



**COUNTRY  
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## **Portugal REAL ESTATE**

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This country-specific Q&A provides an overview of real estate laws and regulations applicable in Portugal.

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# PORTUGAL REAL ESTATE



## 1. Overview

The Portuguese real estate market has been in the international spotlight for investment, due to the growth recorded in recent years. This growth is fundamentally due to demand from large multinationals, residents, entrepreneurs, students, among others, making it one of the most sustainable and attractive real estate markets in Europe. The basis for this great demand includes the climate, a modern education system, a safe society, highly qualified labour force fluent in English, good infrastructures and, in general, an excellent quality of life. In addition, the programmes launched by the Portuguese Government, such as the Golden Visa and the Non-Habitual Residents tax regime have been responsible for many of the investment decisions in Portugal. As from the second half of 2022 the Portuguese real estate market began to slow down as monetary policy shifted. However, the slowdown of the Portuguese real estate sector is proving less pronounced than expected, at least in terms of housing prices. In fact, according to the index produced by the National Statistics Institute, the annual growth rate was above 10% for six consecutive quarters, before moderating to 8.7% in the first quarter of 2023. Interest rates are expected to keep rising but the idea of a recession is losing force and the Portuguese real estate market continues to present strong fundamentals and is proving to be a resilient and robust market.

## 2. What is the main legislation relating to real estate ownership?

The main legislation relating to real estate ownership in the Portuguese jurisdiction is: (i) The *Constitution of the Portuguese Republic*, which is the fundamental Law in the Portuguese legal framework and classifies the right to private property as a fundamental right; (ii) The *Portuguese Civil Code*, which, in general terms, regulates the relationships between private parties, including specific parts on the lease agreements, property and other rights over assets; (iii) The *Legal Framework of Urban Development and Construction* ("RJUE") which, in

general terms, provides the legal regime applicable to the licensing of the constructions and infrastructure works; (iv) The *General Regulation of Urban Construction* ("RGEU") which, in general terms, sets out the technical requirements applicable to the constructions; (v) *Decree-Law no. 268/1994, October 25*, which foresees the legal regime applicable to the horizontal property; (vi) *Decree-Law no. 39/2008, July 7*, which foresees the legal regime applicable to tourism undertakings (vii) *Decree-Law no. 128/2014, of August 29*, which foresees the legal regime for the operation of local accommodation establishments; (viii) *Law no. 6/2006, of February 27*, which foresees the new regime of urban leases; (ix) *Decree-Law no. 294/2009, of October 13*, which foresees the new regime of rural leases; and (x) *Decree-Law no. 84/2021, of October 18*, which sets out the rights of consumers in the case of a lack of conformity of goods, digital content or services, and provides a set of subjective and objective requirements for assessing conformity.

## 3. Have any significant new laws which materially impact real estate investors and lenders come into force since December 2022 or are there any major anticipated new laws which are expected to materially impact them in the near future?

On October 7, 2023, the *Law no. 56/2023, of October 6*, also known as the *More Housing Program* ("Programa Mais Habitação") has entered into force, introducing a series of measures, translated in profound changes in several legal regimes that over the last few years have contributed significantly to attract investment in the real estate market, and which will be affected by the measures of this package, notably the following ones: (i) limitation until December 2029 of the value of rents in new lease agreements, subsequent to lease contracts entered into in the last five years; (ii) establishment of forced leases for vacant properties that do not become part of the rental market voluntarily; (iii) revocation of the possibility of acquiring residence permits for investment activities ("Golden Visa") through real estate

investments; (iv) ending of new registrations of local accommodation in areas of high urban pressure, namely, the metropolitan regions of Lisbon and Porto.

In addition, the More Housing Program has introduced several measures to simplify environmental and urban planning procedures, aiming to simplify several administrative procedures and promote the urban development with certain specific measures to increase the offer of public housing, low-cost construction and affordable renting houses.

#### 4. How is ownership of real estate proved?

The ownership of real estate is proved by a property title and the registry of the pertaining property right before the land registry office. The Portuguese legal system encompasses a national registry system, with several land registry offices, for the registry of ownership and other rights over real estate. Ownership and other rights subject to registry (e.g., mortgages and other encumbrances) are only enforceable against third parties if duly registered.

