



Fall | 18



INTERNATIONAL LAWYERS NETWORK



MGRA & ASSOCIADOS LAW FIRM
Buying and Selling Real Estate in Portugal

ILN REAL ESTATE GROUP



This guide offers an overview of legal aspects of buying and selling real estate in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations, and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.



KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER PORTUGUESE LAW

I. INTRODUCTION

Portugal is an Iberian Peninsula country, bordered by the Atlantic to the west and south and Spain to the north and east; in addition to its continental landmass, it also comprises the archipelagos of the Azores and Madeira. Portugal has around 10.3 million inhabitants.

Portuguese territory is split up into three administrative divisions: the first division includes 18 administrative country districts, while the others include the autonomous regions of the Azores and Madeira. All country districts are sub-divided into 308 municipal districts and approximately 3,100 parishes.

Lisbon is the capital of Portugal and its largest city with around 510,000 inhabitants. Portugal's second largest city is Porto, in the north, with around 240,000 inhabitants.

Portugal is a democracy. Its sovereign bodies are the President of the Republic, Assembly of the Republic, Government and the Courts. The current President of the Republic, elected in 2016 for a five-year term, is Marcelo Rebelo de Sousa. Elections for the 230 deputies of the Assembly of the Republic are held every four years and are followed by the appointment of the Prime Minister (currently António Costa), who then forms the government (currently a PS government supported by a four-party left wing alliance).

Portugal has been a member of the European Union since 1986 and a founding member of NATO in 1949. It has been a member of the United Nations since 1955.

II. REASONS TO INVEST IN PORTUGAL

Portugal has a pleasant weather, an extensive Atlantic coast, a wide system of motorways,

excellent infrastructure for living and for leisure time, competitive operating costs, proactive pensions, an advantageous tax system for investors and flexibility in human resource management systems. These singularities have made Portugal a privileged place to invest, to do business and to live.



III. OVERVIEW OF THE NATIONAL REAL ESTATE MARKET

The real estate market in Portugal is highly developed. It has a high relative quality of supply in all sectors, on par with the larger core European markets, dynamic demand and a considerable presence of foreign occupiers. The market is highly transparent, with various international consultants regulated by the most demanding professional organizations of the commercial real estate sector. There is also a strong international contingent of developers and investors looking for new opportunities in the Portuguese market.

1. REAL ESTATE INVESTMENT MARKET

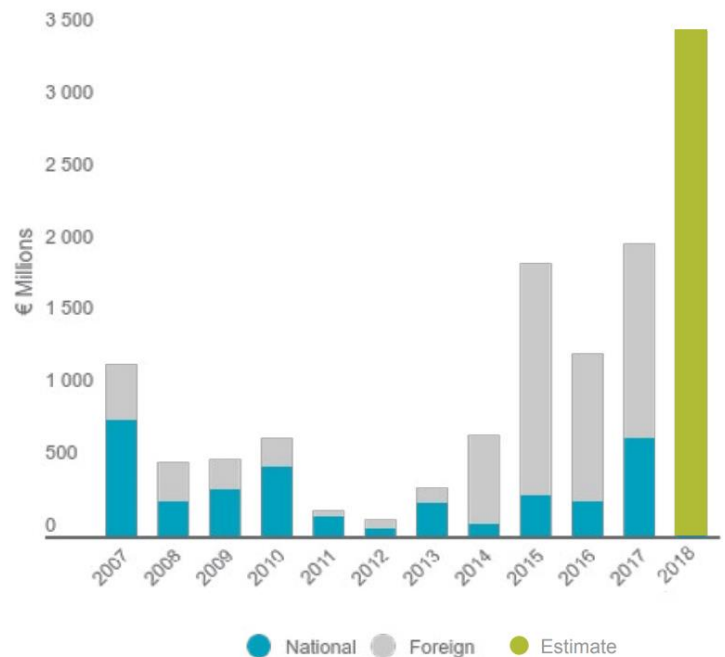
In 1985, the road for real estate investment funds in Portugal was opened. Since their launch and up until the 1990s, these funds had typically been used as SPVs rather than as an actively managed, pooled, closed-end-fund. The market in Portugal, up to 1998, was relatively small and not particularly professional, with foreign investments being few and far between.



