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# Real Estate 2022

Portugal: Law & Practice

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# PORTUGAL

## Law and Practice

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## 1. GENERAL

### 1.1 Main Sources of Law

The main source of real estate law is the Portuguese Civil Code.

### 1.2 Main Market Trends and Deals

Despite the consequences of the COVID-19 pandemic, the Portuguese economy registered a significant growth in 2021, rising by 4.9% according to some studies, reflecting an increase of 9.5% in exports, an investment enlargement of 7.2% and a rise of 5% in private consumption. This marked a recovery in private consumption and investment.

After a substantial slowdown in 2020, where retail and tourism struggled due to the rise of e-commerce and shopping centre closures and as a result of the lockdown and travel restrictions, respectively, these sectors gained new strength in 2021 (particularly tourism, and notably hotels and resorts). One of the biggest transactions expected to be closed during 2022 comprises a portfolio of tourist assets and is estimated to reach approximately EUR1 billion, which is a massive transaction considering the size of the market.

With regards to residential real estate, Portugal broke its sales record in 2021, with more than 190,000 houses sold, amounting to approximately EUR30 billion.

Investor appetite for alternative trends such as student residences is resilient, and interest in senior residences and data centres is growing significantly.

The up-and-coming logistics sector is also noteworthy, having been growing around the globe, including in Portugal. The largest ever transaction of a logistics portfolio is rolling out in 2022,

with a Portuguese bank selling one of the largest funds holding logistic assets.

Considering these trends, forecasters are optimistic that investment values will soon reach pre-pandemic figures.

### 1.3 Impact of Disruptive Technologies

The Portuguese real estate market is constantly evolving, notably due to the emergence of new technology tools. Blockchain, artificial intelligence and metaverse are some of the main technologies that will have a significant influence on the real estate market in the coming years.

In Portugal, proptech has already changed the way transactions are conducted. For instance, Portugal's land registry website allows market players to promote land registry acts online, to make electronic deposits of documents, to make payments, to make requests and to consult the land registry certificates, or even to notify public entities of the exercise of legal pre-emption rights in the sale of properties.

As of 4 April 2022, it will be possible to use videoconferencing to make authentic acts and finalise terms for the authentication of private documents and acknowledgements (ie, the deed of purchase and sale of property) (see **1.4 Proposals for Reform**).

Machine learning projects capable of automatically reading and analysing data and conducting due diligence exercises have been implemented in Portugal, and artificial intelligence capable of identifying suitable investment targets using algorithms and software to manage conditions precedent in large real estate and financing transactions in real time have also been used.

Smart contracting, through blockchain, is also becoming a reality. Real estate leases executed through a website or financing agreements that

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can automatically release liens when fully repaid are two of the many examples of the potential of this technology.

## 1.4 Proposals for Reform

The Portuguese government revised its Golden Visa programme by publishing Decree-Law No 14/2021, of 12 February. This new regime entered into force at the beginning of 2022 and excluded investments in the metropolitan areas of Lisbon and Porto from the scope of the regime, with a view to funnelling international investment to the lower density regions of the country.

Due to the increased demand for student accommodation, the Portuguese government created a legal regime for the installation and functioning of residences for higher education students (Decree-Law No 14/2022, of 13 January).

The Portuguese Securities Market Commission (CMVM) has recently made the draft of the new Asset Management Framework (AMF) available for public consultation, aiming to review and compile in the same statute the existing General Framework of Collective Investment Undertakings and the Legal Framework for Venture Capital, Social Entrepreneurship and Specialised Investment, which will have a particular impact on real estate funds. The key goals of this comprehensive and transversal review of the existing statutes applicable to the asset management sector are to simplify its regulation, turning it into a more effective and efficient regime capable of increasing the competitiveness of the Portuguese market and safeguarding investors. The statute is expected to enter into force by the end of 2022.

## 2. SALE AND PURCHASE

### 2.1 Categories of Property Rights

Apart from full ownership or freehold, there are other categories of property rights that can be acquired, such as:

- surface right (*direito de superfície*), which is the right to construct or maintain (permanently or temporarily) a building on land owned by another person or entity, or to plant and maintain crops on such land. When surface rights terminate, the owner of the land becomes the owner of the building incorporated in the land; or
- right of use (*usufruto*), which is the right to use (temporarily) the profits and the right to use and manage a property for which the title belongs to another entity.

### 2.2 Laws Applicable to Transfer of Title

The main legislation concerning real estate is the Civil Code, which is applicable to the transfer of any type of real estate (residential, industrial, offices, retail or hotels).

### 2.3 Effecting Lawful and Proper Transfer of Title

The purchase and sale of a property must be executed in writing, through either a public deed or a certified private agreement, and registered with the Property Registry in order to produce effects against third parties.

Title insurance is not common in Portugal. As Property Registry certificates are public, there is a legal presumption that the rights definitively registered in the Property Registry are correct, updated and true.

In answer to the growing demand for and use of online services (significantly boosted by the pandemic), Decree-Law No 126/2021, of 30 December, sets forth the legal regime applicable

to authentic acts, terms for the authentication of private documents and acknowledgements (ie, the deed of purchase and sale of property) by videoconference, simplifying such practices for foreign investors. The Decree-Law shall enter into force on 4 April 2022 and remain in force for a transitory period of two years, at which point the government will assess whether it should be definitively consolidated in the Portuguese legal framework. This regime covers acts executed by registrars and justice officials, as well as those executed by notaries, lawyers or solicitors. Provided that the formalities provided for in the Decree-Law are complied with, acts executed by videoconference will be given the same evidential force as acts executed in person.

## 2.4 Real Estate Due Diligence

It is usual for buyers to prepare complete checklists with the required documentation, through their legal and technical advisers. From a legal perspective, the main documents requested and reviewed are as follows:

- the land registry certificate;
- the tax registry certificate;
- the licence of use for buildings;
- the energy efficiency certificate, if applicable;
- the building specifications certificate, if applicable;
- proof of the payment of all taxes and charges related to the property;
- confirmation of non-exercise of pre-emption rights; and
- planning, zoning and environment documentation in the case of land for construction.

