

# Joint ventures in Portugal: overview

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## DOMESTIC COMPANY JOINT VENTURES (JVS) Regulation

### 1. Are JVs expressly regulated?

Under Portuguese law, a joint venture is a commercial structure between two or more economically and legally autonomous entities. Depending on whether the JV is incorporated or unincorporated the relevant statutes are the:

- Commercial Companies Code (CCC).
- Legal Regime for Consortium and Unincorporated Partnership Agreements approved by Decree-Law No. 231/81 of 28 July 1981 (LRC).
- Law No. 4/73 of 4 June 1973 which approved the Legal Regime for the Complementary Group of Companies (LCCG) and its respective regulation (Decree-Law No. 430/73 of 25 August).

### Types

### 2. Which types of JV are allowed?

Under Portuguese law, joint ventures can have the following structures:

- A limited liability company (*sociedade anónima*) (SA).
- A complementary group of companies (*agrupamento complementar de empresas*) (CGC).
- A consortium agreement.
- An unincorporated partnership (*associação em participação*).

**Limited liability company.** This is the vehicle used for companies of significant dimension, in terms of participants (shareholders), size and duration. It is the most appropriate structure to carry out an incorporated joint venture. In this structure, the SA company is the vehicle which will be vested with all assets, property, activities, rights, and liabilities. As an autonomous legal entity, the incorporated joint venture benefits from ownership of its own assets, which means that it can acquire and dispose of property and enter into contracts directly, as well as be a party in judicial proceedings.

**Complementary group of companies.** The CGC is regulated by the Legal Regime for the Complementary Group of Companies (LCCG), and is defined as a collective legal person composed of natural or legal persons, which come together for the purposes of improving either the conditions or the outcome of their economic activities (*paragraph 1, LCCG*). Therefore, participation in the profits is a secondary, albeit possible, purpose of a CGC, and must be included in the founding agreement to be effective. The CGC, as the SA type company, also benefits from an autonomous legal identity, however, it cannot own immovable property (unless such immovable property is acquired for the establishment of the CGC's

corporate office) or hold shares in other companies (*sections 5(a) and (b), Decree-Law No. 430/73*).

**Consortium agreement.** The consortium agreement is regulated by the LRC, an instrument which came into force as a measure to promote economic co-operation between companies. A consortium agreement is defined as an agreement between two or more natural or legal persons that carry out an economic activity and undertake to jointly carry out a specified activity or make a specified contribution for any of the following purposes (*section 1, LRC*):

- Carrying out preparatory activities, material or legal, for a specific enterprise or a continuous activity (*section 2(a), LRC*).
- Executing a specific enterprise (*section 2(b), LRC*).
- Providing similar or complementary goods or services, produced by each party, to third parties (*section 2(c), LRC*).
- Natural resource exploration (*section 2(d), LRC*).
- Production of goods, which can be divided in kind between the parties (*section 2(e), LRC*).

**Unincorporated partnership.** The unincorporated partnership is also regulated by the LRC. This JV structure is defined as an association by one party in a third party's economic activity, where it participates in the profits or in the profits and losses of that activity (*section 21.1, LRC*). Participating in the profits is an essential component of this type of structure, while participation in the losses is possible but not essential (*section 21.2, LRC*).

### 3. What are the principal corporate/company laws governing corporate JVs?

The principal legal instrument governing corporate JVs is the Commercial Companies Code (*see Question 1*).

### Formation and registration

### 4. What are the typical JV founding documents for a corporate JV?

For the incorporation of a limited liability company, the following documents are needed:

- Identification documents of shareholders, whether they are natural or legal persons (at least five shareholders).
- If a shareholder is a legal person, a resolution of the board of directors or the shareholders' general assembly granting powers for the incorporation of the company, stating the amount of the share capital which will be held by the company.
- Admissibility certificate, which provides evidence that the name chosen for the company is permitted.
- Evidence of share capital deposit (at least EUR50,000).



