

## Real Estate - Portugal

### Real estate law – key concepts

Contributed by **Morais Leitão, Galvão Teles, Soares da Silva & Associados**

July 10 2015

[Legal framework](#)  
[Foreign investment](#)  
[Structuring investment](#)  
[Real estate ownership](#)  
[Leases](#)  
[Developments in practice](#)

Author

Filipa Arantes Pedroso



#### Legal framework

##### **Ownership of real estate**

The definition of 'property' in Portugal follows that in other continental legal systems based on civil law and the French Civil Code, encompassing not only freehold, but also other rights of guarantee and acquisition. Therefore, the definition includes full possession and its exclusive use and disposition. There are no trusts, except in the free zone of Madeira, where it is possible to incorporate a trust.<sup>(1)</sup> A person can also own the title to a property while another person has the right to temporarily take the profits and the right to use and manage the property.<sup>(2)</sup> Further, a person can construct or maintain (permanently or temporarily) a building on land owned by another person, or plant and maintain crops on that land.<sup>(3)</sup> A property may be owned by one or more persons (common property)<sup>(4)</sup> and buildings can be divided into segments (eg, floors), which in Portugal is called a 'horizontal property'.<sup>(5)</sup>

##### **Registration system**

The purchase and sale of a property (arable land and plots of land or buildings) must be executed by a notary or a lawyer, or the commercial and industrial office or registry officers. Certain documents are required for the purchase and sale of a property - notably, a licence for use in the case of a building or a construction licence. These documents are issued by the municipality in which the relevant property is located.

The purchase and sale of property must be registered with the Property Registry to have effect against third parties; the Property Registry is part of the Portuguese state. Registration is compulsory with regard to any facts that create, recognise, acquire or modify any real estate rights. The right that is registered first prevails over any subsequently registered rights.

##### **Choice of law**

The law applicable to possession, title to property and other real estate rights is defined by the state in which the property is located.<sup>(6)</sup> Therefore, Portuguese law applies to the creation, recognition, acquisition or modification of any real estate rights in Portugal.

In indirect acquisitions of real estate, share deals, share purchase and sale agreements may be subject to any other law that has a connection with the persons or companies involved. However, if the company or special purpose vehicle is a Portuguese entity, Portuguese rules on the sale of shares or of any other participation such as quotas (ie, participation in a company not represented by shares, but registered at the Commercial Registry) or units in real estate investment funds must be complied with.

#### Foreign investment

There are no restrictions on the ownership of real estate by non-resident or foreign investors, which means that they are treated the same as Portuguese nationals or residents. Tourism and activities declared to be of relevance to tourism under the applicable legislation may be granted tax incentives. Companies established in Portugal may be entitled to a special investment support regime - notably, exemptions from property transfer tax (IMT) and stamp duty on the acquisition of land and property if considered to be of national interest.

#### Structuring investment

Real estate can be acquired directly in an asset deal or indirectly in a share deal. The asset deal is subject to IMT and stamp duty. Value added tax (VAT) is not applicable. However, if certain conditions are met, the owner may renounce the applicable VAT exemption, allowing the seller to deduct the VAT

paid during construction or any other VAT applied in the course of business.

The most popular investment vehicles for share deals are commercial companies – a public limited liability company or a private limited liability company. Other common investment vehicles are the real estate investment fund and the real estate investment company.

In the case of commercial companies, if the real estate is already owned by the company, the aforementioned transfer taxes (IMT and stamp duty) do not apply when the company is sold. However, if the company is a quota company (ie, a private limited liability company), the transfer taxes apply if the company has only one shareholder or if one of the shareholders holds more than 75%. Income from real estate is subject to general corporate income tax if the property belongs to a company at a rate of 21%, or 17% on the first €15,000 in the case of small or medium-sized enterprises, to which a municipal surcharge of up to 1.5% of its taxable income may be added.

If the property is owned by a person, income from the property can be included in the overall income of that person and be subject to the applicable progressive tax rate, which ranges from 14.5% to 48%, or be subject to a tax rate of 28%.

Real estate investment funds can be open or closed end, depending on whether they are incorporated by public or private subscription. Real estate investment funds have no legal capacity and therefore are managed by management companies or credit institutions. The incorporation of a management company requires the authorisation of the Bank of Portugal; the incorporation of a real estate investment fund needs authorisation from the Securities Market Commission and the fund is then subject to its supervision. Real estate investment companies have legal capacity and can have variable capital, with a similar regime to the open-ended real estate investment fund, or fixed capital, which has the same regime as a closed-end real estate investment fund.

## **Real estate ownership**

### ***Planning***

Portuguese planning and licensing legislation is largely contained in the Basic Law of Political Planning of the Territory and Urbanism, the legal regime applicable to territorial management instruments and the legal regime for licensing and development, known as the RJUE.<sup>(7)</sup> Municipalities play an important role in planning and licensing real estate projects. Planning in Portugal is carried out in accordance with previous options contained in plans. Therefore, in the development of a real estate project, it is important to analyse the applicable rules on territorial management - notably, special plans and municipal plans.