The elimination of foreign exchange risk with most other European markets, when Portugal joined the Euro in 1999, placed the country more notably on the radar of international investors. Investment, in 1998, ahead of the Euro’s launch, increased from around €180 million to more than €400 million, around 90% of which was foreign. Almost all asset transactions were in the office or shopping center sectors; with retail property accounting for more than 60% of the capital involved. As can be noticed in the picture to the right:

- In 2007, the volume of transactions broke through the €1 billion barrier and achieved a new investment volume record.
- 2008 registered a 60% fall in activity compared to the preceding year, mostly due to restrictions and scarcity of bank funding for the real estate sector.
- In 2009, the market followed the previous year numbers, before showing a slight recovery in 2010 with a total investment volume of €690 million.
- The two following years continued to reflect the sector investment tendencies. 2012 reached a low point for the last 12 years, recording only a total investment of €108 million (a 36% drop over 2011).
- In 2013, the rise in the market activity began, and a total of €322 million in commercial real estate assets were closed, tripling the volume of 2012 and double the 2011 figure of €167 million.
- 2014 continued the evolution of the Portuguese real estate market. There was a significant evolution in all sectors.

- 2015 registered €1.9 billion of transactions in commercial real estate assets, doubling the volume of the previous year. 90% of the invested capital came from outside the country. The values surpassed the historical high of 2007.
- During the year of 2016, the value of real estate transactions was lower (around € 1.3 billion), but in 2017 Portugal reached a new historical high, with € 2 billion invested in real estate.
- It is widely expected that in 2018 may surpass 2017 and even reach the investment threshold of € 3 billion.



Real Estate Investment in Portugal during the past decade.



2. FOREIGN INVESTMENT IN REAL ESTATE

The real estate investment market in Portugal came to notice by the foreign investors since the country joined the Euro in 1999.

More than €4.2 billion of foreign capital have been invested mostly by Germans, British, Dutch and Americans on the acquisition of several real properties since then. Recently, investors from China, Russia, Brazil and France have also made an impact in Portuguese market. This value could have been higher as the Portuguese market was, on occasion, simply not large enough to supply sufficient products in terms of number, quality and/or scale, to fully meet the demand recorded at the time.

Portugal remained present in the investment intentions of several of the most important European investment houses over the past 15 years, with buyers interested in effectively diversifying risk and achieving slightly higher income returns than those available from other markets, in a country offering security, transparency and less competition.

Dramatic changes impacting the European economic situation and in particular Portugal had driven away the attention of foreign institutional investors until 2013. However, the second half of 2015 brought back international investment in to Portugal and, more particularly, the last quarter of the year, showed signs of what may be considered an upturn of real estate investment activity. The successful outcome of the political crisis, continued improvement of economic indicators, greater public debt market stability and Portugal's good performance in terms of the adjustment program, made important contributions to market recovery.

IV. HOW TO MAKE A REAL ESTATE INVESTMENT

Portugal, lined with other continental legal systems such as France (propriété), Germany (Voll Eigentum) and England (freehold), adopted the concept of “full ownership” which is defined by the full and exclusive right of use, disposal, and fruition of the property.



1. INDIVIDUAL (DIRECT ACQUISITION)

The formalization of a real estate acquisition requires the compliance of some important steps, as follows:

1.1. INVESTIGATION

Investigate the property intended to be acquired by checking its commercial, legal, fiscal, environmental and urban status is essential for a clean and structured execution of the sale and purchase agreement.

