

portugal

SOUSA MACHADO, FERREIRA DA COSTA & ASSOCIADOS
SOCIEDADE DE ADVOGADOS

portugal

Sousa Machado, Ferreira da Costa & Associados, Sociedade de Advogados

Address:	Rua Castilho Nº 5, 4º Andar 1250-066 Lisboa, Portugal
Tel:	+351-21-385-44-69
Fax:	+351-21-385-48-15
Email:	advoga@mail.telepac.pt

The law firm Sousa Machado, Ferreira da Costa & Associados, Sociedade de Advogados ("SMFC") was founded in 1991 by 4 partners and now comprises the 4 founding partners, 8 associates and 5 trainee lawyers.

SMFC offers legal advisory services particularly in the following practice areas:

- business law, including commercial law, labor law and commercial contracts;
- civil law in general and in particular civil contracts, law of obligations (contract), insurance law, family and inheritance law;

- litigation, pre-litigation and debt recovery, notably in areas of mobile telecommunications, credit insurance and motor vehicles (financial lease contracts) and in the chemical, agri-foodstuffs, pharmaceutical and cosmetics, etc., industries;

Generally speaking, the scope of the SMFC services covers consultancy, arbitration and court related practices and procedures in the following areas:

1. Commercial and Corporate Law, notably:

- incorporation of companies and articles of association amendments;
- mergers, acquisitions, management buy-outs and buy-ins, takeover bids, initial public offerings, corporate restructuring;
- joint-ventures and partnerships;
- commercial contracts (distribution, financial leasing, factoring, etc.);
- corporate advisory services.

2. Administrative Law, notably:

- licensing;
- procurement procedures;
- concession contracts;
- consortia, complementary groups of companies, European Economic Interest Groupings, commercial associations;
- public works contracts;
- public supplies and services contracts.

3. Banking, Economic and Insurance Law:

- banking law;
- credit insurance and life assurance law;
- securities transactions;
- payment systems.

4. Law of Obligations and Contract Law, notably:

- mobile telecommunications contracts;
- software licensing contracts and implementation of information technology solutions;
- civil law and civil contracts.

5. Family and Inheritance Law.

6. Bankruptcy and Pre-Bankruptcy Law:

- liability consolidation;
- company recovery and bankruptcy procedures;
- debt recovery and conversion.

7. Competition and Regulation Law, notably:

- concentrations;
- concession, representation and distribution contracts.

8. Tax Law, notably:

- tax litigation;
- calculation and planning of tax liabilities.

9. Real Estate and Urbanization Law, notably:

- leases, assignments of operation, conveyances (key money-trespasses), etc.;
- promissory agreements, sales, leasing, time-sharing, etc.

10. Community Law, notably:

- freedom of movement of capital and establishment, and free movement of persons and goods,
- tax rules.

11. Labor Law, notably:

- negotiation of association agreements;
- downsizing operations: collective dismissals, suspension of employment contracts, etc.;
- labor advisory services.

12. Legal due diligence:

- outline of companies' legal situation;
- outline of the lawfulness of companies' boards and resolutions;
- characterization of companies' legal/tax, parafiscal, administrative, labor and licensing obligations and of those relating to their premises;

- review of adopted legal procedures;
- characterization and assessment of companies' litigation and pre-litigation situations.

13. Litigation, notably:

- recovery of commercial, bank and insurance debts;
- civil;
- labor;
- administrative offense;
- corporate, commercial and bankruptcy;
- tax;
- criminal;
- insurance.

The experience SMCF has acquired in the course of its years of activity, combined with the previous experience brought in by its partners, who were lawyers formerly having their own offices, have allowed for the provision of the services briefly described above to top ranking companies in the areas of mobile telecommunications, software and information technology, credit insurance, motor vehicles and real estate, among many others.

For a number of years now, SMFC has been providing services to Clients in the above-mentioned sectors, particularly within the scope of litigation and debt recovery, and therefore possesses the structures and expertise needed to ensure its competent performance of the actions required to attain proposed goals.

portugal | corporate law

Regulations and Rules

Legal framework of Corporate Law in Portugal:

- Law of 28/06/1888: the Commercial Code (Código Comercial);
- Decree law no. 262/86 of 02/09: the Companies Code (Código das Sociedades Comerciais);
- Decree law no. 5/2005 of 04/01: the European Public Limited Liability Companies Regime (Regime das Sociedades Anónimas Europeias);
- Decree law no 486/99 of 13/11: the Stock Code (Código dos Valores Mobiliários);
- Decree law no. 129/98 of 13/05: the National Registry of Collective Persons (RNPC) legal regime (Registo Nacional de Pessoas Colectivas);
- Decree law no. 207/95 of 14/08: the Notary Code (Código do Notariado);
- Decree law no.403/86 of 03/12: the Company Registry Code (Código do Registo Comercial);

Types of Companies and Liability of Shareholders

Portuguese Companies must adopt one of the following legal forms (¹):

- Public Limited Liability Companies – Stock Corporations (Sociedade Anónima - SA);
- Private Limited Liability Companies (Sociedade por Quotas - Lda);
- General partnership (Sociedade em Nome Colectivo);
- Companies “em comandita” (Sociedade em Comandita);
- Branch (Sucursal); or

¹ We adopt the English translation set out in the Second Council Directive no 77/91/EEC of 13 December 1976. However, there are some substantial differences between UK Private Limited and Public Limited Liability companies and Portuguese SA companies and Lda. companies.

- Limited Liability Proprietorship (Empresário em Nome Individual de Responsabilidade Limitada - EIRL).

Share Capital

Private limited liability companies must have a minimum share capital of 5,000 euros whereas a public limited liability company must have a minimum share capital of at 50,000 euros. Other rules apply as regards the number of shareholders. A public limited liability company must have at least five shareholders, whether private individuals or companies and private limited companies must have a minimum of two shareholders, save for private limited liability single shareholder companies (sociedades unipessoais por quotas).

