GÓMEZ-ACEBO & POMBO

Corporate Highlights

of Investing in Portugal

Section prepared by:

Mafalda Barreto
Partner, Portugal

Susana Morgado
Senior Associate, Portugal

No. 1 | 2016

Summary

Design and layout: José Ángel Rodríguez León • Translation and adaptation: John Woodger

SETTING UP A COMPANY

General considerations

Foreign investment. Portugal applies a principle of non-discrimination to investment as regards the investors' nationality. Accordingly, there are no restrictions in Portugal to foreign investment nor is such investment required to have a Portuguese partner or to obtain prior authorization, only to obtain a foreigner's tax identification number[1]-[2]. By virtue of this same principle, there are no corporate law limitations to the distribution of dividends to foreign investors[3].

Governing law. Companies with registered office and effective management in Portugal are subject to Portuguese jurisdiction. Portuguese companies are regulated, inter alia, by the Portuguese Commercial Companies' Code ("PCC").

Foreign companies operating in Portugal. Foreign investors may conduct their business in Portugal either through a subsidiary or through a branch. Except for companies that wish to conduct an activity that is covered by the EU Directive no. 2006/123/CE[4] on services in the internal market, the incorporation of a subsidiary or a branch is mandatory if the foreign investor wishes to carry out its business activity for more than one year.

Formalities to incorporate a company

Company name and object. Shareholders wishing to incorporate a company in Portugal must apply for approval of a company name and object at the Register of Legal Persons (RNPC). A company's name cannot be misleading as regards the business activities the company wishes to conduct or the identification of its shareholders and cannot be liable to create confusion with other existing registered names.

A foreign company that wishes to register a branch is dispensed from having the branch's name recognised/approved.

Together with the approval of the company name, a tax identification number is assigned to the company / branch.

Registration for tax purposes. Foreign individuals or body corporates wishing to set up a company in Portugal are required to register themselves with the Portuguese tax authorities.

Likewise, foreign individuals or body corporates appointed as directors of a Portuguese company or as legal representatives of a Portuguese branch are also required to register themselves with the Portuguese tax authorities.

---

1 Without prejudice to prior licences, permits or authorizations that may be required for certain types of activities (*e.g.* construction, manufacture of pharmaceutical products and medical devices, real estate, to name but a few) or restrictions in certain sectors of activity.

2 As further detailed in the section on "Formalities to Incorporate a Company" below.

3 Notwithstanding specific tax rules that may apply.

4 Article 2 1. "*This Directive shall apply to services supplied by providers established in a Member State.*"; Article 4 "'*service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty*;".

In addition to the above, non-EU foreign non-resident shareholders or directors are required to appoint an individual or corporate body, with domicile in Portugal, to represent them before the Portuguese tax authorities.

Social Security of foreign directors. Foreign non-resident directors are required to register with the Portuguese social security. Exemption from payment of payroll taxes to the social security may be granted upon request if their position is not remunerated and provided that the relevant director (i) is covered by a social security scheme in his/her country of residence and (ii) is not in default of the mandatory payments under such scheme.

Opening a bank account to deposit the share capital. The share capital, or the part thereof legally required to be paid up immediately, must be deposited with a Portuguese bank on or before signing of the deed of incorporation or, if the company is a *sociedade por quotas*, up to the financial year-end.

The opening of a bank account entails a client due diligence process involving, inter alia, the delivery of documents relating to the to-be incorporated company, its shareholders and directors in order to comply with KYC rules.

At this point, we note that Portuguese banks are very demanding and formal at the time of opening operating accounts, in compliance with their duties under the anti-money laundering legislation. For this reason, foreign investors should bear in mind that opening a bank account is usually a lengthy and bureaucratic process that should be prepared well in advance prior to the act of incorporation.

By-laws (articles of association). Shareholders need to draft and approve the by-laws that define the rules of conduct for the company, *e.g.* its company name, object, equity and governance structure and specific rules such as limitations to the transfer of shares, redemption, distribution of dividends, winding up and liquidation.

Legal act of incorporation. Companies are incorporated by way of a private document[5] that must be signed by all of its shareholders, with wet-ink signatures. The signatures should be attested by a notary or lawyer, if not signed before the Companies Registrar or may be performed abroad at the Portuguese consulate.

Representation of foreign shareholders at the act of incorporation. Foreign shareholders may be represented in the act of incorporation by proxies, including their local legal representatives. The power of attorney should be given before a notary or at the Portuguese Consulate abroad.