Buyers' approach to real estate due diligence has not significantly changed due to the COVID-19 pandemic. However, investors are more cautious regarding certain specific topics, such as force majeure and the revision of price clauses in construction agreements and break clauses in lease agreements.

## 2.5 Typical Representations and Warranties

The typical representations and warranties in real estate transaction are as follows:

- the capacity of the seller and buyer;
- ownership of the property;
- charges and encumbrances;
- pre-emption rights and other third party rights;
- planning and zoning;
- authorisations and licences;
- the rental status of the property;
- litigation;
- liabilities and taxes;
- defects and equipment;
- environment; and
- asbestos risks.

Due to the pandemic, investors are asking for specific representations and warranties regarding the following:

- existing rent-free periods and rent reductions agreed or requested by the lessees;
- any revision of prices underway in construction works (even where the parties have agreed on lump sum and non-revised prices); and
- any existing delays in construction works grounded on a change of circumstances or lack of materials.

A time to remedy is usually granted and, if no remedy is possible, an indemnity is paid by the seller to the buyer. In some cases, such an indemnity may be secured by a bank guarantee, a bond or an escrow account for a certain period of time.

Representation and warranty insurance is increasingly used in Portugal by professional investors, notably in share deals of a significant amount.

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## 2.6 Important Areas of Law for Investors

Real estate, urban and planning and tax law are the most important areas for an investor to consider when purchasing real estate.

## 2.7 Soil Pollution or Environmental Contamination

The owner of a polluted property is not liable for such pollution if they were 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 clean-up 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 an indemnity from the entities that were responsible for the pollution.

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

## 2.8 Permitted Uses of Real Estate under Zoning or Planning Law

The permitted uses of a parcel of real estate shall be assessed through the municipal land use plans, which contain the main regulations concerning the use of the land. There are three types of municipal plans:

- the municipal director plan (PDM);
- the urbanisation plan (*planos de urbanização*); and
- the detailed plan (*planos de pormenor*).

The size of a project, the timing for approval and the execution of relevant infrastructure may be subject to an agreement with the relevant municipality.

## 2.9 Condemnation, Expropriation or Compulsory Purchase

Several legal regimes establish the possibility of the 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.

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

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

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

## 2.10 Taxes Applicable to a Transaction

The purchase and sale of real estate is generally subject to both property transfer tax (IMT) and stamp duty (*Imposto do Selo*), which are payable by the purchaser. IMT is levied at the following progressive rates, applicable to the contract price or the property's tax value (*valor patrimonial tributário* – VPT), whichever is higher:

- between 0% and 7.5% (depending on the contract price/property's tax value) for urban property meant for housing purposes;
- 5% for rural property; and
- 6.5% for other types of property.



Stamp duty is levied at a rate of 0.8% on the same amount.

IMT may apply at an aggravated 10% rate if the acquirer is an entity that is resident in a black-listed jurisdiction for tax purposes (as per the list published in Decree No 150/2004 of February 13, as amended), or is controlled by an entity that is resident in a blacklisted territory.

IMT may apply to the sale of shares of a company – namely LDA companies (*sociedade por quotas*) or SA (*sociedade anónima*) – only to the extent that the following requirements are fulfilled:

- the company's value is derived, directly or indirectly, more than 50% from real estate located in Portugal, by reference to the balance sheet value, or, if higher, to the tax value of the real estate;
- such real estate assets are not allocated to an agricultural, industrial or commercial activity (not consisting of real estate buy and sell); and
- through that acquisition, by amortisation or any other actions, one of the partners becomes the holder of 75% or more of the share capital of the company, or the number of shareholders is reduced to two members, which are either married to each other or in a registered partnership, and considering that, in both cases, any shares owned by the company (ie, own shares) must be allocated to the shareholders in the proportion of their shareholdings for the purposes of such calculation.

If the above criteria are not fulfilled, IMT should not apply to the sale of shares of a Portuguese resident company.

Under Portuguese law, there are certain IMT exemptions on the purchase and sale of real estate, provided certain conditions are met, such

as the acquisition of properties (i) by real estate trading companies for the purpose of resale, (ii) for rehabilitation purposes, and (iii) under company restructuring operations.

## **2.11 Legal Restrictions on Foreign Investors**

There are no restrictions on the ownership of real estate by a non-resident or foreign investor; the treatment is the same. Tourism and activities declared to be of relevance to tourism under the applicable legislation may be granted tax incentives.

## **3. REAL ESTATE FINANCE**

### **3.1 Financing Acquisitions of Commercial Real Estate**

A facility agreement secured by a mortgage is the most common financing and security method for real estate projects in Portugal.

There are no specific restrictions regarding the maturity of a financing, but the maturity date should be determined.

Loan-to-value, interest-cover and debt-service cover ratio are terms customarily agreed on to set a tighter framework for a credit facility.

### **3.2 Typical Security Created by Commercial Investors**

Security usually associated with real estate financing includes:

- mortgage of property;
- assignment of revenues (*consignação de rendimentos*);
- pledge of shares/quotas;
- book debt/receivables/insurances – a pledge or an assignment by way of security can be granted over receivables;
- pledge of bank accounts;



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- pledge of intellectual property; and
- personal guarantee (*fiança*).

### 3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

As a general rule, no governmental or other consents are required for the provision of security. There are no restrictions on granting security over real estate to foreign lenders, nor on repayments being made to a foreign lender.

### 3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

Notarial fees and registration fees are due on the granting of security over real estate.

In general, the utilisation of credit by a Portuguese borrower is subject to stamp duty at variable rates according to the loan term, as follows:

- 0.04% per month if the loan term is shorter than one year;
- 0.5% if the loan term is equal to or greater than one year and shorter than five years; or
- 0.6% if the loan term is equal to or greater than five years.