For each of the companies described, shareholder liability is limited to the capital contribution. However, a shareholder who actively participates in the management of a company may be regarded as a de facto director, and be held liable for corporate mismanagement in the event of bankruptcy, together with any other appointed director or manager.

Classes of Shares

BEARER / NOMINATIVE

Bearer (ao portador) shares are stock corporation certificates owned by the person holding them (the "Bearer"). Bearer shares are transferred by simple delivery. Stock corporations are permitted bearer shares so long as their share capital is fully paid up.

Nominative (nominativas) shares bear the name of the holder on the share certificates. Nominative shares are transferred by contract.

COMMON / PREFERRED

The rights attaching to each class of share differentiate it from the other classes of shares. Each of the shares within the same class will have the same rights attaching to them.

Common (ordinárias) shares represent ownership in a company. Holders of common shares can exercise an element of control by electing the management board and voting on corporate policy.

Preferred (preferenciais) shares have some sort of rights and privileges attaching to them over and above those attaching to common shares. The nature of these rights or privileges shall consist of patrimonial advantages (mainly concerning dividends); but never involve "the right of vote" or "the preferred subscription right".

Corporate Governance: Classes

a) SHAREHOLDERS MEETINGS

Decisions of the Shareholders:

- Approval of financial statements and distribution of profits.
- Appointment and Removal of the management and auditors.
- Amending the Articles of Association of the Company;
- Merge, split-up, transform or dissolve the company.
- Alienation/encumbrance of real estate.
- Issue of preference shares.
- Issue of bonds.
- The division and assignment of quotas (only for Private Limited Liability Companies).

Shareholders Meeting	Quórum		Majority*
SA	1st call	no quorum or 1/3 for amending the Articles of Association	Majority of votes attached to shares present or represented or 2/3 for amending the Articles of Association
	2nd call	no quorum	Majority of votes attached to shares present or represented or, for amending the Articles of Association, 2/3 or Majority of votes attached to shares present or represented, if at least 50% of the shares are present or represented
LDA		no quorum	Majority of outstanding shares or 3/4 of outstanding shares for amending the Articles of Association

*Certain decisions may require unanimous vote or other majority according to the company's Articles of Association.

A company must hold an Annual General Meeting once a year in order to approve the financial statements, distribution of profits and approval/censure of Management.

DECISION-MAKING BODIES

The "SA" is required to have a board of directors. In the 'directorate' form, the board is replaced by a Supervisory Board (Conselho Geral) on the one hand and a Direction on the other hand.

The "Lda" is managed by one or more managers (gerente/gerência plural).

The board of directors (or the members of the Direction) in a "SA" and the manager of a "Lda" have very broad authority to bind the company. Although restrictions may be contained in the Articles of Association, these are not enforceable against third parties provided the actions of the Directors or manager are within the bounds of the corporate purpose.

In an "SA", the board of directors is appointed by the shareholders, generally for a four year term (but the Articles of Association can provide for a shorter term). There are no requirements for independent directors. In a "Lda" the managers are appointed until removal or resignation.

The directors and managers may or may not be remunerated.

Annual Accounts-Financial and operating results: Duties and Liabilities

Necessary documents for approval:

- detailed balance sheet;
- operations assessment;
- annual company report;
- legal account certification;
- supervision body opinion.

All referred documents referred to above must be approved by the company in general meeting within three months of a company's financial year end.

Accounts must be filed within three months from the date of approval.

Other documents to be filed with the Company accounts:

- instrument of accounts approval containing profits application;
- annual report;
- a detailed balance sheet with operational assessment and
- correspondence annexed;
- legal account certification;

No document authentication is needed.

Publication. Publication of the Accounts settlement in the government's journals is mandatory. It can be a comprehensive publication, abstract publication, simply by specifying the documents deposited in the relevant company file.

Statutory Audit:

- Scope: All companies must have a statutory audit performed;
- Competence: Chartered accountants are responsible for the statutory audit as such documents represent the company's financial situation. The chartered accountant can certify the accounts without any reserves, certify with reserves, or provide a negative certification;
- Procedure: The chartered accountant can be hired through a service contract, either individually or as a member of a chartered accountants' society.

Quoted Companies

There are no specific rules of corporate governance. However, quoted companies must comply with the Stock Code regime, approved by Decree law n.º 486/99 of 13/11 (Código dos Valores Mobiliários). This regime establishes cooperation, communication and publicity duties for the quoted companies, as well as determining the regulation and supervision activities of the Securities Commission (Comissão de Mercado de Valores Mobiliários). The Bank of Portugal (Banco de Portugal) performs the supervision and economical regulation of financial quoted companies.

All quoted companies should comply with the recommendations and decisions of the Securities Commission.

portugal | tax law

Taxes on Corporate Income

The profits of companies operating in Portugal are taxable under the Companies Income Tax Code (Código do Imposto sobre as Pessoas Colectivas – "CIRC").

The definition of "Taxable Profits" includes (i) income profits, (ii) capital gains, and (iii) other revenues taxable under the personal income tax rules set out in the Personal Income Tax Code (Código de Imposto sobre o Rendimento das Pessoas Singulares – "CIRS"). The latter only applies to companies or other legal entities that are not resident in Portugal or are deemed to have a permanent establishment in the Portuguese territory, provided that such revenues are not liable to Personal Income Tax (Imposto sobre o Rendimento das Pessoas Singulares – "IRS").

Corporate profits are taxed at a 25% general rate. However, local authorities may apply a supplemental tax rate which can raise the tax rate on corporate profits to 27.5% maximum.

Corporate Residence / Permanent Establishment

A company is deemed to be resident in Portugal if either it has its head-office in Portugal or if its effective management or control is exercised in Portugal. In normal circumstances, a company's central management and control is regarded as being exercised where the major decisions affecting the company are taken – this is generally where the company's board of directors meets. Entities with or without legal personality that, despite having no head-office or place of effective management in Portugal, obtain income not liable to Individual Tax in Portugal, are also residents in Portugal, hence liable to IRC. Income generated from activities outside of Portugal, through foreign branches, is generally exempted from taxation in Portugal.