- Articles of association.

Under section 3.1 of the LRC, a consortium agreement must be in writing. An unincorporated partnership does not have a prescribed legal form. However, a clause excluding a party from participating in the losses or limiting a party's liability must be in writing (*sections 23.1 and 23.2, LRC*). If the consortium or the unincorporated joint venture involve the transfer of immovable property, a public deed must be executed (*sections 3.1 and 23.1, LRC*), similarly to CGCs which must be in writing, and where a public deed is only required if such CGC involves the transfer of immovable property (*paragraph III.1, LCGC*). In any event, registration with the commercial registry is required (*paragraph IV, LCGC*).

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#### 5. Is the use of foreign language in a JV's founding documents (both corporate and contractual) restricted?

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For incorporated JVs, the founding documents should be drafted in Portuguese. Alternatively, the founding documents of a contractual JV (see *Question 4*) can be in a foreign language.

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#### 6. Are public officers (for example, public notaries) involved in a JV's formation procedure?

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Corporate JVs must be registered in the commercial registry. Contractual JVs are not subject to registration, although notaries will be involved when a contractual JV encompasses the transfer of immovable property.

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#### 7. Are JVs registered with any local registries? Are public sector bodies' authorisations required for a JV's establishment?

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##### Local registries

See *Question 6*.

##### Public sector bodies

See *Question 6*.

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#### 8. What other formal requirements must be complied with to validly constitute a JV?

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No other formal requirements are necessary, except for those set out in *Question 4*.

##### Permitted markets

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#### 9. Can the JV structure be used in every industry sector? Are there any restrictions to be considered and carefully assessed before investing in a JV?

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Almost all industry sectors in Portugal are open to investment in the form of a JV. The same rules apply to domestic and foreign investment. There is no mandatory requirement to have a Portuguese shareholder or partner and no limitation on repatriation of dividends.

## Purpose

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### 10. Can a JV be established with any purpose?

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Contractual JVs (such as a consortium) can be entered into with any purpose listed in section 2 of the LRC (see *Question 2*). An unincorporated partnership is established for the purposes of participating in a third party's economic activity (*section 21.1, LRC*), and a CGC is incorporated for the purposes of improving the conditions or the outcome of the economic activities of the parties (*paragraph I.1, LCGC*).

An incorporated joint venture also has a corporate object which must be indicated in the company's articles of association (*section 11.1, CCC*).

### Share capital and participation

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### 11. What possible forms of participation are there in a JV's share capital? How can a JV member contribute and are there statutory limits on the possibility to make contributions in kind?

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#### Forms of participation

For contractual JVs, parties to a consortium or unincorporated partnership agreement can stipulate in the founding agreement how and in what terms each party will participate, and the resulting allocation of profits and losses (*sections 18 and 25, LRC*).

#### Contributions

In an unincorporated partnership, contributions must be of a "patrimonial nature". Such contribution, whether or not it is made up of the constitution or the transfer of a right, must become a part of the joined party's assets (*section 24.1, LRC*).

The contribution can be in cash or in kind but, in any event, a value must be attributed in the contract to such contribution (*section 24.4, LRC*). However, the contribution of the joining party can be waived if the party participates in the losses (*section 24.2, LRC*). In a consortium, parties can undertake to carry out a specific activity or make a contribution (*section 1, LRC*). Therefore, the contribution can be in cash or in kind as well, although making a contribution is not an essential requirement for the formation of a consortium, despite being an essential component in an unincorporated partnership. In a CGC, the founding agreement determines the contribution of each member (*paragraph III.2, LCGC*).

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### 12. Can a corporate JV's share capital be denominated in a foreign currency?

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Under section 14 of the CCC, share capital must be denominated in euros.

### Duration and limits on membership

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### 13. Are there statutory limits on a JV's duration?

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There are no statutory limits on the duration of a JV.