#### 5. Are there any restrictions on who can own real estate?

There are no restrictions on who can own real estate in Portugal. Notably, there are no restrictions based on the nationality of the natural person or the location of the registered head offices of legal entities who intend to acquire real estate in Portugal. However, any natural person or legal entity who intends to purchase real estate must have capacity to do so, under the applicable law, and must be compliant with Portuguese law. Moreover, acquisition of real estate in Portugal through entities based on certain listed tax places ("Tax Havens") may attract negative tax consequences.

#### 6. What types of proprietary interests in real estate can be created?

Within the Portuguese legal system, there are several types of proprietary interests that can be created over real estate. The more common proprietary interests are: (i) *full ownership*, which includes full and exclusive right of use, enjoyment, and disposal of the property; (ii) *co-ownership*, in which two or more persons hold ownership rights over the same property and, as a rule, have to contribute to the necessary expenses in proportion to their respective interests in the property; (iii) *usufruct right*, which grants its holder the powers of use, enjoyment, and administration of a property owned by another person, during an agreed period or in

perpetuity; (iv) *surface right*, which grants the right to build or maintain, in perpetuity or temporarily, a construction on land belonging to another person, or to plant or maintain plantations on such land; (v) *lease agreement*, which grants a temporary right of use of real estate against payment of rent; (vi) *lending agreement*, which grants a temporary right of use of property without economic compensation.

#### 7. Is ownership of real estate and the buildings on it separate?

In principle, under Portuguese law, the owner of the land is also the owner of the constructions made over (or below) that land. Nevertheless, it is possible to separate both rights, by creating a surface right over the land, which consists in the right to build or maintain, in perpetuity or temporarily, a construction on land belonging to another person.

#### 8. What are common ownership structures for ownership of commercial real estate?

In Portugal, various ownership structures can be used for commercial real estate, depending on factors such as the size of the investment, the number of owners, and tax considerations. Common ownership structures include corporate structures, such as, ownership through limited liability company ("*Sociedades por Quotas*") or a public limited company ("*Sociedade Anónimas*") and collective investment undertakings, notably ownership through real estate investment funds known in Portugal as "*OIA Imobiliários*". In addition, it would not be unusual to assign the exploitation and/or the management of commercial or offices centres to a company different to the owner of the centre.

#### 9. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

The due diligence process is not mandatory, but it is common practice. The scope of the due diligence varies significantly depending on the dimension and complexity of the transaction. For retail low value transactions, the due diligence consists basically on confirming the ownership, that there are no mortgages, charges or encumbrances registered over the property, that there no outstanding taxes over the property and that all the other documents required for the deed (e.g., energy certificates) are valid and updated. In general terms, that implies (i) obtaining the land registry certificate of the property to check if the vendor is the registered

owner of the property, if there are any mortgages, charges or encumbrances over the property and if the property is correctly described and there are no inconsistencies between the legal and tax certificates; (ii) carry out searches to confirm that there are no outstanding municipal property taxes on the property; (iii) confirm that the use permit and the energetic certificate issued for the property are valid; and (iv) if applicable, check the horizontal property deed and confirm that there are no outstanding debts to the condominium administration.

For larger transactions it is usual to conduct a much more thorough due diligence exercise on the property including not only the ownership, charges and tax, but also any agreements with third parties, urban, planning, licensing, and environmental aspects. It would also be usual to conduct a technical due diligence on the building. The tax and legal due diligence are generally based on the documentation provided by the seller and on the documentation and information made available by the public relevant entities (land registry offices, tax departments, municipalities, etc.).

#### **10. What legal issues (if any) cannot be covered by usual legal due diligence?**

Depending on the agreed scope, due diligences can cover almost all and every legal relevant aspect. However, there are certain legal issues that may only be identified through a site inspection, such as certain environmental issues, unknown illegal occupants, non-authorized works and, in general, compliance with planning and building regulations. For large transactions, it is customary and advisable to conduct a technical due diligence.

#### **11. What is the usual process for transfer of commercial real estate?**

The transaction of a real estate in Portugal normally begins with the execution of promissory sale and purchase agreement ("PSPA") detailing the conditions of the sale, according to which the owner promises to sell, and the purchaser promises to buy, the property, at an agreed price and within an agreed period. This agreement usually involves the payment of a deposit ("Sinal"). The final deed is usually subject to non-exercise of any applicable pre-emption rights (meaning that after the execution of the PSPA the public and private entities who are entitled to such pre-emption rights must be notified of the intended sale and purchase to exercise their pre-emption rights with the applicable time limit), but it can also be subject to other

conditions like the promissory purchaser obtaining finance for the acquisition or the promissory seller obtaining all the documents required for the sale. Unless otherwise agreed by the parties, if the buyer fails to complete the agreement, he will lose the deposit; if the seller fails to complete the sale, he must repay the amount of the deposit in double. Once all the conditions precedent are fulfilled the real estate transaction is completed through the execution of a notarial deed or an authenticated document (with similar force to the deed) signed between the seller and the purchaser. The sale and purchase deed must be preceded by liquidation and payment of municipal transfer tax ("IMT") and stamp duty tax ("Imposto do Selo"). Finally, upon the execution of sale and purchase public deed, the acquisition is subject to registration in the land registry office and in the tax authorities.