Any company whose head office or effective place of management is not located in Portugal may be subject to Corporate Income Tax in Portugal (Imposto sobre o Rendimento de Pessoas Colectivas – “IRC”) as follows:

- if it has a permanent establishment located in Portugal, IRC will be charged on the taxable profits attributable to such establishment;
- if it does not have a permanent establishment in Portugal, IRC will be charged on any income included in any of the income categories set out in the Personal Income Tax Code (Código do Imposto sobre o Rendimento de Pessoas Singulares – “CIRS”) provided that such income is deemed to be obtained in Portugal.

A permanent establishment is defined as “any fixed installation or permanent representation through which an activity of commercial, industrial or agricultural nature is carried on”. A permanent establishment is also deemed to exist where a non-resident entity carries on its trade in Portugal through employees or other personnel contracted for that purpose for a period of 120 days, not necessarily consecutive, in any twelve month period. For companies located in countries where there is a tax treaty with Portugal, the rules in determining permanent establishments may be modified. However, these rules may be set aside if the applicable Double Tax Avoidance Convention (“CDT”) so provides. The taxable profits attributable to a permanent establishment are determined in accordance with the same rules that apply to resident companies, which means the permanent establishment will have to prepare financial statements and have its own accounting records. The taxable profits attributable to a permanent establishment in Portugal are subject to a tax rate of 25%.

Income Determination

For this purpose, the CIRC sets out a list of the types of income which are deemed to be obtained in Portugal, including:

- real estate income whenever the real estate is located in Portugal;
- capital gains obtained from the sale of shares in Portuguese companies;
- any of the following incomes paid by a debtor which has its head-office, effective place of management or a permanent establishment (to which such payment is attributable) in Portugal:

- royalties (intellectual property rights);
- rents from the lease or use of industrial, commercial or scientific equipment;
- other capital investment income;
- salaries paid to directors and other members of corporate bodies;
- games of chance prizes;
- fees as contract intermediary;
- income from the provision of services performed or used in Portugal, other than transport, communications and financial activities; and
- income from derivatives transactions.

The CIRC establishes that the taxable income obtained by a non-resident company which is not attributable to a permanent establishment in Portugal will be determined in accordance with the rules applicable to the different income categories set out in the CIRS. The taxable income obtained in Portugal by a non-resident company without a permanent establishment in Portuguese territory will be subject to taxation at a rate from 15% to 25% depending on the type of income. These rates may be reduced in accordance with the applicable CDT.

Any income deemed to be obtained in Portugal by non-resident companies may be taxed according to one of two different methods:

- the income may be subject to tax withholding (retenção na fonte), which means the entity obliged to pay the income should retain a portion of such income calculated in accordance with the tax rates set out in the CIRC and deliver such portion to the State; or
- the income may have to be reported by the non-resident company to the Portuguese tax authorities which shall determine the tax amount that must be paid by that company in accordance with the tax rates set out in the CIRC.

In the event the Company must report its income to the Portuguese tax authorities, it must appoint a tax representative to comply with the reporting obligations.

Portuguese law includes several anti-abuse provisions the purpose of which is to avoid the distribution of profits to countries or territories with a more privileged tax regime (e.g transfer pricing, sub-capitalization, and exceptions to the tax exemption on capital gains). Some of these provisions were introduced to penalize the use of offshore companies incorporated for the purpose of reducing taxes, including inter alia:

- the payment to persons or companies resident in countries and territories with a clearly more favorable tax regime; and
- the attribution of profits of companies not resident with a clearly more favorable tax regime.

The payments made by companies resident in Portuguese territory will not be considered as a cost for the purposes of determining their taxable profits if they are made to non-resident persons or companies subject to a clearly more favorable tax regime, save if the company demonstrates that such costs (i) are related to transactions effectively performed and (ii) are not abnormal nor excessive.

A person or company is deemed to be subject to a clearly more favorable tax regime if:

- it is resident in one of the countries or territories listed in the resolution approved by the Minister of Finance;
- it is not subject to any income tax similar to IRS or IRC in such country or territory; or
- in respect of the amounts paid or due, the amount of tax paid is equal or less than 60% of the amount of tax which would be due if such person or company were considered resident in Portuguese territory.

For the purpose of assessing the amount of tax as set out in third paragraph above, the Portuguese company must maintain and provide whenever requested by the Treasury Department (Direcção-Geral do Tesouro) evidence of the tax paid by the non-resident company and the calculations of the amount of tax which would be payable if the company were resident in Portugal.

The profits of non-resident companies subject to clearly more favorable tax regime will be calculated, in proportion to their shareholdings, and after

deduction of income tax charged on such profits, as income of the shareholders resident in Portugal, even if such profits are not distributed (provided that such shareholder holds a shareholding of, at least, 25% or, 10%) where the non-resident company is not held, directly or indirectly, by more than 50%, by resident shareholders. The non-resident company is deemed to be subject to a clearly more favorable tax regime in the same circumstances set out above.

Deductions

Business expenses are generally deductible, when related to the corporate purpose and activity.

Depreciation and depletion: Depreciation can be straight-line or reducing, over a term based on the useful life of the asset. Unused depreciation allowances can be carried forward indefinitely.

Net operating losses can be carried forward for six years.

Payments to foreign affiliates: (see 5)

Group Taxation

Companies within a group structure may consolidate their accounts, provided the same company controls them. According to the Portuguese Companies' Code of 1986 (Código das Sociedades Comerciais – "CSC"), control is deemed to exist if one company:

- holds all shares in another company and thus is able to exercise a dominant influence; or,
- is able to exercise a dominant influence identical to that of a shareholder owning 100% of all issued shares, and to manage the controlled company's businesses (both these situations are called "Grupo de Facto")

Companies within the same group are obliged to consolidate if the parent company:

- holds the majority of the voting rights in the subsidiary;
- has the right to appoint the majority of the members of the board of directors of a company where it holds an interest;
- has the right to manage the controlled company's business under a Management and Control Agreement (Contrato de Subordinação);
- holds shares and solely or under agreements with other shareholders controls the majority of the voting shares of a company.

