



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Portugal: Real Estate

This country-specific Q&A provides an overview to real estate laws and regulations that may occur in Portugal.

It will cover the most pertinent issues including ownership structures, restrictions, transfers, taxes and environmental contamination.

This Q&A is part of the global guide to Real Estate. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/real-estate>



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The Legal 500



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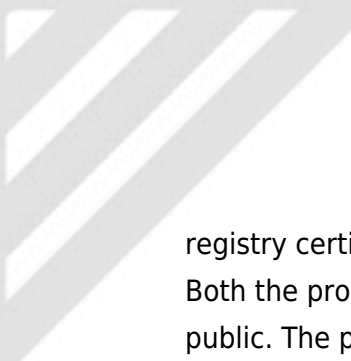
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1. Overview

The year 2017 continued to be an excellent year with some major private international players continuing to invest in real estate in Portugal. Investment in retail and offices has increased this year. The considerable liquidity in other countries and the still attractive yields in Portugal makes Portugal an attractive country to invest.

2. How is ownership of real estate proved?

Ownership of real estate is evidenced by a property registry certificate (certidão predial) issued by the Property Registry (Conservatória do Registo Predial). Additionally, according to the Portuguese law all real estate must have a property tax



registry certificate (caderneta) issued by the tax authorities (Autoridade Tributária). Both the property registry certificate and property tax certificate are accessible to the public. The property registry certificate contains the specific description of the plot or building, including area, definition of the type of property (urban or rural), and the registration of rights or restrictions on the property, including liens, mortgages, or encumbrances. The tax registry certificate is a document certifying the registration of the property with the tax authorities. Access to these public records when acquiring real estate is essential, not only for confirmation purposes, but also to assess whether there are any registrations that may affect the ownership transaction, such as any rights, restrictions, or charges, including mortgages, easements, or encumbrances on the property. As a general rule, the facts subject to registry, such as the purchase and sale of property, shall only become effective against third parties (erga omnes effects) after the corresponding registry date.

3. Are there any restrictions on who can own real estate?

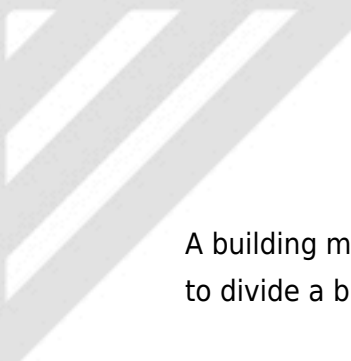
There are no restrictions concerning the ownership of real estate by non-residents or foreign investors.

To invest in Portugal foreign investors must obtain a Portuguese non-resident tax number. Foreign investors from outside the EU must have a tax representative to obtain a Portuguese non-resident tax number.

4. What types of proprietary interests in real estate can be created?

The owner of a property has full possession and exclusive use and disposition of such property.

There are also other titles to property such as the right of use (usufruto), surface right (direito de superfície) and joint property (compropriedade).



A building may be owned by one or more entities (common property) and it is possible to divide a building in various units (propriedade horizontal).

5. Is ownership of real estate and the buildings on it separate?

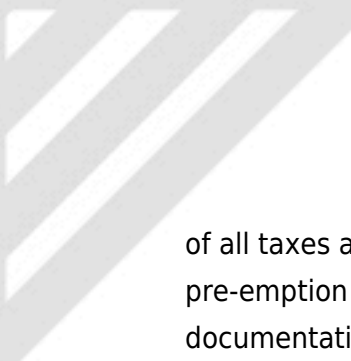
The owners of buildings are usually the owners of the real estate, however in the case of a right of use when one entity owns the right of use of the building (usufruto) and the other entity the ownership of the land where the building is located.

6. What are common ownership structures for ownership of commercial real estate?

Commercial real estate is usually owned by entities and not individuals. The type of vehicles used are mainly commercial companies, notably joint stock public companies (sociedade anónima) for larger companies and private limited liability companies (sociedades por quotas) in the case of smaller companies which want a more flexible structure and fewer corporate government requirements. Other vehicles such as Real Estate Funds and Real Estate Companies have been less required lately. Portugal has not yet implemented the legislation concerning the so-called REITS. The market has been waiting for this legislation for quite a long time.

7. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

There is no market standard form for the due diligence process for acquiring commercial real estate. It is usual for purchaser to prepare, through their legal and technical advisors, complete checklists with the documentation and information required. From a legal perspective, the main documents requested and reviewed are (i) the land registry certificate (“certidão do registo predial”), (ii) the tax registry certificate (“caderneta predial”), (iii) the license of use for buildings, (iv) the energy efficiency certificate (“certificado de eficiência energética”), (v) proof of the payment



of all taxes and charges related with the property, (vi) confirmation of non-exercise of pre-emption rights, when applicable (vii) planning, zoning and environment documentation in case of land for construction of commercial real estate. In Portugal it not usual for a seller of real estate to provide any warranty cover in relation to legal title to the real estate as the title is confirmed by the Property Registry.

8. What legal issues (if any) cannot be covered by usual legal due diligence?

There can be access rights not registered which can be a right acquired by the use for a certain period of time. The real areas of the property may sometimes not correspond to the registered areas. However legal due diligence only confirms that the registered areas in the Property Registry correspond to the ones registered in the tax registry, and this is enough to transfer the property and register the same in the name of the buyer.

9. What is the usual process for transfer of commercial real estate?

The purchase and sale of a property must be executed in writing (either by public deed or by private executed agreement) by a notary, a lawyer, or the commercial or registry officers. The purchase and sale of a property must be registered with the Property Registry in order to produce effects against third parties. Registration is compulsory regarding the facts that create, recognize, acquire or modify any real estate rights. The Property Registry Code establishes a principle of priority according to which the right that is registered first, prevails over any subsequently registered rights. The Property Registry certificates can be physical or electronic.

It is usual that the purchase and sale is preceded by a promissory purchase and sale duly certified by the above mentioned entities. The promissory sale and purchase agreement usually contains the representation and warranties of the parties which are repeated in the notarial deed. An obligation of specific execution (*execução específica*) should be included in the promissory sale and purchase agreement, as it will allow

either of the parties to request the court to execute the contract instead of paying a penalty or compensation.

Transaction Steps	Seller	Buyer	Comments
Pre-agreement	<ul style="list-style-type: none"> · Preparation of promissory sale and purchase agreement · Negotiation of the promissory sale and purchase agreement with buyer 	<ul style="list-style-type: none"> · Due diligence · Title, registration, pre-emption rights, mortgages or encumbrances, leases if applicable, planning, licences, environmental and taxes related to the property. 	
Signing of the Promissory Agreement to Closing	<ul style="list-style-type: none"> · Satisfaction of any conditions to closing 	<ul style="list-style-type: none"> · Arrangement of purchase price funding (including any third party debt) · Satisfaction of any conditions to closing 	<ul style="list-style-type: none"> · Written agreement with signatures certified. · A deposit paid by the promissory purchaser between 10% and 20% is usual
Closing	<ul style="list-style-type: none"> · Repayment of any existing debt and discharge of mortgage (if any) · Execution of transfer agreement 	<ul style="list-style-type: none"> · Payment of transfer property tax and stamp duty prior to signing the transfer deed. · Execution of transfer deed · Payment of purchase price 	
Post-closing		<ul style="list-style-type: none"> · Registration of transfer at land registry 	<ul style="list-style-type: none"> · Land Registry registratin fee around €250

10. **Is it common for commercial real estate transfers to be effected by way of share transfer as well as asset transfer?**

It is common to have share transfers not only for tax reasons as it does not pay property transfer tax ("IMT"), except in certain specific cases, and stamp duty. Purchasers tend to incorporate SPVs to acquire commercial real estate and later sell the SPV owner of the property.

11. **On the sale of interests in land does the benefit of any**

occupational leases and income automatically transfer?