Appointment of Directors. It is advisable that company directors, and members of other statutory bodies if applicable, are appointed in the act of incorporation.

Note, however, that foreign non-resident directors may only be appointed after obtaining their Portuguese tax identification numbers.

There are no restrictions on the number or on the nationality of directors[6].

Centre of Main Interests (COMI). A company shall be deemed to have its COMI where its legal seat and place of effective management are located. COMI is very similar to that used

---

[5] Unless a more formal document is required by law.

[6] It should however be taken into consideration that if all of the directors are resident in a jurisdiction other than Portugal, the COMI of the company may be considered to be that of the residence of the directors.

for purposes of determining the jurisdiction where companies are deemed to be resident for income tax purposes.

The consequences of having the COMI – in a jurisdiction other than Portugal - is that it might attract taxation to that country where COMI is considered to be located, as well as being used to determine the insolvency law that applies.

Considering that the Corporate Income Tax law does not provide a definition of "place of effective management", this concept is usually interpreted under the OECD Model Tax Convention on Income and on Capital ("OECD Model Convention") Commentary to its Article 4, rule that deals with the definition of resident.

In accordance with this commentary to Article 4 of the OECD Model Convention, "*The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the place of effective management*". For this purpose, the place "(…) *where the meetings of its board of directors or equivalent body are usually held, where the chief executive officer and other senior executives usually carry on their activities, where the senior day-to-day management of the company is carried on* (…)" should be taken into account.

Thus, in order to make sure that a company has its place of effective management in Portugal, the most relevant management and commercial decisions which are necessary for the conduct of its activity should be taken in Portugal within the scope of its board meetings (ideally, some of the members of the board should also be Portuguese residents).

Accountant ("TOC"). An accountant must be hired by the company to, inter alia, register the company for tax and social security purposes and take over responsibility for the company's accounts and tax and social security statements before the Portuguese authorities. The accountant must be an independent individual or company and member of the Portuguese professional body OTOC. The TOC should be hired in advance of the company's incorporation to ensure timely compliance with the statement of commencement of activity.

Registration with the Companies' Register. The incorporation of the company and the appointment of its members must be registered with the Companies' Register within 2 months of the act of incorporation.

Online registration is currently available with a significant reduction in registration fees and completion and approval processes normally being quite quick and efficient.

Official publication. After registration, the Companies' Register will have the company's incorporation published on the website www.mj.gov.pt/publicacoes.

Registration with the Tax Authorities and with the Social Security. Tax and social security registration of the company and its directors is mandatory within 15 and 10 calendar days, respectively, from the application to register the company and should be submitted by the company's TOC.

Legal form, types of companies

Since this note is not meant to be exhaustive, we shall focus on the most commonly used options, which are to set up a privately held company under the form of a private limited company *(sociedade por quotas)* or of a public limited company *(sociedade anónima).*

Alternatively and as referred above, foreign investors may also conduct their business through a branch.

PRIVATE LIMITED COMPANIES ("*Quota Companies*")

General topics. The share capital is divided into "quotas" - dematerialized holdings that have a nominal value representing the quota of rights and liabilities of its quotaholders (*i.e.*, members).

Liability. Externally members are liable up to the amount of their holding and internally are jointly and severally liable for the entire nominal share capital.

In the event of debt or bankruptcy, the assets of the company alone can be used to pay the creditors, except (i) in cases of parent company liability or (ii) if contractual shareholder liability has been provided for in the by-laws.

Minimum membership. Generally a minimum of two members is required.

Wholly-owned companies. A wholly-owned quota company may be incorporated by a company or an individual provided that such company is not itself a wholly-owned quota company or that such individual is not the owner of another wholly-owned quota company.

Minimum Capital. There is no minimum capital, but the minimum value of a quota is set at EUR 1,00.

Paying up the share capital. The capital can be paid up in cash and/or assets (which must be specified and appraised by a qualified independent auditor).

Up to a maximum of fifty percent of cash consideration can be postponed.

Transfer of quotas and pre-emption rights. Legal effects of limitations on transfers between members can be set out in the by-laws and effectiveness before third parties requires registration and publicity in the official online service. The transfer of quotas requires prior consent of the company, unless the transfer is made to a spouse, ascendant or descendant or is made between members. The withholding of consent must be approved together with an offer of redemption or repurchase of the relevant *quota*. The by-laws may contain further limitations or prohibit the transfer (in which case any member has a withdrawal right after a period of 10 years).

Bonds. Quota companies may issue bonds in the same terms as permitted for public limited companies (please see section below).