A practical consequence of consolidation is that the amounts transferred from the companies generating revenues to their affiliates would not be subject to stamp tax.

In relation to tax consolidation, the CIRC allows companies to consolidate their profits provided that the controlling company (i) is located in Portugal, (ii) directly or indirectly controls a minimum of 90% of the shares in its subsidiaries, and (iii) all the companies within the group are subject to IRC.

Tax Incentives

Tax incentives are regulated by Decree-Law 215/89, of 1 July 1989, as amended from time to time (Estatuto dos Benefícios Fiscais – “EBF”), and include, among many others, new businesses, small and medium companies, businesses set up in economically troubled areas (as defined geographically by regulation), reductions/exemptions from corporate tax, etc.

Withholding Taxes

In accordance with the CIRC a company is required, in certain circumstances, to operate a withholding system under which income tax on the companies' profits is deducted at the time the amount is made available to the company. IRC will be withheld on the income generated in Portugal, including:

- interest on bonds;
- interest on loans or other kind of indebtedness.

Entities that carry on commercial, industrial or agricultural activities are required to make three payments on account in July, September and December. Each

payment represents 25 per cent of the previous year's liability. The difference between the amount paid and the amount actually due is paid when the corporate tax return is submitted (by 31 May of the following year).

Currently Portugal has treaties with some European countries. Under such tax treaties cross-border transactions benefit from lower tax rates.

The EU Parent and Subsidiaries directive required Members States to abolish withholding taxes on dividends paid to an EU parent and for full relief to be given for taxes suffered by the subsidiary in computing the tax on the parent's income, from 1 January 1992. Portugal implemented the directive in July 1992.

Other Taxes: VAT – Transfer tax – Capital tax – Stamp Duty – Property Tax – Other Taxes

VAT

Turnover is subject to value added tax (IVA). According to the Value Added Tax Code (Código do Imposto sobre o Valor Acrescentado – “CIVA”), the following transactions are subject to Value Added Tax (Imposto sobre o Valor Acrescentado – “IVA”):

- transfer of assets and the provision of services performed in Portuguese territory against consideration;
- imports; and
- intra-community acquisitions.

Depending on the transaction, a rate of 5%, 12% or 19% will be charged on the transactions (the reduced rate of 5% is applied to essential commodities such as water, food, medicine, books, etc).

The services provided by a company, irrespective of its activities, will be subject to VAT. However, under the reverse charge mechanism, the beneficiary of the services will pay the VAT and will be allowed to deduct the entire VAT amount paid.

TRANSFER TAX

Transfers of real estate are taxed progressively, according to the amount paid by the party that acquires the property (Imposto Municipal sobre as Transmissões Onerosas de Imóveis – “IMT”).

STAMP DUTIES

Stamp tax (imposto do selo) is charged on certain acts and documents. The General Table of Stamp Taxes (Tabela Geral do Imposto do Selo – “TGIS”) provides for different rates depending on the type, nature, extent and purpose of the transaction. Amongst the acts that are subject to stamp tax, we would mention: a) bankers or private credit lines and similar agreements, at a rate of 5 per thousand on the full amount of the credit; b) interest paid for loans, credit lines and loans made by the members of a company to the company (suprimentos), at a rate of 5 per cent and due on maturity of the interest; and, c) capital share increases, except when such increases are made in cash.

PROPERTY TAX

Local authorities levy property tax on private real estate, at rates which vary from one geographic area to another, and are applied to a deemed value estimated by the tax authorities.

INDIVIDUAL TAXES

Personal Income is taxed according to the Personal Income Tax Code (Código de Imposto sobre o Rendimento das Pessoas Singulares – “CIRS”).

Rates for individual tax:

Taxable Base (euros)	Tax Rate (A)	Tax Rate (B)
0 to 4,266	12	12,0000
4,266 to 6,452	14	12,6777
6,452 to 15,997	24	19,4333
15,997 to 36,792	34	27,6667
36,792 to 53,322	38	30,8700
over 53,322	40	

The tax rate (B) is only applicable to the amount of income that exceeds the relevant taxable base.

Territoriality and Residence

Individuals who are residents for tax purposes are taxed on their worldwide income. Tax residence is determined under Portuguese tax law but could be determined on the basis of a bilateral tax treaty, through various factors, for instance, the location of the family home and center of vital interests. Non-residents of Portugal are taxed on their Portuguese source income, through a withholding at the source.

Gross Income

Contributions to social security, retirement, unemployment, and the like are paid by the employer directly to the relevant authority on account of its employees. All of these payments are deductible from gross income for tax purposes.

Deductions

Expenses: Deductions are available for certain expenses such as medicine, alimony payments and education, real estate and some financial purposes.

Legal reductions: various professions are allowed to take a flat ‘business expenses’ deduction (e.g. lawyers 30%).

Personal allowances: Allowances are available for minor children, aged and other dependents, students, as well as by reason of poverty, infirmity and handicap.

Tax Credits

Tax credits are available in most cases for taxes withheld on foreign source income and double international taxation.

Other Taxes

SOCIAL SECURITY TAXES

Social Security deductions:

Rate	Employer	Employee
34.75%	23.75%	11%

LOCAL TAXES ON INCOME

There are no local taxes on income.

WEALTH TAXES

There are no wealth taxes in Portugal.

portugal | **foreign investment**

Introduction

Several powerful forces have prompted the Portuguese government to proceed with the long-term reorganization, Liberalization and privatisation of the Portuguese economy.

Portugal's membership of the European Union ("EU") and the development of the Single Market have forced Portugal to prepare for domestic and foreign competition and changed the government's approach to foreign investment.