The rules for licensing a real estate project are contained in the RJUE and aim to confirm whether the project complies with the applicable law. Municipalities are responsible for licensing projects, but other entities also need to be consulted and in certain cases their opinions are binding (eg, the Tourism Authority for tourism projects). Where construction is completed, a licence must be obtained confirming that it was concluded in accordance with the approved design and terms of the construction licence. This user licence certifies that the relevant building or section can be put to use. Tourism projects also need to comply with the legal regime for the installation, operation and functioning of tourism projects.

Certain commercial retail establishments and groups of establishments that have commercial spaces above certain thresholds (2,000, 3,000 or 8,000 square metres) require special licences, generally called commercial licences.

### ***Environment***

The Environmental Liability Law, based on the 'polluter pays' principle, establishes that if any damage to the environment occurs or there is a threat of damage due to private or public economic activity, the entity responsible must take the necessary measures to repair the damage or prevent additional damage (administrative liability) and will also repair any damage suffered by the individuals affected by such activities (civil liability).<sup>(8)</sup>

Criminal liability can arise from damage to the environment such as contamination of soil, which is considered a criminal offence punishable by up to three years' imprisonment or a fine equivalent to 600 days' imprisonment according to the Criminal Code.

### ***Tax***

The acquisition of real estate is subject to IMT at a rate of:

- 6.5% on the price or tax value – whichever is higher – of urban property (buildings and land for construction); or
- 5% on the price or patrimonial value – whichever is higher – of rural property (arable land).

The acquisition of property is also subject to stamp duty at the rate of 0.8% on the price or patrimonial value, whichever is higher.

Properties are also subject to municipal property tax, which is paid in instalments every year in April, July and November at a rate of between 0.5% and 0.8% for urban properties that were not evaluated in accordance with the municipal property tax code, and between 0.3% and 0.5% if the property was evaluated in accordance with the municipal property tax code.<sup>(9)</sup> Rural properties are subject to a tax rate of 0.8%. For properties owned by certain offshore entities listed in the applicable law, municipal property tax is payable at a rate of 10%.

## **Finance and security**

A loan agreement secured by a mortgage is the most common method of financing and providing security for real estate projects in Portugal. A mortgage grants the creditor the right to be paid a certain amount with priority over other creditors without any special privilege. The mortgage is created by an authenticated private document or a deed executed by a notary public. The mortgage must be registered at the Property Registry to be effective.

Other security, such as a pledge, is also common and is usually required in addition to the mortgage by the financing party. If the property is owned by a company, there is a pledge of shares or quotas, which must be registered at the Companies Registry. The requirements for a pledge of shares depend on the type of shares (ie, bearer, nominative or book entry shares). A pledge of credit rights such as leases, bank accounts, insurance policies or construction contracts is also common. The creditor will usually require a pledge over the credit rights to which the debtor is entitled and which represent the main revenue of the project being financed. In certain conditions the pledge can be qualified as a financial pledge. Personal security is also usually required by the financing party to the shareholders or parent company of the company that owns the property.

Financing and security granted in Portugal or to Portuguese companies is subject to stamp duty on the amount of financing or the maximum amount secured. If security is an accessory to a finance agreement and granted simultaneously, the security is not subject to stamp duty, meaning that stamp duty applies only to the amount of financing. Stamp duty rates on financing or security are charged at:

- 0.4% if for less than one year;
- 0.5% if for between one and five years; and
- 0.6% if for longer than five years.

## **Leases**

Following the enactment of the new urban lease regime,<sup>(10)</sup> two reforms entered into force on November 12 2012 and December 19 2014.<sup>(11)</sup> Lease agreements must now be executed in writing. If a property is sold, the leases are not terminated; rather, they are automatically assigned to the new owner of the property. There are two types of lease – housing and commercial. Housing leases no longer have a minimum term and unless the parties agree otherwise, the lease is considered to have been entered into for a fixed term of two years. The main terms of commercial leases continue to be freely agreed between the parties - notably, regarding duration, termination and opposition to extension. The maximum duration of a commercial lease is 30 years; unless the parties have agreed otherwise, the law provides for a default five-year period, with the tenant permitted to terminate the lease with one year's notice.

The parties can also freely assign responsibility for maintenance of the leased premises. However, unless the parties have agreed otherwise, the landlord will be responsible for maintenance. The rent and other costs are also freely agreed between the parties.

The assignment of a lease agreement is subject to the consent of the landlord, except in case of the transfer of an ongoing business where the lease is included. In this case, the landlord has a right of pre-emption, unless the parties have agreed otherwise. However, a tenant has a pre-emption right in the sale of a leased premises to a third party, provided that it has been in the leased premises for more than three years; in this case the parties may not agree otherwise.