Usually, it is done by commissioning due diligence procedures, which should ensure and guarantee that the property in question is not subject to any encumbrance, costs, or limitations (registered with the respective Land Registry Office), or that any impediments have been extinguished before or after the sale.

If the intention is to acquire a plot of land, the buyer should also verify, with the competent entities, the urban planning in all its different forms, as well as any restrictions and licenses.



If the intention is to acquire a building, or building unit, the buyer should also verify the use permit license which defines the purpose of the property.

1.2. SALE AND PURCHASE PROMISSORY AGREEMENT

Before the formalization of the real estate sale, it is common practice to celebrate a promissory agreement as an immediate binding document, in which case the signing of the definitive sale agreement is usually conditional upon the parties' compliance with several obligations.

The parties can also agree with a deposit and down payment of the property price. In the case of a default by the promissory seller, the promissory purchaser may receive twice the amount paid; if the default is caused by the promissory purchaser, the promissory seller can keep the amounts already received.

1.3. SALE AND PURCHASE AGREEMENT

The real estate sale is formalized either in a deed, signed before a notary, or by a certified private document, which can be signed in the presence of a lawyer.

Altogether with the deed, or certified private document, there is the Land Registry Office record, which is one of the main instruments of a real estate deal, destined to make public the property's actual legal status.

Due to the principle of the priority of registration, the first registered right is effective before third parties and prevails over their incompatible rights even if those rights have been established before the date of registration.

Accordingly, together with the sale and purchase agreement, the registry of the property acquisition is vital to assure the protection of the purchaser before third parties.

1.4. REAL ESTATE WARRANTY

According to Portuguese Law, the real estate seller (and the property builder, when applicable) is responsible for any defects or flaws in the property that may occur in a five-year period upon delivery. The purchaser must report the defect or flaw to the real estate seller or property builder within one year from the date of detection of the defect (always within the five-year warranty period). The problems that have arisen during this period cannot be the result of bad use by the purchaser.

There may be warranties with distinct deadlines when a conventional warranty is stipulated between the parties and is expressly stated in the sale and purchase agreement.

This legal warranty can also be refused by both parties, specifically if they agree to sell the property "as it is" at the moment of the sale.

2. SPECIAL PURPOSE VEHICLE (INDIRECT ACQUISITION)

The second form of real estate investment is the indirect acquisition of property, via a special purpose vehicle, previously incorporated, or acquired, for such purpose. This procedure requires the compliance of some steps, as follows:

2.1. DUE DILIGENCE

As in direct acquisition deals, in indirect acquisition deals it's also recommended the



commission of a *due diligence* procedure by the purchaser, in order to i.) verify the property's legal status, as detailed above and to ii.) analyze the investment vehicle's commercial, financial, tax, corporate and legal status, ensuring the legal acquisition of equity stakes, as well as that no undesired obligations or rights are dragged along with the entity to be used as vehicle.

2.2. SHARE DEAL

This process involves the acquisition of equity stakes in investment vehicles, such as commercial companies (usually joint-stock and limited liability companies) and undertakings for collective investment of a contractual nature or of a corporate nature.

2.3. SALES GUARANTEES

In special purpose vehicles acquisitions, it is common practice by the seller to accept liability for a specific length of time for any infringement of its representations and warranties on the object of the sale and underlying assets.

V. TYPES OF SPECIAL PURPOSE VEHICLES

It is standard practice in Portugal to make real estate investments through one of these three vehicles which, in other words, represent the process of a special purpose vehicle acquisition deal: (i) commercial companies, (ii) real estate investment funds and, (iii) real estate investment companies.

1. COMMERCIAL COMPANIES

Joint-stock companies as well as limited liability companies are on the Portuguese frontline, representing the majority of the existing national commercial entities.

1.1. LIMITED LIABILITY COMPANIES BY SHARES (PLC)

In a PLC, share capital is divided up into shares, with a minimum initial amount of €50.000,00, and must, only at the moment of its incorporation, have a minimum of five shareholders, unless it is incorporated by another company, as its sole shareholder.