Stamp duty should be calculated on the amount of the loan.

Stamp duty should also be charged on the granting of security, unless the latter may be considered as simultaneous and materially ancillary to a contract specifically taxed for stamp duty purposes (eg, the financing).

When applicable to security, stamp duty rates are the same as set out above for loans, and are calculated based on the secured amount.

### 3.5 Legal Requirements before an Entity Can Give Valid Security

The validity of the guarantees provided to secure third-party debt (including any group companies)

is subject to an assessment of whether or not the grantor of such a guarantee has a justified corporate interest in doing so. Corporate interest may be assumed from the existence of a group relationship between both companies (so long as both are Portuguese resident companies), but some doctrines argue that such an assumption only exists where the guarantee is granted by the holding company to the subsidiary. In the case of upstream guarantees or guarantees to sister companies, the corporate interest should be demonstrated on other grounds (a confirmation of this in the resolution approving the transaction may be considered sufficient, but please note that at the end of the day corporate interest is a factual matter).

Financial assistance is forbidden under Portuguese law, meaning that companies cannot grant loans or guarantees in order for a third party to acquire their shares.

### 3.6 Formalities when a Borrower Is in Default

To initiate enforcement proceedings, a creditor must hold an enforceable title (*título executivo*) and file an application against a debtor with the appropriate court competent for enforcement.

A mortgagee does not have the right to take possession of a property in the event of default of payment of the secured obligation, but only the right to a judicial sale of the property and to be paid from the proceeds of such sale.

In a judicial sale, the property will be sold free of any charges and encumbrances.

In relation to mortgages, the normal procedure is the enforcement of the security by means of seizure – ie, the judicial apprehension of an asset given as the guarantee of an obligation.

The seizure gives a creditor the right to be paid from the proceeds of the sale of such assets, with preference over other creditors, provided that there is no prior security in rem over the attached assets.

### **3.7 Subordinating Existing Debt to Newly Created Debt**

Under Portuguese law, it is possible for existing secured debt to become subordinated to newly created debt if a subordination agreement is made between parties.

### **3.8 Lenders' Liability under Environmental Laws**

The owner of a polluted property is not liable for such pollution if they were 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 clean-up 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 an indemnity from the entities that were responsible for the pollution.

### **3.9 Effects of a Borrower Becoming Insolvent**

Pursuant to the Portuguese Insolvency Code, certain common transactions can be terminated by an insolvency administrator without any condition and in relation to which evidence in contrary is not even admitted (unconditional termination). The most obvious applicable cases are as follows:

- the granting of security in rem by an insolvent company (such as the granting of mortgages, the pledge of shares or of bank accounts, etc) to secure pre-existing obligations or other obligations that replace the former, within the period of six months preceding the commencement of insolvency proceedings;

- personal guarantees granted by the insolvent, within the six months before the commencement of insolvency proceedings, in respect of businesses that are not of interest to the insolvent company;
- the granting of security in rem simultaneously with the creation of secured obligations, within the period of 60 days before the commencement of insolvency proceedings;
- payments or other acts aiming to discharge debts by the insolvent company whose due date would fall after the date of the commencement of insolvency proceedings, if the act is performed within the six months before the commencement of the insolvency proceedings (or after the commencement of the insolvency proceedings but before the due date); or
- the reimbursement of shareholders' loans within the period of one year immediately preceding the commencement of insolvency proceedings.

### **3.10 Consequences of LIBOR Index Expiry**

The key consequence for borrowers will mostly depend on whether the agreement already includes fall-back provisions, or if the new benchmark rate that is being developed will apply. The main mechanism that is being adopted to manage that risk is the inclusion of fall-back provisions in the agreement being entered into force.

## **4. PLANNING AND ZONING**

### **4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning**

In Portugal, there are several types of planning and zoning instruments, which vary depending on their purpose and reach.

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- “Programmes” are strategic and high-level instruments where a broad framework of the main guidelines for the territory is set. There is a national programme as well as sectorial programmes, special programmes and regional programmes. Governmental entities must uphold the principles and choices defined in the programmes in their decisions, and other territorial instruments must reflect and complement the programmes.
- “Plans” are detailed and execution-centred instruments that are directly binding for both public entities and private individuals. Plans have a local reach, and they can encompass either one municipality (municipal plans) or two or more neighbouring municipalities (intermunicipal plans).

The permitted uses of a real estate property are defined by the municipal plans, which by law must contain the main regulations concerning the use of the land and mirror all relevant programme guidelines for that territory.

Municipal plans are subdivided into three types:

- municipal director plans (*plano diretor municipal* or PDM);
- urbanisation plans (*planos de urbanização*); and
- detailed plans (*planos de pormenor*).

The size of a project, the timing for approval and the execution of relevant infrastructure may be subject to an agreement with the relevant municipality.

## **4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction**

The Legal Regime for Construction and Land Development is the basic legislation for the

construction of new buildings or other works in existing buildings, such as rehabilitation.

This legal regime provides for several controls:

- prior information;
- licence;
- prior communication; and
- use authorisation.

The prior information corresponds to a preliminary analysis of the feasibility of a given construction work. If the prior information is approved by the municipality, which is the competent authority to allow construction works, then a new procedure for construction must follow. Bear in mind that the prior information binds the municipality to approve the construction licence if that request is presented within one year of the approval of the prior information.

The licence is the default type of control for the construction of buildings or refurbishment works.

The prior communication is a statement presented to the municipality by the promoter of the construction works, and is applicable to situations in which the urban parameters for construction are already set out and all of the required opinions have been issued.

The use authorisation is a permit for the use of buildings or their parts, and for changes to that use. After construction work takes place, the authorisation for use is the permit that attests that the construction was carried out according to the licensed project or according to the project contained in the prior communication.

## **4.3 Regulatory Authorities**

Regulation of the development and use of plots of land is carried out by the municipalities in the urban and planning control proceedings. There-

fore, municipalities are the competent authorities to conduct the procedure and issue the relevant titles.