Membership of the EU has also required the Portuguese economy to open up to foreign investment. In 1992, capital movements, in relation both to EU and non-EU countries, were liberalized. Decree-Law 170/93 completed the total Liberalization of cross-border capital flows, effective as from 1 January 1993, though the Bank of Portugal still retains the right to impose temporary restrictions in exceptional circumstances.

Most governmental controls have been abolished and foreigners, particularly if they are EU-residents, may now develop their business in Portugal on the same basis as Portuguese nationals. In 1993, Decree 170/93 established a new legal framework governing economic and financial transactions with foreign investors.

In relation to privatizations, there is a consensus in Portugal in favor of a gradual denationalization and Liberalization in a number of sectors that have remained state monopolies since 1975, to which the government has also committed itself regardless of its political complexion.

The combination of external factors, such as EU membership, along with macro-economic objectives of the government, such as the need to raise revenue, both to invest in what remains of the public sector and to reduce the government's budget deficit, have led to a widespread but often slow process of privatisation in all state-owned sectors of the economy.

In 1989, after important changes to the National Constitution, the government embarked on an extensive privatisation program, Law 11/90 (the Privatisation Law), which established a framework for the privatisation of state-owned companies. The law gives the government the power to decide how to privatize each state-owned sector.

BUSINESS FORMS

There are a number of business forms that can be used as investment vehicles in Portugal:

- a branch or place of business;
- a representative office;
- a joint venture; and
- a company.

REGISTRATION OF A BRANCH

The main differences between a branch and a subsidiary are the following:

- a branch has no formal capital, and is therefore not subject to a minimum capital amount. However, the head-office must allocate an amount of designated capital to the branch for operational purposes. Limited liability companies must have a minimum share capital;
- the branch's appointed legal representative shall manage its business and no corporate bodies are required, while a company is required to have a management body and a supervisory officer; and
- the incorporation of a company tends to be more costly than the registration of a branch.

In general, the main operational difference between a branch and a subsidiary derives from the fact that a subsidiary operates as a different legal entity, while a branch represents the foreign company in Portugal.

Once the decision to register a branch in Portugal has been taken, the foreign company must complete and file a form at the Companies' National Registrar (Registo Nacional de Pessoas Colectivas - "RNPC") and at the Commercial Registrar (Conservatória do Registo Comercial). This form contains:

- the company's name;
- country of incorporation;
- a list of directors of the company, as well as details of their full names, residential addresses, dates of birth, civil status, nationality; and
- name of the appointed secretary with details of his/her full name, residential address, date of birth, civil status, and nationality.

Certified copies of the constitutional documents of the company, as well as of the minute of the board of directors or shareholders meeting resolving to register the branch must be delivered to the Commercial Registrar. Both copies must bear the Apostille of the Hague Convention and be accompanied by a certified official translation.

STEPS REQUIRED TO INCORPORATE A COMPANY IN PORTUGAL

Most national or foreign investors choose as their investment vehicle a limited liability company because it best suits the purpose of limiting the parent company's risks. The equivalent form to the Portuguese Sociedade em Comandita is quite common in Germany, France and even in Italy, but it is seldom used in Portugal. The main difference between limited liability companies (Sociedade por Quotas and Sociedade Anónima) and unlimited liability companies (Sociedade em Nome Colectivo and Sociedade em Comandita) is related to the shareholders' liability for the company's debts. The other major differences concern the transfer of shares and the company's management and supervision structure.

When deciding what legal form the subsidiary should assume, the foreign investor will take in to consideration the differences between Private Limited Liability Companies and Public Limited Liability Companies that may influence their business operations in Portugal. From a day-to-day point of view, the two can be managed in broadly similar ways, although the Private Limited Liability Company can in some cases be less formally managed.

To summarize, the choice of a Private Limited Liability Company as the investment vehicle means the choice of a more lightly regulated corporate structure, and is appropriate for short-term investments. Public Limited Liability

Companies are usually recommended for long-term investments and if the participation of a larger number of investors is envisaged.

The following steps are required to incorporate a company in Portugal:

- application for a name certificate (Certificado de Admissibilidade de Denominação) before RNPC;
- the granting of the public deed of incorporation before a Public Notary, who will also certify the company's Articles of Association;
- share capital deposit in a Portuguese Bank - minimum 30% for Public Limited Liability Companies and 50% for Private Limited Liability Companies;
- registration of the new company at the Commercial Registrar and at RNPC;
- registration before the tax authorities; and
- publications.

After the incorporation procedures are completed, the company's foreign shareholders must register their investments with ICEP.

In addition Public Limited Liability Companies are required to issue the shares certificates by filing and completing a form at the Securities Commission (Comissão do Mercado de Valores Mobiliários - "CMVM").

The company is considered incorporated from the moment it is registered at the Commercial Registrar. However, it may start operating and enter into contracts before its formal incorporation, in which case the company's parent company shall be deemed liable for any such transaction. In addition, all actions taken before the company's incorporation will need to be ratified in its Articles of Incorporation. Once the public deed has been completed and before registration, the company's appointed directors may enter into any contracts and manage the company, but shall remain personally liable for all actions taken before the formal registration.

Application for a Name Certificate and for a Temporary Identification Card

The application for a name certificate and for a temporary identification card must be filed before the RNPC. An appropriate form must be completed,

requesting reservation of the company's intended name (three possible names may be proposed), and containing details on:

- the applicant's relevant information (e.g. name, date of incorporation and registration number); and
- the object of the new company.

This certificate must be requested by one or more of the future shareholders, by their appointed representative or by an agent. Solicitors are allowed to file such forms on behalf of their clients.

The certificate reserving the company name is issued by the RNPC so as to ensure that it will not be confused with that of an existing company. The certificate also accords an exclusive right to use the approved name for a period of 180 days and may be renewed within designated time limits.

When applying for the name certificate and to prevent delays, the applicant must also request a temporary identification card. The application is also made to the RNPC by filing and completing a form.

This identification card is valid for one year and can be renewed if the incorporation process has not been completed.