#### **12. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?**

Both assets deals and shares deals are common, depending on the circumstances and the preference of the parties.

#### **13. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?**

Under Portuguese law, and unless otherwise provided for in the lease agreement, the lease agreements are transferred to the purchaser of the leased property. In this event, the landlord must notify the tenant of the sale of the property, informing the tenant of the sale and purchase and that the rent shall be owed to the new owner of the property.

#### **14. What common rights, interests and burdens can be created or attach over real estate and how are these protected?**

Commons rights, interests and burdens that can be created or attached over real estate include mortgages and other charges, leases, lending, usufruct, surface rights, easements, pre-emption rights, put options, call options, retention rights and other covenants. In general, these rights must be registered in the land registry office to be effective vis-à-vis any third parties.

#### **15. Are split legal and beneficial ownership**

## of real estate (i.e. trust structures) recognised

There is no split between legal title and beneficial ownership of property in Portugal. Trusts are not recognized under Portuguese law. However, there are other methods which can establish a difference between legal title and beneficial ownership, including fiduciary agreements (with inherent limitations).

## 16. Is public disclosure of the ultimate beneficial owners of real estate required?

There is no requirement for the public disclosure of the ultimate beneficial owners of real estate. The land registry does not recognise a split between legal title and beneficial ownership and thus only the legal owner of property will be recorded. However, it is required by law the identification and the registry of the ultimate beneficial owners of legal entities and, as such, if the property is owned by a legal person, the ultimate beneficial owner of that entity will be identified and registered in the central registry of beneficial owners ("RCBE").

## 17. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

All the parties in a real estate transaction should bear a Portuguese tax number and moreover any non-EU residents must appoint a tax representative in Portugal unless they adhere to electronic notification system. The purchaser will be subject to the following taxes: (i) *Municipal property transfer tax ("IMT")* to be declared and paid by the purchaser immediately before the transaction (or, in certain circumstances, in the promissory agreement). The IMT rates are 6.5% for urban property, 5% for rural property, and 10% if the acquirer is a company resident in a listed tax haven or a company controlled, directly or indirectly, by a company resident in a listed tax haven. For real estate exclusively intended for residential use, progressive IMT rates between 1% and 8% will generally apply in accordance with the taxable value of the property. IMT exemptions may apply, for example, on certain acquisitions of real estate meant for urban rehabilitation, or on the acquisition of property for resale purposes by real estate companies; (ii) *Stamp duty ("Imposto de Selo")*: the acquisition of a property is also subject to a stamp duty at a rate of 0.8%, as a rule, over the value of the transaction to be paid by the Purchaser; (iii) *Municipal property tax ("IMI")*: every year the owner of any property is subject to pay an annual municipal property

tax. The payment encumbers the owner of the property on 31<sup>st</sup> December of each year. If the tax amount does not exceed €100, the total amount will be paid in May. For taxes amounts between €100 and €500, the total will be divided into two equal parcels, the first for payment in May and the second for payment in November. If it exceeds €500, an additional August instalment is added to these other two mentioned above. The IMI rates are variable from municipality to municipality and are revised each year. Usually, the transfer of property does not attract *Value Added Tax ("VAT")*, although in certain cases the seller may waive the exemption of VAT if the buyer uses, in whole or in part, the building for taxed activities and is itself subject to VAT. On the seller's side, the sale can attract tax earnings in accordance with its annual statements.

## 18. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

The Portuguese legislation for commercial leases includes several mandatory provisions. Subject to these provisions and other mandatory provisions of the Portuguese law the parties may fix the content of the lease agreement and their respective rights and obligations as they deem better. Typically, terms include the following: (i) duration of the lease; (ii) rent and the method of payment; (iii) rent review mechanism; (iv) renewal of the lease; (v) permitted uses and identification of restrictions on the use of the premises; (vi) landlord's and tenant's responsibilities regarding the maintenance and repair of the property; (vii) assignment of the contractual position and subletting; (viii) charges and expenses associated with the property, such as taxes and condominium fees; (ix) other works; (x) terminations rights and obligations.