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### 14. Are there statutory limits on the number of members participating in a JV?

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A corporate or contractual JV must be made up of at least two parties.

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## Public sector bodies

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### 15. Can a public sector body enter into a JV agreement? Subject to what conditions? In particular, do public private partnerships (PPP) laws and regulations apply?

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Under Portuguese law, a PPP is a contract or a group of contracts where private partners undertake to develop an activity with a public partner, by means of a long-lasting relationship, where the responsibility for making the investment and subsequently for exploring it belongs, totally or partially, to the private partner (section 2, Decree-Law No. 111/2012).

The PPP structure is often used by public authorities in Portugal for significant contract projects.

## Non-competition and anti-trust clauses

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### 16. Are there statutory constraints on the use of non-competition or anti-trust clauses in a JV agreement?

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#### During period of effectiveness

No specific constraints on anti-trust and non-competition clauses are applicable to JV agreements, however, the general restrictions on such instruments will apply to JVs. In an unincorporated partnership, the duty not to compete applies to the joining party under section 26(c) of the LRC, unless the agreement expressly allows the joining party to compete with the other party. A similar restriction on competition also applies to parties to a consortium agreement (section 8(a), LRC).

#### Following termination

Portuguese law does not provide for any constraints following termination of JV agreement.

## De facto company/partnership

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### 17. Must the contractual JV satisfy any conditions to avoid falling within the definition of de facto company/partnership?

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To avoid being classified as a de facto company or partnership, the contractual JV should be consistent with the legal definition, structure and purposes defined for each contractual JV structure provided for in the LRC.

## Limiting member liability

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### 18. Can a JV agreement provide that a JV member can participate without incurring any risk, loss or reward?

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In an external consortium agreement, when the goods or services are directly supplied to third parties by each member expressly invoking that capacity (section 5.2, LRC), each party receives amounts owed to it by third parties (section 16.1, LRC), although the agreement can stipulate different distribution of profits (section 16.2, LRC).

In internal consortiums, where the goods or services are supplied by only one member of the consortium, or when each party supplies its goods or services to third parties without expressly invoking such capacity, parties are free to determine how rewards are distributed (sections 17 and 25.1, LRC). If the agreement only establishes the criteria for distribution of losses, the same will apply to the distribution of profits and vice-versa (section 25.2, LRC). If such criteria are not defined in the contract but the contributions of the parties are contractually evaluated, their participation in the losses and rewards will be proportional to their

participation (section 25.3, LRC). If such participation is not evaluated in the contract, then losses and rewards will be shared among the parties, although the parties have the right to a judicial procedure requesting for an alternative distribution of losses or profits (section 25.3, LRC). The rules for internal consortiums apply to unincorporated partnerships.

Companies which are part of CGCs are jointly liable for the debts of the CGC (paragraph. 11.2, LCGC), except where joint liability is expressly excluded in a specific contract with a specific creditor (paragraph.11.2, LCGC).

## Anti-trust

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### 19. Do any anti-trust rules, guidelines or policies apply to a JV agreement?

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JVs must observe general competition and anti-trust laws and regulations, both at the national and European level, as there is no competition regime specific to JVs. Under Law No. 19/2012 of 8 May 2012 which approved the New Competition Law Regime (NCLR), company mergers are subject to a procedure of previous notification if:

- As a consequence of the merger, the national market share acquired, created or re-enforced, becomes equal or surpasses 50% (section 37.1(a), NCLR).
- The national market share acquired, created or re-enforced, corresponds to 30-50%, as long as the individual annual turnover obtained in Portugal for at least two members of the merger is over EUR5 million (section 37.2(b), NCLR).
- The group of relevant companies obtained, in Portugal, a turnover over EUR100 million, as long as the individual annual turnover of at least two of the members was over EUR5 million (section 37.2(c), NCLR).