Public Deed of Incorporation

The deed of incorporation must be signed before a public notary and includes the company's Articles of Association.

The following information and documents must be provided to the notary:

- the name of all the shareholders and appropriate identification documents (for companies - Certified Copy of the parent company' constitutional documents duly legalized and translated - a Certificate of Incorporation containing the relevant data of the parent company country is sufficient; for individuals - passport copies and Portuguese Tax Number);
- powers of attorney to incorporate the company and to approve its articles of association;

- name certificate;
- temporary identification card; and
- articles of association, which must mention: the type of company, the company's name, the corporate purpose, the registered office, the share capital, the company's year-end when different from the calendar year.

The above requirements are mandatory for all Portuguese companies pursuant to Article 9 of the Portuguese Companies Code (Código das Sociedades Comerciais – "CSC"). Furthermore, the law stipulates additional requirements for each different type of company.

The public deed of incorporation specifies the number of shares and the distribution of share capital among the shareholders.

Where the subscription is not in cash, a description of the consideration must be given and an auditor's report on the value of the assets which are contributed in exchange must be presented to the notary.

Registration and Publication Process

Following the signature of the public deed of incorporation, the company will have to be registered:

- at the local tax office for the area of the new company's head office (Declaração de Início de Actividade). The applicant must indicate the new company's estimated amount of business. This requirement is ancillary to the registration at the Commercial Registrar;
- at the Commercial Registrar of the area where its head office is located which must take place within 90 days after the incorporation date; and
- at the RNPC. RNPC shall then issue the company's identification card (NIPC) which replaces the temporary identification card.

The Company's Articles of Association must also be published in both the Official Gazette (Diário da República) and a national or local newspaper.

portugal | labor law

The new Labor Code, which came into force on 1 December 2003, brought about the consolidation in a single "body" of law all the existing rules, which not only had been scattered among some fifty separate pieces of legislation, but also reflected much changed social and economic contexts.

The Labor Code is divided into two books (Book I and Book II). Book I contains the "Generalities" (Sources, Employment Contract and Collective Law) and Book II focuses on the criminal and administrative liability arising from labor law violations.

Generally speaking, aside from showing concern for the protection of workers' personal rights, the Labor Code is characterised by adapting rules and regulations to modern times (new technologies, telework, groups of companies) and by creating a new regime applicable to current issues.

In relation to termination of employment contracts, reference is made to various provisions covering:

- the application of collective dismissal rules to the lapsing of employment contracts as a result of the closing down or bankruptcy of a company;
- the possibility of employers starting a new disciplinary procedure (once only), in the event of the wrongfulness of the dismissal having been decreed for formal reasons and the worker having opted for reinstatement;
- the creation of a framework for the determination, by the court, of the indemnity amount payable in the case of wrongful dismissal, without prejudice to personal damage compensation;
- the possibility of employers opposing workers' reinstatement on duly substantiated grounds, this decision, however, being made exclusively by the court.

In the case of collective bargaining, the Labor Code establishes the requirement of collective agreements regulating their temporal scope and providing for a complementary regime providing for survival and repudiation.

The Labor Code is also applicable to domestic, homeworking, on board ship, rail, dock and professional sport employment contracts. The regulation of the Labor Code, in areas not covered, was made by way of Law 35/2004.

Employment Contracts

Can be open-ended, fixed-term and non-fixed term.

Workers are entitled to: compensation (for property and personal damage); reinstatement (or alternatively, should they so choose, compensation for each full year of seniority or fraction thereof) and the pay they did not receive between the date of dismissal and that on which the court decision becomes final. These rules apply to fixed and non-fixed term employment contracts, albeit subject to specific provisions in individual cases.

There is a special regime applicable to Directors and Managers for the purposes of establishing their exemption from fixed working hours, their daily rest periods and the length of their compulsory weekly rest periods.

Workers' Representatives and Union Representation

Workers may create works councils and sub-councils or join trade union organizations.

Works council members are entitled to a monthly time-credit of 25 hours.

Works council members are entitled to information, to consultation (which is compulsory in certain cases), to meet with the company's management body (at least once a month), to participate in company restructuring procedures and to hold mass meetings with the workers.

Companies may have union delegates, as well as union and multi-union committees, either of these committees being (exclusively) entitled to convene workers' meetings at the places of work (inside or outside working hours).

Union delegates are entitled to a monthly time-credit of 8 or 5 hours, depending on whether or not they are members of the multi-union committee. The law lays down the maximum number of union delegates entitled to this time-credit, depending on the company's size.

Collective Bargaining

Collective labor regulation instruments may be either negotiated or non-negotiated, the former (whose negotiation on behalf of the workers is conducted by trade union organizations) including the collective agreement (association agreements, multi-employer agreements and company-level agreements), the adoption agreement and the voluntary arbitration award.

Collective labor regulation instruments (which cannot go against the provisions of mandatory law or regulate economic activities) supersede employment contracts to the extent that they are less favorable to workers and are either directly (to workers who are members of the signatory trade unions and to affiliate companies of the signatory employers' associations) or indirectly (by extension of regulation issued by the Labor Ministry) applicable.

Workers' Pay and Others Forms of Compensation

From a legal standpoint, pay may be fixed, variable or mixed (i.e. may be composed of a fixed part and a variable part). The Labor Code does not however permit a full-time worker to receive monthly pay of less than the minimum monthly guaranteed amount.

It is customary for collective agreements to provide, in addition to the minimum pay for the work performed by the worker, for length of service payments, seniority premiums and, in industry, for effort or hardship benefits and shift supplements.

As regards social security, the normal procedure under collective agreements is for employers to pay the difference between the statutory sick pay entitlement and the worker's monthly net pay, although in most cases, this is for a limited period of time.

Furthermore, by law, workers are paid a holiday bonus (13th month) and a Christmas bonus (14th month).

Payment in cash is the most usual in Portugal, although for executives, benefits may take the form of using a company car and cell phone.

The minimum monthly pay for 2005 is 374.70 €.