Any party may terminate the lease in case of default of the other party. Termination by the landlord must be declared by a court decision, except in the case of:

- opposition from the tenant to work ordered by public authorities;
- non-payment of rent, costs and expenses for two months; or
- late payment of over eight days more than four times consecutively or four times in a 12-month period.

In the first two instances, termination is effective upon communication to the tenant, unless in the following month the tenant pays the amount due with a penalty of 50% or allows the work requested to be carried out. This means that at the very least, the tenant will remain in the leased premises for three months – two months while the landlord terminates the agreement and another month prior to paying, not paying or agreeing to the work.

Law 31/2012 has introduced a special procedure to expedite the eviction of a lessee and the property's return to the rental market. This reform maintains the eviction procedure for termination of a lease whenever the law requires the use of the judicial route for that end. Further, the law has introduced the aforementioned special eviction procedure as a means to terminate effectively the rental agreement – regardless of the use of the rental property – if the tenant does not vacate the leased property on the date set by law or determined by the parties for that effect.

In addition to requiring that the tenant vacate the leased property, the lessor may use the special eviction procedure cumulatively to request the payment of rent, costs and expenses that are the responsibility of the tenant. The law has established the National Office for Leases – which has jurisdiction throughout Portugal – to manage the special eviction procedure. The rules of the National Office for Leases and the special eviction procedure are governed by Decree-Law 1/2013.

The use of spaces in shopping centres, retail parks, commercial galleries, outlets, offices located in business parks or warehouses located in retail parks that fulfil certain requirements are not considered to be lease agreements. Therefore, the aforementioned legislation does not apply in these cases as they are 'non-typified contracts' (ie, contracts not ruled by a specific law). The users of these spaces are not considered simple tenants, as their establishments benefit from common services provided by a management company (eg, publicity, security and the maintenance of common spaces). In these cases pre-emption rights, assignments of ongoing business, pledges of lease rights and termination processes do not apply.

### Developments in practice

Law 31/2012, which amended the urban lease regime, seeks to:

- improve access to housing;
- foster labour mobility;
- improve the quality of housing;
- make better use of housing stock; and
- reduce the incentives to buy as opposed to lease housing.

Law 30/2012 was implemented to facilitate work on leased premises. Decree-Law 307/2009 was amended by Law 32/2012 to simplify and introduce flexibility in administrative procedures concerning areas for renovation. Further, the amendments aimed to simplify the controls on renovation work and include isolated work on buildings or parts of buildings within the concept of what constitutes renovation - even if the building is located outside an area of renovation - provided that it is more than 30 years old and merits renovation to ensure adequate living and security conditions.

The so-called 'golden residence permit' or 'golden visa' legislation allows foreign nationals from non-EU member states to apply for and obtain a residence permit in Portugal when certain types of investment are made. One such investment is the acquisition of property for a minimum of €5 million. (12) Approximately 400 golden visas were issued in Portugal in 2013 and 1,500 in 2014.

*For further information on this topic please contact [Filipa Arantes Pedroso](mailto:Filipa.Arantas.Pedroso@MoraisLeitaoGalvao.com) at [Morais Leitão Galvão Teles Soares da Silva & Associados](http://MoraisLeitaoGalvao.com) by telephone (+351 22 616 69 50) or email ([fapedroso@mlgts.pt](mailto:fapedroso@mlgts.pt)). The [Morais Leitão Galvão Teles Soares da Silva & Associados](http://MoraisLeitaoGalvao.com) website can be accessed at [www.mlgts.pt](http://www.mlgts.pt).*

### Endnotes

(1) A fiduciary relationship regarding property that subjects the person with title to the property to equitable duties to manage it for another's benefit.

(2) Articles 1439 *et seq* of the Civil Code.

(3) Articles 1524 *et seq* of the Civil Code.

(4) Articles 1403 *et seq* of the Civil Code.

(5) Articles 1414 *et seq* of the Civil Code.

(6) Article 46(1) of the Civil Code.

(7) Notwithstanding the Constitution, which contains planning and development principles.

(8) Decree-Law 147/2008, amended by Decree-Laws 245/2009 and 29A/2011.

(9) If the amount due is below €250, it is paid in April; but if the amount due is above €250 and equal to or below €500, it is paid in two instalments - one in April and another in November.

(10) Approved by Law 6/2006, which entered into force on June 28 2006.

(11) Law 31/2012 and Law 79/2014.

(12) *Despacho* 11820-a/2012, September 4 2012 as amended by *Despacho* 1661-A/2013, January 28 2013.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at [www.iloinfo.com](http://www.iloinfo.com).

**Online Media Partners**



© Copyright 1997-2015  
Globe Business Publishing Ltd