Decree Law 67/2003, 8 April*).

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA

& ASSOCIADOS
SOCIEDADE DE
ADVOGADOS

PORTUGUESE LAW
FIRM OF THE YEAR
IFLR AWARDS 2007

CLIENT CHOICE
AWARD
INTERNATIONAL
LAW OFFICE 2005

PORTUGUESE LAW
FIRM OF THE YEAR
IFLR AWARDS 2005

“A GREAT
CHOICE
FOR
ADVICE
NO
MATTER
WHAT
THE
PROJECT.”

IFLR1000, 2007