Overtime, the annual duration of which depends on the company's size (micro, small, medium and large companies), entitles workers to compensatory paid rest periods and is calculated differently, depending on whether the overtime is worked on a regular working day, on a weekly (compulsory or additional) rest day or on a public holiday.

In the former case (regular working day), the first hour is paid together with a 50% increase and each subsequent hour(s) with a 75% increase.

In the latter case (rest day or public holiday), the increase is 100% per hour.

Applicable Labor Laws

- The Labor Code
- Law 35/2004 of 29 July (Regulation of the Labor Code)
- Decree-Law 352/92 of 24 October (domestic work)
- Law 28/98 of 26 June (sports professional)
- Decree-Law 440/91 (homeworking)
- Law 15/97 of 31 May (work on board fishing boats)
- Decree-Law 381/72 of 9 October (rail work)
- Decree-Law 280/93 of 13 August (dock work)
- Decree-Law 189/99 of 30 September (volunteer work)
- Decree-Law 358/89 of 17 October and Law 146/99 of 1 September (temporary work).

Social Security

Pay records are delivered electronically.

23.75% are paid by the employer and 11% by workers under an employment contract, the employer being responsible for deducting the workers' percentage from their gross pay (this also applies in the case of income tax).

Reference should be made to the fact that in order to fight excessive fixed-term employment contracts, the Labor Code provides for the possibility of the percentage for which the employer is responsible being increased (by 0.6% for the 4th and 5th years of the contract term and by 1% for the 6th year), when the percentage of fixed-term employment contracts having a term of more than 3 years reaches or exceeds 15% of all the workers holding a fixed-term employment contract, irrespective of the term of the latter.

There are two regimes for directors, managers, etc., depending on whether they are entitled to all Social Security benefits. In the first case, the income base is the actual pay and the percentages payable by the company and the worker are the same as for workers under an employment contract. In the second case, should the real pay be higher than 12 times the minimum monthly pay, the income base will be limited to this sum and the percentage payable by the company will be 21.25% and by the director (or manager) 10%.

Overtime is subject to the same contributions and deductions as are regular working hours.

From a legal standpoint, payments in kind are treated as taxable income in terms of Social Security contributions. However, this is seldom put into practice.

Health and Safety at Work

In this respect, the Labor Code is extremely strict and it is therefore impossible to list, even succinctly, companies' obligations and duties, in terms of internal, external and inter-company services.

Supervision of health at work is entrusted to a Works Doctor and medical tests and examinations are compulsory when workers begin employment and when they have been away for more than 30 days due to illness or an accident. Minors and workers over the age of 50 must take medical tests and examinations once a year, and all other workers once every two years.

As for safety, this is monitored by technicians certified by the State Body, as in determined for in such number and the company's size.

Lastly, it should be noted that workers are entitled to have representatives elected for this purpose, both in relation to health and safety.

The applicable health and safety laws are those deriving from the Labor Code (Articles 272 to 279) and Law 35/2004 (Articles 212 to 289).

In addition, there is a specific law relating to work on building sites (Decree-Law 155/95 of 1 July).

Contracting Out and Outsourcing

Broadly speaking, the loaning of labor (in respect of which the Labor Code imposes a number of cumulative requirements) is permitted, but without prejudice to the application of specific laws governing temporary work and, albeit indirectly, without prejudice to the secondment regime.

No limitations are imposed on the provision of services.

portugal | real estate

Types of Ownership

The Portuguese Civil Code provides that ownership consists of the full and exclusive rights of use, enjoyment and disposal over a certain thing that, in general terms, can be classified as "real property" (real assets) or "personal property" (commodities). One can say that the faculties of use, enjoyment and disposal that concern the thing of ownership, include, respectively, the gaining of direct advantages of ownership as well as the fruits – civil (e.g., revenues) and natural – produced by the thing; as well as the ability to alter the thing's substance (in extremis, destroying it) or simply to change its legal status by acts of alienation, limitation or abandonment – beneficial ownership.

Ownership can belong to a single person (natural or legal) or a collection of individuals such as a co-operative or co-ownership, where each individual owns a portion of the whole (e.g. 1/2, 1/4, 1/3) with no direct right over any specific part. In this former case, the co-owners are able to exercise, collectively, all the powers that are conferred on the individual owner, as long as they do not harm the use of the common thing by the other co-owners. In general terms, we can say that co-owners enjoy the same status as the individual owner, but the respective rights are limited, in a quantitative way, by the relevant share or portion of the common thing actually held by each of them.

Title to real property can be either "full" (propriedade plena), or divided into separate rights:

a) The more frequent separation in ownership leads to the creation of two rights: a limited right, to the use and proceeds of the property (usufruto, from the latin "usus et fructus") and the basic (or "stripped") ownership (nua propriedade) corresponding to ownership without the right to the use and proceeds of the property. The usufruto, according to Portuguese legal definition, is the right of temporary and full enjoyment of one alien right or thing, without altering its

form or substance. This means that the owner (proprietário de raiz) of a certain thing is not necessarily the same individual that enjoys (usufrutuário) that thing's benefits and entitlements.

b) The right to the surface area consists in the ability to construct or maintain (ius ad aedificandum), perpetually or temporarily, a building or works on another's property, as well as the power to make or maintain plantations (ius ad plantandum). This way, the owner of the surface area rights acquires the autonomous right in rem over the building or work or plantation, as distinct from the property rights. This particular kind of ownership is very much used for gas stations.

c) Time-sharing provides for a right on a temporary basis to use and inhabit certain units integrated in hotels-apartments or tourism-related projects, usually for holiday purposes. This right is limited to a specific continuous time period each year of seven days minimum and thirty days maximum.

d) Reference should also be made to horizontal property or "floor property". According to article 1414 Civil Code, the parts that compose a building can be owned by different persons, if those parts are able to constitute independent units. Horizontal property – also called a condominium – is a mixture between the concept of single ownership and co-ownership: each owner has exclusive property rights over one autonomous part of a building and shares, with the other co-owners, the property rights over the common spaces, such as the earth on which the building is constructed, the roof and the common parts, such as elevators, stairs, etc. This type of property right emerged from the urban centers where vertical construction is common and relies on the fact that the parts have no separate structural autonomy, even if there is functional autonomy, as a result of the use of the common parts of the building.