After the incorporation, restrictions to the minimum number of shareholders no longer apply.

In its most common composition, the company is governed by a General Meeting, the Board of Directors and the Sole Supervisor, who should be a Statutory Auditor.

In most PLC companies, the share transfer agreements require no special formalities and its register is executed directly at the company itself.

These commercial companies have a confidential advantage for investors, by keeping information about shareholders' identity away from public knowledge.

1.2. LIMITED LIABILITY COMPANIES BY QUOTAS (LTD)

Usually representing the small and medium sized companies, the LTD companies are the most common type of companies in Portugal due the inexistence of minimal initial share capital requirement and simpler functioning and structure, as well as the bigger control given to the founder partners.

Its share capital is divided up into quotas, with a minimum initial amount *per* quota of €1. The limited liability company can have or be incorporated by a sole quota holder (in which case the company must bear the



corporate expression: “sole quota holder limited liability company by quotas”), or by any other number of quota holders.

Different from PLC companies, the information about the quota holders’ identity is public, accessible through the commercial registry official records.

The quota transfer requires writing form and an official registry of the transmission.

2. REAL ESTATE INVESTMENT FUNDS

Over the last few years, these vehicles of real estate investment took up the Portuguese market, mostly due to its favorable tax regime.

The so called “*Fundos de Investimento Imobiliário*” (“FII”) are autonomous assets under the joint ownership of individuals or corporate entities, usually called “unit-holders.” FII’s are also divided up into identical investment units.

FII’s must assume one of three capital variability forms:

- i) Open-ended funds – with a number of investment units variable according to the market demand;
- ii) Close-ended funds – with a fixed number of investment units, established at the moment of its emission, with the possibility of increasing or reducing its number if and when mentioned in the law and management regulation;
- iii) Mixed funds – with a fixed number of investment units and variable number, included in two different categories.

FII’s are a type of undertaking for collective investment of a contractual nature, which management and representation must be performed by third ones specialized in the real estate market.

FII’s can be managed by real estate investment fund management companies with effective registered office and activity in Portugal.

The creation of these entities requires a formal process, which includes authorization and official supervision from Bank of Portugal (“*Banco de Portugal*”) and of the Securities Commission (“*Comissão do Mercado de Valores Mobiliários*” or “CMVM”).

The assets of a FII may comprise liquidity, real estate property and shareholdings in real estate companies.

3. REAL ESTATE INVESTMENT COMPANIES

In 2010, Portugal included in its legislation a possibility that already existed in most of European countries which consisted in forming FII’s with a corporate form (aside of the contractual form previously mentioned).

The so-called “*Sociedade de Investimento Imobiliário*” (“SIIMO”) are collective investment entities with legal personality, which may take the form of a public limited liability company of variable capital (“SICAVI”) or fixed capital (“SICAFI”)’ and whose property assets is owned by such entity.

A SIIMO can be self-managed or managed by professional real estate investment fund management companies (as FII with contractual form). The standard practice in Portugal is to choose already existing investment fund management company.

Both SICAFI and SICAVI are subject to:

- i) The regulations on the previously mentioned open-ended and close-ended real estate investment funds, respectively and,
- ii) The applicable regulations set out in the Portuguese corporate legislation.



SIIMO's must have a minimum share capital of €375.000 divided into identical nominative shares with no nominal value.

Additionally, it is important to point out that the rules behind the incorporation of FII's (contractual form) are equally applied to the SIIMO's incorporation, as well as the applicable Portuguese corporate legislation.

VI. TAX REGIME

1. PROPERTY ACQUISITION

1.1. REAL ESTATE TRANSFER TAX ("IMPOSTO MUNICIPAL SOBRE AS TRANSMISSÕES ONEROSAS DE IMÓVEIS") AND STAMP TAX ("IMPOSTO DE SELO")

The acquisition of real estate is subject to two types of taxes, which must be paid by the purchaser to the tax authorities before signing of the real estate acquisition agreement.