The commercial leases are automatically transferred with the property, the only requirement is the communication to the tenant of the transfer by the seller. The tenant with a lease for more than 3 years has a pre-emption right in the acquisition of the property, so it needs to be previously notified to exercise such right within 8 days after receiving the notification.

12. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

Easements, rights of way, rights of use of water, rights of sight and others can and should be registered and against the real estate. Mortgages and pledges are also registered against the real estate. If not cancelled all these charges and encumbrances follow the real estate when it is sold.

13. Are split of legal and beneficial ownership of real estate (ie Trust structures) recognised?

Trusts are not recognized in Portugal. Therefore the buyer needs to deal only with the registered legal owner and does not need to enquire about any beneficial ownership.

14. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

The purchase of real estate is subject to stamp duty ("Imposto do Selo") at a rate of 0,8% of the purchase price or the tax value (valor patrimonial) whichever is higher, which is payable by the buyer. Furthermore, the purchase of real estate is also subject to property transfer tax ("Imposto Municipal sobre as Transmissões Onerosas de Imóveis" or IMT) at the rate of 6,5% on the acquisition of commercial properties. The IMT also applies to the sale and purchase price or tax value (valor patrimonial).

whichever is higher.

The acquisition of property for rehabilitation purposes and the acquisition of property by real estate companies for the purpose of reselling may be exempted from IMT provided certain specific conditions are met.

The transfer of shares of a joint stock public company (“sociedade anónima”) who owns property is not subject to property transfer tax, while the transfer of a quota to a partner whose quota after the transfer will represent 75% or more of the capital stock of a limited-liability company (“sociedade por quotas”) is subject to property transfer tax. .

Municipal Property Tax (IMI) is paid annually on the tax value of property at a rate which may varies between 0,3% and 0,45%.. Property owned by individuals or legal persons resident in a tax haven is subject to an aggravated 7,5% tax rate. An additional tax (AIMI) was introduced by the State Budget Law for 2017, however the AIMI is not applicable to commercial property. Property owned by residents in a tax haven is subject to a 7,5% tax rate on this additional tax.

15. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

Commercial lease agreements can be for commercial, industrial, professional (namely, for offices) or logistics purposes.

The urban lease regime is established in the Portuguese Civil Code in accordance with the provisions approved by Law number 6/2006 of 27 February 2006, as amended, also known as the “New Urban Lease Regime”. The urban lease agreements are divided into two types: lease agreement for residential purposes and lease agreements for non-residential purposes. Therefore commercial leases fall into this last category.

Rents and lease terms of commercial leases are freely regulated between the parties. In fact, the most relevant aspects of commercial lease agreements such as term,



termination and renewal are freely negotiated by the parties.

In commercial leases rent has usually a fixed amount but a variable amount related with the tenant's revenues is also used.

The typical terms of commercial leases are generally agreed between the parties.

The length of the lease term can be with fixed or non-fixed. The main leases have fixed terms (in case it is agreed between the parties that the agreement is without fixed term, the legal maximum limit is of 30 years).

The maintenance and repair is of the responsibility of the tenant and structural works should be borne by the landlord.

The rent is usually paid monthly and is due on the first working day of the precedent month. The parties can freely agree the increases of the rents. It is usual to subject annual increases at a rate established every year by the Government.

16. **How are use, planning and zoning restrictions on real estate regulated?**

The uses of real estate are ruled by general land use plans and municipal use plans.

The general use plans are subdivided in (i) territorial plans of protected areas (POAP), (ii) territorial plans of reservoirs (POAAP), (iii) territorial plans of the sea coast (POOC), (iv) territorial plans of the river estuaries (POE) and (v) territorial plans of the archaeological parks (POPA). The purpose of these plans is the preservation of natural resources and natural habitats, establishing prohibitions for certain operations and conditions for other operations that may be authorized.

The municipal plans contain the main regulations concerning the use of the land. There are three types of municipal plans: (i) the municipal director plan (PDM), (ii) the

urbanization plans (planos de urbanização); and (iii) the detailed plans (planos de pormenor).