For the purposes of the NCLR, a merger is any operation where there is a long-lasting change of control on all or part of one or more companies (section 36.1, NCLR), be it via the merger of two previously independent companies or parts of companies, or the direct or indirect acquisition of control of at least one company. The incorporation of a common company qualifies as a merger for these purposes if the common company incorporated carries out activities as an economically autonomous entity (section 36.2, NCLR).

## Governance and limits on directors

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### 20. Can the parties to a JV freely regulate the JV or are they subject to certain restrictions?

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The LRC provides for the figure of the head of external consortiums (*chefe do consórcio*). Under section 12 of the LRC, an external consortium contract will nominate one of its members as the head of the consortium. This party is responsible for managing the consortium, both internally and externally, in accordance with the functions attributed to it by the contract (section 12, LRC). The external functions of the head of an external consortium include negotiating any contracts and entering into agreements with third parties, receiving from third parties amounts due to the members of the consortium, and, in certain cases, hiring legal, economic and accounting advisers (section 14.1, LRC). Conversely, in internal consortiums no such figure exists as each party carries out its function autonomously.

In CGCs, unless the contract expressly states otherwise, each member of the group has one vote (section 7, Decree-Law no. 430/73 of 28 August). Further, any director of the CGC binds the company by itself. The powers of the director of the CGC may be limited, but such limitations are not enforceable against a *bona*

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*fide* third party, however, such director (even if their powers are limited) will bind the company before a *bonafide* third party. (paragraph.III.4, LCGC).

LLC-type companies are subject to some mandatory provisions enshrined in the CCC, particularly relating to the allocation of powers between each corporate body. For instance, the board of directors has exclusive powers to represent the company and to manage the company's activities independently, having only to observe shareholders' resolutions or instructions of the supervisory board, in circumstances where the law or the articles so provide (section 405, CCC). The balance of power between the shareholders and the board of directors can be tailored by the provisions of the articles and the shareholders' agreement, although these instruments must always comply with mandatory provisions of Portuguese corporate law, particularly with regards to powers of shareholders, directors and exercise of control.

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## 21. Are there limits or restrictions on the eligibility of an individual as a member of the board of directors/statutory auditor?

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No restrictions exist as to the nationality of appointed directors.

Contractual JVs can appoint or nominate individuals to carry out leadership roles (see Question 20), the law expressly provides for the head of an external consortium. A similar role is not expressly provided in the unincorporated partnership, although the LRC provides that one of the duties and obligations of the joined party is to "diligently manage the JV" (section 26.1(a), LRC).

LLC-type companies have a board of directors or a sole director where the share capital does not exceed EUR200,000 (section 389.2, CCC). Shareholders can be nominated as directors and so can legal persons, however, these must nominate a natural person to serve as a director (section 390.4, CCC). The legal person appointed as a director is jointly liable with the natural person it nominates for acts carried out by the latter as a director (section 390.4, CCC).

### Termination

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## 22. What legal regime applies to a JV's termination? Can a JV be terminated for just cause on request of one party?

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A consortium agreement can terminate on the verification of just cause. The following circumstances will be considered a just cause:

- Bankruptcy of one of the parties.
- Material breach or persistence of a non-material breach.
- The obligations or actives under the contract become impossible to preform, regardless of whether such impossibility is attributable to the fault of one of the parties (sections 10.1 and 10.2, LRC).

An unincorporated partnership terminates in the following circumstances (sections 27 and 29, LRC):

- Complete performance of its objective.
- Its objective becomes impossible.
- The successors decide to terminate the agreement.
- If, in case of a party's death, the successors to such party notify the other party(ies) of the intention to terminate within 90 days of the party's death.
- Merger between the joined and the joining parties.
- Bankruptcy or insolvency of the joining party.

- Just cause.