During proceedings, municipalities may consult other entities that have legal competence over the matter or location involved.

Applicable legislation includes the Legal Regime for Construction and Land Development and the territorial management instruments – ie, the municipal director plan (PDM), the urbanisation plan (*planos de urbanização*) and the detailed plan (*planos de pormenor*).

#### **4.4 Obtaining Entitlements to Develop a New Project**

The process for obtaining entitlements (licences or prior communications) to complete a refurbishment of a building depends on the specific location of the property.

The process to obtain an entitlement generally involves an assessment of the project, at first, which may be followed by public consultation if a project is regarded as having a relevant impact, and then a final decision.

Third parties have the right to participate, as follows:

- for the prior information procedure, consultations may be carried out and opinions may be requested from external entities, such as the Commission for Co-ordination and Regional Development (*Comissão de Coordenação e Desenvolvimento Region – CCDR*);
- for the licensing procedure, municipalities may open public consultations in which third parties may participate; and
- for the prior communication procedure, an investor must submit a prior communication with all of the opinions issued by the competent external entities. Please see **4.3**

**Regulatory Authorities** regarding the provisional legal regime for the simplification of procedures.

Private third parties may also intervene in the procedure since it is considered public information.

#### **4.5 Right of Appeal against an Authority's Decision**

If an application for permission to develop or carry on a designated use is rejected, an applicant may submit an administrative complaint, asking the author of the decision to review it, or submit a hierarchical appeal, asking the supervisor to review the decision. Alternatively, they can file a lawsuit challenging the legality of the decision and ask the courts to condemn the administration to adopt a lawful administrative decision. It is also possible to file an injunction in order to seek a preliminary remedy.

#### **4.6 Agreements with Local or Governmental Authorities**

The Legal Regime for Construction and Land Development provides for several types of contracts to facilitate the development of a certain project. Typical agreements include concession agreements, urban development agreements and planning agreements.

Planning agreements may be presented to municipalities by any interested parties with the purpose of preparing an urbanisation plan or a detailed plan, or facilitating its alteration, as well as its execution.

Major refurbishment operations carried out by municipalities may also be conducted through partnerships with private entities. In this case, rehabilitation concession agreements and urban refurbishment agreements may be executed.

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## 4.7 Enforcement of Restrictions on Development and Designated Use

It is possible for a municipality to carry out coercive works in a property if the owner fails to comply with the municipality's instructions and deadlines for such works.

The municipality may also carry out inspections and supervision actions in relation to the works performed.

Also, if urban planning operations are carried out irregularly, the municipality may implement the following measures:

- embargo of works or refurbishment of land;
- administrative suspension of the licence or authorisation;
- an order to perform corrections or changes to the works or legalisation of urban operations;
- an order for the demolition of works;
- re-establishment of the land in the conditions prior to the works; and/or
- an order to terminate the use of the building in question.

## 5. INVESTMENT VEHICLES

### 5.1 Types of Entities Available to Investors to Hold Real Estate Assets

The main vehicles used to invest in real estate assets are private limited companies (LDA), public limited companies (SA) and Collective Investment Real Estate Undertakings (OIC) (investment funds or investment companies).

### 5.2 Main Features of the Constitution of Each Type of Entity

#### Commercial Companies

##### *SA companies*

The SA is a company limited by shares, meaning that its capital is divided into shares and that the

shareholders' liability for the company's debts is limited to the amount of their investment.

The share capital may result from contributions in cash or in kind (labour and the provision of services are not allowed). Shares may be represented by share certificates or kept in book-entry form, having a minimum nominal value of EUR1.

Shares in an SA are freely transferable, except when the company's articles of association provide for restrictions on their transferability. These restrictions may consist of a pre-emption right in favour of the remaining shareholders. The shares are transferred by the owner's written declaration addressed to the keeper of the SA's share registry.

As a general rule, an SA must be incorporated by a minimum of five shareholders, although it is possible to incorporate an SA with a single shareholder when such single shareholder is a company.

##### *LDA companies*

The LDA is a company limited by quotas, meaning that its share capital is divided into equity participations (quotas) that cannot be represented by transferable certificates nor kept in book-entry form. Quota holders are jointly and severally liable for paying up the company's entire quota capital. The share capital may result from contributions in cash or in kind (labour and the provision of services are not allowed). 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. An LDA may be incorporated either by a minimum of two equity holders or by a single equity holder (either an individual or a company).

**Collective Investment Real Estate Undertakings***Real estate funds (REFs)*

REFs can be open, closed or special. Open-ended funds are incorporated by public subscription, while close-ended funds are incorporated by private subscription. The funds are represented by participation units with the same nominal value and held by the participants. The incorporation of the funds requires the consent of the Securities Commission. The funds have no legal capacity and need to be represented by a managing company. The incorporation of the managing companies requires the authorisation of the Bank of Portugal and the Securities Commission. The participation unities must be deposited with a financial institution with a head office or branch in Portugal.

**Real Estate Companies**

Real estate companies need to be public limited companies (SA), and can have a fixed share capital (SICAFI) or variable share capital (SICAVI). Real estate companies can be self-managed or managed by a management company or any other financial institution. The incorporation of a real estate company is subject to the authorisation of the Securities Commission.

*Real estate investment and management companies (SIGIs)*

SIGIs shall be incorporated as a public limited company, with or without public subscription, and adopt the supervisory model corresponding to a supervisory board and a statutory auditor.

**5.3 Minimum Capital Requirement**

An SA must be incorporated with a minimum share capital of EUR50,000.

LDA companies do not have a minimum amount of capital (the quota holders may freely stipulate the amount of an LDA share capital, with

the minimum nominal value of each quota being equal to EUR1).

SIGIs shall have a minimum paid-up share capital of EUR5 million.

**5.4 Applicable Governance Requirements****SA Companies**

The most common management and supervisory structure of SA companies includes a board of directors and an internal auditing board or an internal single auditor.