IMT – Real Estate Transfer Tax, which is calculated over the price of the real estate or its tax patrimonial value, if higher (which is uncommon).

IMT tax rates for housing buildings are progressive between 0% to 8% and fixed for plots for construction or other urban buildings (6.5%) and rural property (5%), or when the purchaser, not as an individual, has office at tax haven (10%). Nevertheless, Portuguese law foresees some exceptions or postponements on IMT payments, some of them applicable when the acquisition is made by using some of the special purpose acquisition vehicles identified above.

IS – stamp tax, calculated over the price, or the tax patrimonial value, if higher. IS tax rate is, in most frequent situations, fixed in 0.8%, although this rate can increase to 1%

on acquisitions of real estate valued at least at € 1.000.000,00, or when the purchaser, not as an individual, has office at tax haven (7.5%).

1.2. VAT ("IVA")

Under Portuguese law real estate acquisitions are exempted from VAT.

2. PROPERTY OWNERSHIP

2.1. PROPERTY TAX - "IMI"

IMI is levied on a property's taxable value and is payable by the property owners on 31 December of each year. Nowadays, IMI reaches a variable rate between 0.3% and 0.45% for urban buildings and plots for construction, a fixed rate of 0.8% for rural property, and a fixed rate of 7.5% for owners' resident in tax havens.

2.2. SPECIAL CONTRIBUTION

Special Contributions are required when properties are destined for the construction of new buildings and whenever the value of plots of land for construction increases significantly due to major infrastructure public works carried out (mostly in Lisbon, Porto and their outskirts). The applicable rate varies between 20% and 30% and is levied on the aforesaid increased value.

2.3. TAX ON INCOME FROM PROPERTY OBTAINED IN PORTUGAL BY NON-RESIDENTS

Income from property obtained in Portugal by non-residents (e.g. leases) is taxable at a special rate of 28% (applicable to individuals), or 25% (applicable to corporate entities), being in both cases subject to a 25% withholding tax.



VII. LEASING LEGAL FRAMEWORK

1. GENERAL ISSUES

In Portugal, leasing is, day by day, acquiring a more relevant economic weight.

On 14 August 2012, in compliance with the terms established in the memorandum of understanding executed by and between Portugal, the European Commission, the European Central Bank and the International Monetary Fund, a pack of Laws entered into force with the purpose of implementing structural reforms in the Portuguese legal framework of real estate lease to boost the market.

The real estate lease is divided into two types: (i) leases for non-housing purposes and (ii) leases for housing purposes.



2. LEASES FOR NON-HOUSING PURPOSES

The most relevant aspects of lease agreements for non-housing purposes, usually for commercial or industrial purposes, can be freely stipulated by the parties, who are, accordingly, free to agree on issues related to duration, termination, and opposition to the renewal of lease contracts, with subsidiary application of the rules regarding leases for housing purposes.

According to the law, the lease agreements may be entered into for fixed term or be of non-specified duration. The last option is not commonly used in the property market in

recent years. If entered on a fixed-term basis, the duration may be freely agreed between the parties. The agreement can be automatically renewable, unless the parties agree or any of them decide otherwise.

Maintenance works are freely regulated between the parties. In this particular case, if no provision is made by the parties, the landlord is responsible for the property maintenance.

The costs and expenses related to the property are freely agreed between the parties, who are also free to agree the criteria for updating them.

Parties can subject the transmission of tenant’s contractual position to landlord’s permission, although, if nothing is stipulated, the transmission is possible in the most frequent situation of transfer of the commercial or industrial business carried out in the property (“*trespasse*”).

Any party may cancel the lease agreement based on a serious breach of duty committed by the other. The legal system provides a non-exhaustive list of cases of breach justifying a landlord’s decision to terminate the lease agreement.