Termination of incorporated JVs follows the terms of immediate dissolution of companies as prescribed in the CCC. Under the CCC, the causes for the immediate dissolution of a company are:

- The term fixed in the articles elapses (section 141.1(a), CCC).
- Shareholders' resolution (section 141.1(b), CCC).
- Complete realisation of corporate object (section 141.1(c), CCC).
- The corporate object is deemed to be illegal (section 141.1(d), CCC).
- Bankruptcy (section 141.1(e), CCC).

Further, the ACL also provides the following non-immediate causes for company dissolution (section 142, CCC):

- The number of shareholders remains inferior to the legally prescribed minimum for more than one year.
- The corporate object becomes impossible to pursue.
- The company remains dormant for two consecutive years.
- The company carries out an activity beyond the scope of the articles of association.

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## 23. Is the termination of a JV agreement subject to any public sector body's approval?

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Some of the grounds specified above can require a judicial procedure (such as just cause, insolvency or bankruptcy), while others will not require one.

### Choice of law and jurisdiction

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## 24. Are there constraints on the choice of the law and the jurisdiction applicable to a JV?

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Foreign law can be chosen to regulate a JV in Portugal. However, the applicability of a foreign law will be limited by mandatory provisions of Portuguese law and public policy. Under section 3.1 of the CCC, the personal law of companies with their registered office in Portugal is Portuguese law.

### JVS WITH FOREIGN MEMBERS

#### Validity and authorisation

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## 25. What are the rules relating to validity and authorisation of JVs with foreign parties?

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### Validity

There is no restriction on the nationality of parties to a JV.

### Limits

Not applicable.

### Authorisation

Not applicable.

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### Effect of foreign membership

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#### 26. Are any of the rules relating to domestic company JVs (see Questions 1 to 24) different for JVs with members incorporated under, or governed by, the laws of a foreign country?

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No different rules apply to JVs with foreign members or parties.

### Economic or financial incentives

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#### 27. Are there economic or financial incentives for foreign direct investments in a JV?

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Economic and financial incentives are set out in Decree-Law No. 162/2014 of 31 October 2014 which approved the Tax Code for Investments (TCI). The TCI establishes tax benefits and incentives

for investments. Tax benefits can be granted for a ten-year period to investments of an amount equivalent or superior to EUR3 million in areas including tourism, agriculture, defence, environment, energy and telecommunications.

### Minimum investments/contributions

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#### 28. Are there mandatory minimum equity investments or contributions in kind thresholds for a foreign JV member?

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There are no mandatory minimum equity investments or contributions in kind thresholds for a foreign JV member.

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## THE REGULATORY AUTHORITIES

### National Competition Authority

**Main activities.** Ensures compliance with Portuguese competition laws and regulations.

**W** [www.concorrenca.pt/vEN/Pages/Homepage-AdC-vEN.aspx](http://www.concorrenca.pt/vEN/Pages/Homepage-AdC-vEN.aspx)

### Technical Unit for Project Support

**Main activities.** Functions include preparation, development, execution and overall support of PPP processes ensuring technical assistance.

**W** [www.utap.pt/](http://www.utap.pt/)



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## Practical Law Contributor profile

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**Areas of practice.** Banking and finance; corporate; commercial, including distribution and franchising; capital markets; energy and natural resources (oil and gas, mining); international aspects of foreign investment into Angola and Mozambique; shipping.

**Languages.** Portuguese and English.

**Professional memberships/association.** Commonwealth Lawyers Association; International Distribution Institute (IDI), Country Expert for Portugal, Franchising/Agency and Distribution; British, Brazilian & Portuguese Lawyer's Association; Officer and Senior Vice-Chair of the European Forum, IBA, 2011-2013; currently co-operating with the IBA to develop the African Regional Forum.

**Publications.**

- Author of articles for international publications as well as participating as a speaker at international conferences in the areas of investment in emerging markets; oil & gas, corporate, banking & restructuring and shipping related matters.
- Winner of the 2007 40 under Forty Award organised by Iberian Lawyer.
- Ranked as a leading lawyer by the most prestigious international directories.