Two other structures are also admissible:

- a supervisory board and an executive board of directors (and a certified chartered accountant); or
- a board of directors comprising an audit commission and a certified chartered accountant.

The management of an SA may be delegated to a single manager if the company's capital stock is equal to or less than EUR200,000.

Directors are not legally required to be shareholders. Corporate shareholders can be appointed directors, but must appoint an individual to perform such duties. At least one of the members of the internal auditing board or the internal auditor (as applicable) must be a certified chartered accountant. A secretary and a deputy secretary may be appointed in SAs.

The board of directors of an SA is legally required to meet at least once a month, unless the company's by-laws establish a different period for their meetings. Meetings may take place anywhere that the directors find most convenient, or via electronic means or by video conference. Minutes of board meetings must be recorded in a book of minutes and signed by all those present.



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The annual accounts must be approved by the shareholders at the annual general meeting, and an electronic declaration for tax purposes must be submitted.

## LDA Companies

An LDA may be managed either by a single manager or by a managers' board. The managers must be individuals and are not legally required to be quota holders. An LDA must appoint either an internal auditor or an internal auditing board if it surpasses at least two of the following three thresholds during two consecutive fiscal years:

- the total amount of the LDA's assets exceeds EUR1.5 million;
- the total amount of the LDA's net sales exceeds EUR3 million; and/or
- the average number of the LDA's employees exceeds 50.

At least one of the members of the internal auditing board or the internal auditor (as applicable) must be a certified chartered accountant.

The annual accounts must be approved by the quota holders at the annual general meeting. The submission of an electronic declaration for tax purposes is also required.

## Real Estate Funds and Real Estate Companies

Except for self-managed companies, REFs and real estate companies do not have legal capacity and are managed by management companies.

## 5.5 Annual Entity Maintenance and Accounting Compliance

There are no significant annual maintenance and accounting compliance costs for commercial companies, other than the fees due to a company's accountant and auditor (as agreed between the parties) and the fees charged for the submission

of the annual approval of accounts (roughly EUR85). REFs and companies pay fees to:

- the Securities Commission for incorporation;
- the management company (except self-managed investment companies);
- the depositary bank; and
- advisers.

## 6. COMMERCIAL LEASES

### 6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Lease agreements, contracts for the use of shops in commercial centres, retail parks or outlets and commodatum agreements (ie, a lease agreement free of charge) are agreements that allow a person, company or other organisation to occupy and use real estate for a limited period of time without buying the property.

### 6.2 Types of Commercial Leases

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

### 6.3 Regulation of Rents or Lease Terms

Rents and some of the lease regimes for commercial leases are freely regulated between the parties. Conversely, there is a mandatory regime for lease agreements for residential purposes.

On account of COVID-19, the Portuguese government enacted legislation that determined the suspension of effects of the termination, revocation, opposition to renewal and expiration of residential and non-residential lease agreements by landlords. The effects of the execution of primary housing mortgages were also suspended. These measures expired on 30 June 2021, so it is once again possible for landlords to evict



lessees whose contracts have expired or who are not paying their rents. Also, banks can now proceed with the execution of mortgages.

#### **6.4 Typical Terms of a Lease**

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

##### **Length of Lease Term**

A lease can have a fixed term or a non-fixed term. The usual choice is a lease agreement with a fixed term of between one and five years (the legal minimum limit is one year and the legal maximum limit is 30 years).

##### **Maintenance and Repair**

Regarding the maintenance and repair of occupied real estate, a tenant is entitled to keep a leased area in good condition and to make any ordinary repairs. Structural work costs should be borne by the landlord.

##### **Rent Payments**

Rent is usually paid monthly and is due on the first working day of the preceding month.

##### **COVID-19 and Force Majeure**

The parties to a lease agreement are free to define which events constitute force majeure, so no single or unique definition can be provided. However, force majeure can be classified as any unforeseeable or unavoidable situation, the effects of which arise independent of the parties' will or personal circumstances, such as acts of war or subversion, epidemics or pandemics, cyclones, earthquakes, fire, lightning, floods, general or sectoral strikes, or other unavoidable circumstances, in accordance with criteria of reasonability.

The inclusion of COVID-19 provisions has been prominent in large-scale real estate transactions, but less common in lease agreements.

#### **6.5 Rent Variation**

Parties to a lease agreement can freely agree on how rent will be increased for as long as a lease agreement lasts.

#### **6.6 Determination of New Rent**

Generally, rent is subject to annual increases by the application of a coefficient established every year by the government.

#### **6.7 Payment of VAT**

Generally, lease agreements are exempt from VAT, but this exemption may be waived if the necessary conditions are met.

#### **6.8 Costs Payable by a Tenant at the Start of a Lease**

At the beginning of a lease agreement, one monthly rent payment is required, and parties may agree on the payment of up to three monthly rents in advance as a security deposit.

#### **6.9 Payment of Maintenance and Repair**

The maintenance and repair of areas used by several tenants – eg, parking lots or gardens (condominium costs) – are generally agreed upon between the parties, with the costs being borne by each tenant in proportion to the area occupied by each of them. Service charges are generally based on the area of the property leased to each tenant in proportion to the area of the whole building. If no provision is made by the parties, the landlord must bear these costs.

#### **6.10 Payment of Utilities and Telecommunications**

Generally, utility bills and telecommunications are borne by each tenant in proportion to the area they occupy. These types of matters are stipulated between the parties.

#### **6.11 Insurance Issues**

Only properties that are subject to the horizontal property regime must be covered by a manda-

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tory insurance policy covering the risk of fire. There is no legal provision imposing the costs of any insurance obligation on any of the parties. However, in this type of insurance, the insurance premium is usually paid by a tenant due to contractual undertaking. In a commercial lease agreement, landlords usually impose that the insurance policy undertaken by the tenant must cover damages caused by natural and human causes. Whenever the value of the real estate so justifies, the landlord may request further insurance coverage, such as for damage caused by terrorism or sabotage.