## 19. How are use, planning and zoning restrictions on real estate regulated?

In general terms, the land use, planning and zoning restrictions in Portugal are regulated by law and by planning instruments which shall be in compliance with the legal framework on planning matters. The planning instruments are divided into different levels: national, regional, intermunicipal and municipal. The national level comprises the national planning policy program ("PNPOT") – which, in general, establishes the strategic options relevant to the organisation of the national territory –, the sector and the special programs, while the regional level includes only the regional programs. At the intermunicipal and municipal levels there are intermunicipal programs (whose elaboration is optional)



and intermunicipal and municipal general plans, master plans, and detailed plans. While the programs bind only public entities, the plans bind but also private entities. Please note that the entire Portuguese territory is covered by general municipal plans which are a reference instrument for the preparation of other municipal plans, as well as for the development of sectoral interventions by the state administration in the Municipalities. The elaboration of these plans is mandatory, except if the Municipalities choose to prepare an intermunicipal general plan instead.

## 20. Who can be liable for environmental contamination on real estate?

In general, under Portuguese law, the author of the environmental damage caused by the contamination (the polluter) is responsible for its remediation, under the terms of the polluter pays principle. Accordingly, under the terms of the legal regime for liability for environmental damage (Decree-Law 147/2008, of July 29), the economic operator is responsible for repairing the environmental damage caused in the exercise of one of the activities listed in annex III of this legal regime and, when the activity is imputable to a legal person, the obligations apply jointly and severally to its directors, managers or administrators. Besides the polluter, the State can also repair the environmental damage caused by contamination, when it is not possible to attribute this responsibility to the author of the environmental damage. Regarding soil contamination, the non-polluting owner (or possessor) may also be responsible for decontaminating the soil if this is provided for in the applicable planning instruments.

## 21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

Yes, the buildings are legally required to have their energy performance assessed. The requirements for energy performance assessments and the situations in which minimum energy performance levels need to be met are governed by Decree-Law 101-D/2020. In Portugal, the energy performance of buildings is assessed through an Energy Performance Certificate ("*Certificado Energético*"). In general terms, the following buildings are subject to the energy certification obligation: a) the construction of new buildings; b) major building renovations; c) large commercial and service buildings; d) buildings owned and occupied by a public entity and frequently visited by the public; e) buildings, when they are sold, given in lieu of payment, leased or

transferred, provided that this includes the transfer of the physical space in which the establishment is installed; f) buildings that are the target of financing programs to improve energy performance; g) buildings eligible for tax benefits. Regarding compliance with minimum performance levels, it should be noted that new buildings shall have almost zero energy needs. Minimum energy performance requirements must therefore be complied with in relation to the building surrounding, which are aimed in particular at minimizing the occurrence of pathologies and limiting energy needs in order to achieve comfortable indoor conditions.

## 22. Is expropriation of real estate possible?

Yes. However, the expropriation of real estate may only be carried out for reasons of public utility included in the powers, purposes or object of the expropriating entity, upon the payment of a fair compensation in accordance with the *Portuguese Expropriation Code*.

## 23. Is it possible to create mortgages over real estate and how are these protected and enforced?

Yes, it is possible to create mortgages over real estate. In fact, mortgages are the most widely used security for real estate assets. Mortgage is a security in rem ("*Garantia Real*") that gives the creditor the right to be paid for the value of certain immovable or similar assets belonging to the debtor or to a third party, with preference over other creditors who do not enjoy special privilege or priority of registration. Thus, the creditor who holds a mortgage has, with a few exceptions, a preference in the satisfaction of his claim over the other creditors of the owner of the encumbered property in the event of an enforcement sale.

## 24. Are there material registration costs associated with the creation of mortgages over real estate?

Yes, there are material registration costs associated with the creation of mortgages over real estate.

Specifically, according to the *Emoluments Regulation for Registries and Notaries*, 122 euros is due for the deed and 500 euros is due for the registration of the acquisition of one or more mortgages.

## 25. Is it possible to create a trust structure

**for mortgage security over real estate?**

As above referred, trusts are not recognized under

Portuguese law. It is disputable whether a mortgage may be registered in the name of a security agent to the benefit of the lending banks.

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