Additionally, the contract can be simply terminated by means of written communication sent by the landlord to the tenant in situations of delay or lack of payment of the rent.

On all other serious breaches, the termination can be declared by the Court.

3. LEASES FOR HOUSING PURPOSES

The lease agreements for housing purposes, unlike the lease agreements for non-housing purposes, have less contractual freedom.



Some of the most relevant matters are imperatively established in the law. That is the case of rules regarding the early termination and the opposition to renewal of the lease agreements which were, nevertheless, softened in 2012, favoring and strengthening the landlord position.

These lease agreements may also be entered into for a fixed term or be of non-specified duration. The information provided above on leases for non-housing purposes is also applicable here.

Regarding the fixed-term lease agreements, the tenant is entitled to oppose to the renewal of the lease, by means of a notice sent with a prior notice that may vary depending on the initial term or on the term of its renewal, as well as to terminate the lease agreement at any time and without justification, provided that 1/3 of the lease duration has elapsed, by means of a written communication sent to the landlord with a prior notice provided in the applicable law.

As to non-fixed term agreements, the law provides the conditions and the prior notices that the landlord and the tenant must comply in order to legally terminate the agreement.

As in the non-housing lease agreements, any party may cancel the lease agreement based on a serious breach of duty committed by the other. Also, here the legal system provides a non-exhaustive list of cases of breach justifying a landlord's decision to terminate the lease agreement.

Additionally, the contract can be simply terminated by means of a written communication sent by the landlord to the tenant in eligible situations of delay or lack of payment of the rent.

On all other serious breaches, the termination can also be declared by the Court.

4. SPECIAL PROCEDURE FOR EVICTION

One of the ultimate goals of the urban lease regulation's reform in 2012 consisted of speeding up the procedure for eviction. A special eviction regime was established in order to ensure the effectiveness of the termination of lease agreements – regardless of its purpose – applicable when the tenant has not vacated the leased property on the date foreseen in the law or agreed by the parties.

This eviction procedure is specially used when the lease agreement was terminated by non-judicial means. The landlord can cumulate the request for eviction with the claim of payment of rents and other expenses and charges due by the tenant. This procedure takes place before an extrajudicial entity and is aimed to ensure fast procedures, although it can, under certain circumstances, be transferred to court.

VIII. URBAN REHABILITATION

To promote the properties' rehabilitation, the new reforms simplified the urban licensing procedure required for these operations as well as for termination of lease agreements when the landlord desires to perform rehabilitation works on the property.

There is a special procedure applicable to the prior licensing control regarding buildings that were built at least 30 years ago and that show high levels of deterioration. According to this procedure, the execution of works in such buildings does not require a construction license, usually a bureaucratic process, being that a prior formal communication to the competent entity is requirement enough to allow the works to commence.



In case the property is leased, and the landlord intends to carry out refurbishment works or deep restoration, in most situations, the landlord is entitled to terminate the lease agreement without having to resort to court and obtain the release of the leased property, provided that the landlord relocates the tenant or, alternatively, awards the tenant with the compensation legally foreseen.



The information contained in this "Guide" is provided for informational purposes only and should not, under any circumstances, be understood as legal advice on any subject matter. Recipients of this document, clients or otherwise, should not act or refrain from acting on the basis of any content included in the document without seeking the appropriate legal advice from an attorney on their particular facts and circumstances. Mouteira Guerreiro, Rosa Amaral & Associados, Sociedade de Advogados R.L. expressly disclaims all liability for any possible damages caused by actions taken or not taken based on any or all the contents of this document.

This "Guide " and its contents are provided "AS IS" without warranty of any kind, either expressed or implied, including, but not limited to, the implied warranties of merchantability, fitness for a particular purpose, or non-infringement.

Reproduction, distribution, republication, and/or retransmission of material contained within this "Guide" is prohibited without prior written permission of Mouteira Guerreiro, Rosa Amaral & Associados, Sociedade de Advogados R.L.