There is no publicly available information on whether payments were made under business interruption insurance policies for rents and other costs in the context of the COVID-19 pandemic, although the reports from the Portuguese insurance regulatory authority did not reference any abnormal or unexpected claim activity in respect of this sub-branch of non-life insurance. However, this type of insurance and/or coverage is not very common in Portugal, and usually concerns only business interruption due to damage to property and not related to external factors, such as a pandemic. Therefore, the coverage of rents and other costs in the context of the pandemic will have depended ultimately on the wording of the insurance policy and on a case-by-case assessment.

## **6.12 Restrictions on the Use of Real Estate**

A landlord may impose some rules and restrictions on the use of a leased property, such as restrictions concerning alterations made to the property, the assignment or sublease of the property, and the type of use of the leased property. The law foresees that the tenant must use the property by respecting its licence of use.

## **6.13 Tenant's Ability to Alter and Improve Real Estate**

Generally, the parties agree on the conditions under which the tenant may alter or improve real estate – primarily, it is established that the tenant shall not carry out any works on the leased property without the prior written consent of the landlord. Repair works mean all ordinary repairs, maintenance and works and, in general, any reconditioning or replacements necessary to repair and maintain the property in good conservation status. The tenant is responsible for the execution of the repair work, directly or through third parties, and for the planning, procurement and management thereof. It is common for all works performed by the tenant to become an integral part of the property or, upon a landlord request, to be removed and the property returned in the same condition as it was on the delivery date, save for deterioration caused by normal wear and tear.

## **6.14 Specific Regulations**

The urban lease regime is established in the Portuguese Civil Code in accordance with the provisions approved by Law No 6/2006, of 27 February 2006 (as amended), and applies to both lease agreements for residential purposes and lease agreements for non-residential purposes.

The exceptional rent moratorium regime introduced by Law No 4-C/2020 of 6 April 2020 applies different solutions, based on the type of lease agreement at stake.

### **Residential Lease Agreements**

In order to benefit from this moratorium, tenants of residential lease agreements must fulfil one of two conditions:

- the rent must represent a household effort rate higher than 30%; or
- the tenant must have suffered a shortfall of 20% of their household income in relation to

(i) the income of the previous month, (ii) the same period of the last year or (iii) the month of February 2020.

### **Non-residential Lease Agreements**

With regard to non-residential leases, the following rents may be subject to deferral:

- rents due during the state of emergency and the month thereafter;
- rents due during the months where the establishments were forced to close under legal or administrative measures; and
- rents due in the three months following the imposition of the closure of the establishments or the suspension of its activity being lifted.

The repayment period of these rents begins on 1 January 2021 and lasts until 31 December 2022. Repayment is to be made in 24 successive instalments, paid together with the rent of the month at the time.

### **Closed Establishments**

A special regime was enacted by reference to the tenants whose establishments were closed in March 2020 and remained closed until 1 January 2021. In these cases, the period for settlement of the rents due in 2020 starts on 1 January 2022 and continues until 31 December 2023. Rents due in 2021 could also have been deferred if requested by the tenant, until 20 January 2021.

### **Use of Shop Agreements in Shopping Centres**

The fixed or minimum monthly rent due from the tenants was lowered in proportion to the reduction in monthly invoicing, up to 50% of the value of the monthly turnover, when those establishments had a drop in monthly sales volume compared to the sales volume of the same month in 2019 or, in its absence, to the average sales volume of the last six months prior to the enact-

ment of Presidential Decree No 14-A/2020, of 18 March, which declared the first emergency state in Portugal, or a shorter period, if applicable. This measure expired on 30 June 2021.

### **6.15 Effect of the Tenant's Insolvency**

Lease agreements (in which the insolvent party is the tenant) are not suspended upon an insolvency declaration. The insolvency administrator may terminate a lease agreement at any time, provided that 60 days' notice is given. Nevertheless, a landlord cannot request termination of a lease agreement after an insolvency declaration based on a delay in the payment of rent related to the period before the insolvency declaration, or for the economic deterioration of the tenant.

### **6.16 Forms of Security to Protect against a Failure of the Tenant to Meet Its Obligations**

A landlord can protect themselves against a tenant's failure to meet its obligations by requesting some securities, such as a rent deposit, a bank guarantee or a guarantor (*fiador*).

### **6.17 Right to Occupy after Termination or Expiry of a Lease**

A tenant is not entitled to occupy a property after the expiration or termination of a commercial lease. In order to prevent default, the landlord may foresee a contractual clause in which a fine is applicable for each day of delay until the delivery of the property. If the tenant continues to occupy the property, the landlord can proceed with an eviction procedure.

### **6.18 Right to Assign a Leasehold Interest**

Both the assignment of the leasehold interest and the sublease of all or a portion of the leased premises by the tenant are subject to the authorisation of the landlord.

## 6.19 Right to Terminate a Lease

The events that typically give a landlord and tenant the right to terminate a lease agreement are related to the default of the other party, such as the non-payment of rent or costs and expenses for more than three months, or late payment of more than eight days, more than four times in a row, or four times in a period of 12 months.

## 6.20 Registration Requirements

In general, lease agreements do not need to follow any particular execution formalities and do not have to be recorded in the Land Record.

Only lease agreements entered into for a period longer than six years must be recorded in the Land Record, in which case a fee of approximately EUR250 is due from the tenant.

## 6.21 Forced Eviction

In the event of default prior to the date originally agreed, a tenant can be forced to leave (ie, be evicted). There is a special eviction proceeding with the aim of expediting the eviction of a tenant of a leased property, which may be used in cases where the lease agreement can be terminated by judicial means, as long as the stamp tax has been paid. This procedure takes place on the *Balcão Nacional do Arrendamento*. Through this proceeding, in addition to requiring the vacation of the leased property, the landlord may also request the payment of cumulative rents, costs and expenses that are deemed the responsibility of the tenant. This process has been reported as being quicker than the judicial process, although several delays have still been verified. The estimated duration of the process is two years.