Land Register

The Portuguese Register of Deeds is generally very reliable, and the information registered can be fully trusted to be accurate. The land certificate (título de registo da propriedade) confers on the owner the power to exclude any alien claims over the registered rights, in as much as the law stipulates that

registration constitutes a legal presumption of the existence of the owner's rights and his title, which means that the registration cannot be judicially questioned without a simultaneous request to cancel.

In the case of real estate transactions, the legal provisions that are submitted to the obligatory register contain all the information which determines the acquisition or modification of various types of ownership. Until the owner's registration information is submitted, he may not be able to transfer his property rights.

Transfer Formalities (e.g. Notary Deed)

Notarial acts are part of the required procedure for property constitution, transfer, acquisition or extinction relating to real estate assets. Notarial conveyance takes place before submission to the register, and provides the legal form and certificate for the authenticity of the transaction by way of which the property rights are created or varied. The notary performs an instrumental function in relation to the will of the parties who come before him. Very often, it is necessary to present certain documents or provide evidence of legal and prior formalities, such as the payment of taxes. Property taxes include the "IMI" – real property municipal tax – and the so-called "IMT" – real estate transfers municipal tax. To operate a property transfer it is also necessary to exhibit a) the habitation or construction license issued by the city hall (for urban buildings); b) the land registry title, which proves the ownership of the transferor; and c) the real estate register (caderneta predial), issued by the competent government office.

Mortgages, Main Rights of Mortgages

The mortgage receivable (crédito hipotecário) is a lien by operation of law (real security) that confers to the creditor a preferential right over other creditors.

The mortgage bond (obrigação hipotecária) can be defined, in simple terms, as an ancillary guarantee, attached to the principal obligation, intended to ensure that the credit is duly collected; in other words, it fulfills the role of continuing the priority assigned to the mortgagee, as a preferential/lien creditor (covenantee).

The law provides for three different types of mortgages: voluntary, judicial and legal. The voluntary mortgage is executed as a notarial deed or will and must specify what is mortgaged. All types of mortgages should be registered, in order to exist and to be valid and enforceable against third parties. A very frequent transaction, both in business and domestic use, is related to house credit (particularly for young buyers), and consists of a mortgage loan, i.e., the financial institution that offers the capital will secure its credit through a charge established over the building ("mortgagee in possession"), sometimes with recourse to an adjustable-rate mortgage.

Pre-Emption Rights

There are pre-emption rights in specific cases, such as in favor of owners of adjoining buildings; the owner of real property burdened with an easement of access; the co-owners in the case of property transfer; the tenant in the event that leased property is sold, and, finally, in relation to surface rights. In all these cases, the relevant person affected has a pre-emption right over third parties wishing to acquire the relevant property.

Special Legal Protections for Parties e.g. Seller or Buyer's Right to Cancel

a) Both the seller and buyer may petition the Court to contest the validity of a purchase if the consent to the transaction has been tainted by "erro" (an error as to the fundamental characteristics of the property), "dolo" (misrepresentation: one part tricks the other into the purchase) or "coacção" (physical or mental violence). The buyer may also petition for the sale to be avoided, or for a reduction in the price, where a "defect" results in the property being improper for the use for which it was meant or restricts its use to such an extent that the buyer would not have purchased the property or would have offered a lower price had he been aware of the defect ("venda de bens defeituosos").

b) Apart from the possibility of judicial recourse in normal circumstances, Portuguese law makes provision for possessory law suits e.g. action of trespass (acção de esbulho e acção de reivindicação de propriedade), (seizure) (embargos de terceiro) or action by petition.

Portuguese law also provides for a so-called "sale secured by a lien on property" (article 409 Civil Code), which confers on the buyer the possibility of reserving to himself the property of the thing until the total fulfillment of the other party's obligations.

Adverse possession (usucapião) is one way of acquiring property through peaceful, sustained and public possession for the duration of the period fixed in law.

Restrictions on Acquisition e.g. by Foreigners

Portuguese law has no restrictions in relation to property acquisition by foreigners.

Construction and Use Restrictions e.g. Permits, Zoning

The enjoyment and exercise (use) of rights related to ownership, though full, is not, however, absolute, and takes into account that the law determines, in article 1305 Civil Code, the need to comply with restrictions and boundaries imposed by the social and dynamic function of ownership, regarded as one of the pillars of modern legal systems.

Apart from the general case of "proibição do abuso de direito" (prohibition of abuse of right), public expropriations and temporary requisition, there are two different types of restrictions to be noted: "public law restrictions" and "private law restrictions".

As to public law restrictions, there is specific legislation linked to, e.g. town planning law (inspections and supervision of construction works), that covers areas like waters, environment, air quality protection, forests, industry, work licensing, natural parks, sanitation, noise, etc. In addition, there are private law restrictions also stipulated in the Portuguese civil code, which are numerous, e.g. easements, excavations, water flowage, right of demarcation, right of division and joining rustic buildings, etc.

Lease Formalities e.g. Written, Time Limit for Lease Term and Possible Registration of Lease Interest

An oral lease (arrendamento verbal) is not valid, because Portuguese law determines the need for a written contract (Urban Lease Law) in relation to real property. In addition, the contract must include several fundamental elements, such as the permitted use and the number of the finance inscription in the register (inscrição na matriz predial).

Unless the parties decide to stipulate an effective term for the lease – the so called “limited duration contract” – where, for instance, in the case of habitation urban leases, the time period validity is, at least, five years – article 98, Urban Lease Law, the landlord will not have, in principle, the right to revoke the lease; only the tenant has such a right.

Certain kinds of lease are submitted to registration e.g. leases for six years or plus.