According to a recent reform, the general plans must now be included in the municipal plans.

17. **Who can be liable for environmental contamination on real estate?**

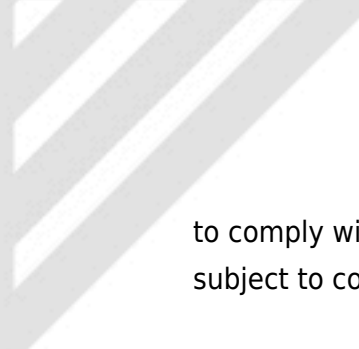
The Environmental Liability Law identifies land contamination as an environmental damage. The owner of the polluted property is not liable for such pollution if he was not responsible for the contamination. However, if the owner of the property undertakes certain types of economic activities defined in the law, the competent authority may order the decontamination of the property, regardless of whether or not the owner is responsible for the contamination. In these cases, the owner has the right to claim from the entities that were responsible for the pollution.

If the owner of the land is not ordered to carry out the decontamination measures, in some situations, the licensing of future activities in the property may be conditional upon decontamination of the property.

18. **Is expropriation of real estate possible?**

Several legal regimes establish the possibility of expropriation/taking of land and compulsory sale with fair compensation. The legal regimes to take into account vary according to the title and basis on which such expropriation/taking of land or compulsory sale is made.

In this respect, for instance, the Law on the General Foundations of Public Policy of Soils, Territorial and Urban Management establishes that expropriation on public interest grounds (expropriações por utilidade pública) may take place in order to achieve the purposes of public soil policy. Alternatively, and in certain cases (ie failure



to comply with performance of rehabilitation or regeneration), the owners may be subject to compulsory sale (venda forçada).

The Legal Regime of the Territorial Management Instruments also establishes that expropriation or compulsory sale may take place in order to perform the territorial plans and programs.

The procedure for expropriation is set forth under the Expropriations Code. According to such legal regime, the expropriation may be agreed or if agreement is not reached a litigation procedure will follow. The latter will be conducted through arbitration. Once a decision is issued, the process will be referred to the court for a judicial phase.

Expropriation gives rise to payment of a fair compensation (justa indemnização) by the expropriating entity to the expropriated parties.

The procedure for compulsory sale states that the competent authority may sell the property in a public tender. For such purpose a resolution on promotion of the sale and other terms to follow is set out in the Expropriations Code.

19. Is it possible to create mortgages over real estate and how are these protected and enforced?

Mortgages over real estate must be executed before a public notary (or equivalent official) and registered with the Land Registry Office, such registration being a condition of validity of the mortgage. If agreed between the parties, the mortgagee can become beneficiary of the proceeds of the insurance entered into to cover the risks of the mortgaged property.

A mortgage does not have the right to take possession of the property in event of default in the payment of secured obligation, but only the right to judicial sale of the property and to be paid with the proceeds of ... Sale. In a judicial the property will be sold free of any changes and encumbrances.

20. **Are there material costs associated with the creation of mortgages over real estate?**

Mortgages over real estate must be executed before a public notary (or equivalent official) and registered with the Property Registry. The registration is a condition of validity of the mortgage. The costs are not substantial, the notarial fees vary usually between €600 and €1000 and the registration fees are around €250.

21. **Is it possible to create a trust structure for mortgage security over real estate?**

Trusts are not recognized by Portuguese law.

22. **What is the main legislation relating to commercial real estate ownership?**

The main source of real estate law, commercial or not, is the Portuguese Civil Code based on Roman law and the French Civil Code encompassing not only freehold but also other rights of guarantee and acquisition. The definition of property includes full possession and exclusive use and disposition. The law applicable to possession, title to property and other real estate rights is defined by the country in which the property is located, therefore Portuguese law is applicable to the creation, recognition, acquisition or modification of any real estate rights in Portugal. Furthermore registration is compulsory regarding creation, recognition, acquisition or modification of real estate and the Real Estate Registration Code is applicable.