According to Law No 1-A/2020 of 19 March 2020 (as amended), all eviction actions, special eviction proceedings and return of leased property procedures are suspended when the tenant would be placed in a situation of fragility due to lack of own housing, in light of a final judicial

decision to be delivered. This suspension lasts throughout the validity of all COVID-19-related prevention, containment and mitigation measures.

## 6.22 Termination by a Third Party

If a tenant is opposed to urgent works (namely remodelling or restoration) required by any public authority from the landlord, the law foresees the possibility of the landlord terminating the lease agreement. Within six months, the tenant still has the possibility to cease any opposition by accepting the works, in which case the termination of the lease agreement is no longer valid.

Upon notice being given to the tenant, the landlord is obliged to pay the tenant compensation in an amount corresponding to one year's rent or, alternatively, to ensure a house is available to the tenant in the same municipality or in a surrounding municipality, in similar conditions of location, rent and expenses.

This process may take approximately six months to one year.

## 7. CONSTRUCTION

### 7.1 Common Structures Used to Price Construction Projects

The most common structure used to price construction projects is fixed price, according to which an owner/employer agrees with a contractor on a total and fixed price for the entire project. A detailed description of the works is set forth in the agreement, and any required preparatory and accessory works are deemed to be included in the scope of work. Since the price is fixed and non-revisable, it cannot change due to increases in costs of workforce, materials, equipment or inflation in general. Any additional works and respective costs must be expressly approved by the owner/employer.

## **7.2 Assigning Responsibility for the Design and Construction of a Project**

Typically, a constructor is liable towards an employer for any defects of the construction. In fact, it is common to include a guarantee of “fitness for purpose” in the construction agreement, meaning that the contractor will be strictly liable towards the employer for any defect. However, the responsibility of the contractor will be excluded if they are able to prove that the defects are due to an error of design. In this case, the constructor may then request to be reimbursed by the designer for the costs they bore correcting such defects. Pursuant to Portuguese law, the request for the licensing of construction works shall include a declaration from designers stating that they complied with all technical and construction rules in force.

## **7.3 Management of Construction Risk**

Construction risks on a project may be managed through clauses on limitation of liability. However, it should be noted that liability cannot be completely excluded by the parties. In fact, pursuant to Portuguese law, clauses whereby a creditor waives in advance its rights to compensation by reason of default or late performance by a debtor are deemed null and void. Also, in general, contractual clauses directly or indirectly excluding liability in cases of serious default or wilful misconduct are seen as abusive. Under their contractual autonomy, private parties are allowed to negotiate remedies for breach of contractual obligation, notably through limitation of liability clauses or liquidated damages clauses.

As regards warranty for defects, under the Portuguese Civil Code construction works pertaining to immovable property intended for long-term use are covered by a statutory five-year warranty period. Nevertheless, the Civil Code allows the parties to agree to extend the five-year warranty period based on the principle of freedom of contract, pursuant to which entities are free to agree

on the terms of the contracts they enter into. Conversely, it is disputable whether the parties may agree to reduce the statutory five-year warranty period based on their contractual freedom.

## **7.4 Management of Schedule-Related Risk**

Usually, parties agree on a schedule for completing construction works, which includes a final date for completion of the entire project as well as monthly milestones for the completion of each construction stage. The payment of an instalment of the price is linked to each construction milestone, meaning that the employer may withhold the respective payment (or part of it, in proportion to the portion of the works not completed) and/or be entitled to monetary compensation for each day/week of delay if such a milestone is not achieved within the agreed completion date.

For such a purpose, the contractor should prepare monthly progress reports and submit them to the owner. The owner should then inspect the works and, if acceptable, proceed with making the corresponding payment to the contractor.

## **7.5 Additional Forms of Security to Guarantee a Contractor's Performance**

It is common for owners to seek several forms of security from a contractor, such as contractors' parent company guarantees and comfort letters, letters of credit, and bank guarantees on first demand. Additionally, owners require contractors to have works insurance and insurance against injury to persons and damage to property.

## **7.6 Liens or Encumbrances in the Event of Non-payment**

Contractors and/or designers are not permitted to lien or otherwise encumber a property in the event of non-payment. In cases of non-payment, they may execute the guarantees put in place (ie,

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bank guarantees) or resort to asking the courts for compensation for their damages.

## 7.7 Requirements before Use or Inhabitation

In general, buildings are subject to a municipal licence known as a licence of use (*licença de utilização*). Without this licence, no property may be sold (except in specific cases provided for by law under which such properties are exempt from the requirement for a licence of use).

## 8. TAX

### 8.1 VAT

In general, the sale of real estate located in Portugal is subject to property transfer tax and stamp duty, and exempt from VAT, unless the vendor waives the exemption (provided certain requirements are met). If VAT applies to the sale of real estate property, stamp duty should not apply.

### 8.2 Mitigation of Tax Liability

Normally, large real estate portfolios may be structured as share deals to mitigate the application of property transfer tax.

Since 1 January 2021, the transfer of more than 75% of the equity of a Portuguese company may trigger IMT. An IMT exemption may apply, depending on the characteristics of the real estate portfolio and its weight on the company's balance sheet, and depending also on the number of buyers, to be analysed on a case-by-case basis.

Likewise, the acquisition of participation units in privately placed, closed-ended real estate investment funds is subject to IMT, regardless of the location of the management company, and the redemption of participation units or the increase or reduction of the share capital, as a

result of which one of the holders, or two holders who are married or in a registered partnership, hold at least 75% of the participation units representative of the investment fund's patrimony.

Generally, collective investment undertakings are subject to corporate income tax but they benefit from an advantageous regime. Investment income, capital gains and rental income are not included in their taxable income, except when such income is derived from offshore entities. Additionally, such entities are exempt from state and municipal surcharges (*derrama estadual* and *derrama municipal*).

Furthermore, collective investment undertakings are subject to stamp duty at a 0.0125% rate on their net asset value, payable quarterly.

### 8.3 Municipal Taxes

Municipal property tax is levied annually on the patrimonial value of both urban and rural immovable property, payable by the respective owner or person entitled to the use or fruition on 31 December of any given year. Municipal property tax is usually payable in three instalments, in May, August and November.

The general tax rates vary between 0.3% and 0.45% of the tax value for urban immovable property and are set at 0.8% for rural immovable property. If the taxable person is resident in a blacklisted jurisdiction for tax purposes (as per the list published in Decree No 150/2004 of February 13, as amended), or is an entity that is controlled by an entity resident in a blacklisted territory, an aggravated 7.5% tax rate should apply.

Moreover, individuals, companies and structures or collective bodies without autonomous legal personality and undivided inheritances may be liable to Additional Municipal Property Tax (AIMI) if they are owners or usufructuaries or have the



surface right over urban properties located in Portugal.

For AIMI purposes, the tax is calculated on the sum of urban properties that are not classified as “commercial, industrial or for services” or as “others”, with reference to 1 January of each year, multiplied by the applicable rate, as follows:

- individuals and undivided inheritances: 0.7%;
- companies: 0.4%; and
- legal entities resident in a blacklisted jurisdiction: 7.5%.

In the case of individuals, a tax rate of 1% should apply to the taxable amount between EUR1 million and EUR2 million, and a tax rate of 1.5% should apply to the taxable amount that exceeds EUR2 million.

Moreover, as a general rule, individuals and undivided inheritances may benefit from a deduction of EUR600,000 of their taxable base. Taxpayers who are married or in a registered partnership and opt to be jointly taxed for AIMI purposes have the right to a joint deduction amounting to EUR1.2 million, which is applicable to the sum of the VPT of all their qualifying urban properties. Additionally, in this scenario, the brackets to which the increased marginal rates of 1% and 1.5% are applied are doubled.

## **8.4 Income Tax Withholding for Foreign Investors**

### **Rental Income: Non-Residents**

Foreign investors, either resident or non-resident, are subject to withholding tax on rental income at a rate of 25% if the lessee is a legal entity or an individual that has organised accounting obligations.

Final taxation of non-resident investors shall apply at a rate of 25% of corporate income tax

for legal entities, and at an autonomous rate of 28% for individuals.

### **Rental Income: Residents**

In the case of resident individual taxpayers, tax withheld at a rate of 28% is to be considered as a payment on account of the final tax due (when such income is not taxable according to the rules applicable to individual business income, in which case different rules apply). Certain long-term rental contracts may benefit from reduced tax rates (up to 10% reduced tax rate in the case of rental contracts with a term equal to or greater than 20 years).

Resident individuals may choose to aggregate the aforementioned rental income in their taxable income, in which case such income will be subject to tax at progressive rates of up to 48%. Moreover, a solidarity surtax may apply at a rate of 2.5% on the taxable income exceeding EUR80,000 and at 5% on taxable income exceeding EUR250,000.

As for legal entities subject to corporate income tax, tax should be withheld on rental income at a 25% tax rate, on account of final tax due.

The general corporate income tax rate amounts to 21%. A municipal surcharge of up to 1.5% may apply. A state surcharge may also apply, at the following rates:

- 3% on taxable profit between EUR1.5 million and EUR7.5 million;
- 5% on taxable profits between EUR7.5 million and EUR35 million; and
- 9% on taxable profits in excess of EUR35 million.

### **Capital Gains: Non-residents**

Generally, capital gains realised by non-resident legal entities on the sale of real estate are subject to corporate income tax at a rate of 25%, and



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non-resident individuals are subject to tax at a rate of 28%. Tax is assessed upon the submission of an annual tax return.

Capital gains realised by non-resident legal entities on the sale of shares of Portuguese companies may be exempt from tax under domestic law, provided that the assets held by the company whose shares are being sold are not composed, by more than 50%, of real estate located in Portugal, or that such entity does not hold, as a controlling entity (as defined in Portuguese corporate law), participations in the share capital of controlled entities whose assets are composed, by more than 50%, of real estate located therein. Certain exemptions may apply in the terms set forth by double tax treaties, if applicable.

### **Capital Gains: Residents**

Capital gains obtained by resident individuals on the sale of real estate are only taxed on 50% of the gain, and subject to the progressive rates mentioned above. Exemptions are available in the case of proceeds derived from the sale of family housing when reinvested for family housing purposes.

Capital gains realised on the sale of real estate by resident entities subject to corporate income tax should be taxed at the general rates and subject to municipal surcharges and state surcharges, in the terms described above. If the capital gain is reinvested in tangible fixed assets, intangible assets or non-consumable biological assets, only 50% of its value is taxed if the reinvestment is made before the end of the second year after the sale.

Capital gains realised by a resident entity on the sale of shares of Portuguese subsidiaries may be exempt from corporate income tax under the participation exemption regime, provided that, namely, the shares have been held for a minimum period of one year before disposal, and that the value of real estate located in Portugal does not represent, directly or indirectly, more than 50% of the company's assets, unless such assets are allocated to an agricultural, industrial or commercial activity that does not consist of the purchase and sale of real estate.

### **8.5 Tax Benefits**

The ownership of real estate by legal entities allows the recognition of tax-deductible depreciation according to the assets' expected useful life. The acceptable depreciation rates, for corporate income tax purposes, are limited by the applicable tax law.

Several tax benefits are available under IMT and municipal property tax legislation, to be analysed on a case-by-case basis.

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**Morais Leitão, Galvão Teles, Soares da Silva & Associados** is a leading full-service law firm in Portugal, with decades of experience. It is well recognised for its expertise and excellence in several branches and sectors of the law, on both a national and international level. The firm combines its unique technical expertise with a distinctive approach, and provides cutting-edge solutions that often challenge some of the most conventional practices. With a team of

more than 250 lawyers, Morais Leitão is headquartered in Lisbon and has additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Cabo Verde (VPQ Advogados) and Mozambique (MDR Advogados).

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