Corporate Bodies

Structure. Quota companies may have a structure comprising one or more *gerentes* (roughly equivalent to a director) or a *conselho de gerência* (management board).

A quota company must appoint an auditor (*revisor oficial de contas / ROC*) to legally certify its financial statements where the company has surpassed at least two of the following limits over two consecutive years: (i) a balance sheet totalling EUR 1.500.000,00; (ii) net sales and other profits totalling EUR 3.000.000,00; and/or (iii) an average of 50 employees during the financial year.

A quota company does not need to appoint an independent external ROC if it has appointed a supervisory board/sole supervisor or has not exceeded at least two of the above-mentioned thresholds over two consecutive years.

A quota company may also adopt a structure comprising one or more directors or a management board, together with a supervisory board (*conselho fiscal*) or a sole supervisor.

Management. Directors must be individuals with unrestricted legal capacity.

Number of directors. Quota companies must be governed by at least one director (no maximum limit).

Delegation. Directors are allowed to delegate powers to one or more other directors specifically to decide and/or bind the company in a particular transaction or particular types of transactions.

Company secretary (*secretário da sociedade*). Quota companies may have a company secretary (and deputy) on the same terms as "Share Companies".

Proxies. the company may appoint proxies to represent it with limited powers.

Winding up and liquidation of the Company. Winding up of the company will occur whenever (i) its duration under the by-laws has elapsed; (ii) it is approved by a majority of three quarters of the members (quotaholders) with voting rights or a higher majority if such is determined in the by-laws; (iii) the purpose for which the company was incorporated is deemed to be fully completed; (iv) the company's object is held illegal; or (v) the company is declared insolvent.

An administrative winding up may be applied for on the basis of a legislative or contractual provision where (i) for of a period above one year the company has a number of members (quotaholders) below the mandatory minimum; (ii) the company's object can no longer be pursued; (iii) for two consecutive years the company is *de facto* without activity; (iv) the continued pursuit of an activity does not fall within the company object; (v) the company has not filed its annual accounts at the register of companies for more than one year.

Liquidation entails the full settlement of the company's liabilities and the *pro rata* distribution of assets to its shareholders.

PUBLIC LIMITED COMPANIES ("Share Companies")

General topics. The share capital is represented by shares, with or without nominal value.

Liability. Shareholders are liable up to the amount of their shareholding.

Particular attention should nonetheless be taken where incorporating a share company wholly-owned by a Portuguese corporate shareholder given that such shall be subject to specific rules on liability, including, amongst others, strict several liability with the subsidiary for claims outstanding in excess of 30 days.

Minimum number of shareholders. At least five shareholders. Wholly-owned share companies are also admitted.

Share capital. The minimum share capital is of 50,000.00 €, divided into shares with a value of at least one cent of a Euro each.

Paying up the share capital. The share capital can be paid up in cash alone or in cash and assets (specified and appraised by a qualified independent auditor).

Payment of up to a maximum of seventy per cent can be postponed; the remaining thirty per cent must be paid up on incorporation.

Types of shares. Shares can be bearer shares or registered shares. Shares must be registered where: (i) they are not entirely paid up; (ii) pursuant to the by-laws there are restrictions to their transfer, including the need for prior authorisation of the company; or (iii) pursuant to the by-laws the shareholders may be required to make ancillary contributions to the company (*prestações acessórias*).

Transfer of shares. Sale and purchase contracts for the transfer of shares are not subject to any specific contractual form. However, the validity and legal efficacy of the transfer in itself shall depend on the type of shares issued and on whether they are recorded in book entries or represented by certificates (*e.g.*, proper registration and notification to the company is required for registered shares).

The transfer of shares cannot be prohibited and can only be restricted by the company's by-laws in respect of registered shares by establishing: (i) pre-emption rights conferred to other shareholders; (ii) the need for prior authorisation of the company; or (iii) compliance with certain specific requirements deemed to be in the company's best interest.

Bonds. Generally speaking, share companies may issue bonds, provided that the relevant by-laws are registered for more than one year and the share capital is either fully paid up or the shareholder in default has been served notice of default on its payment-up.

The issue of bonds is subject to other limitations under the law and may be subject to further limitations under the by-laws.

Some of the following types of bonds may be issued: (i) right to a fixed interest rate and supplementary interest or a refundable premium, prearranged or depending on the company's profits; (ii) bonds that grant the holder the right to an interest and provide for a redemption plan, dependant on and variable in accordance with the issuer's profits; (iii) bonds that are convertible into voting or non-voting ordinary or preference shares or into other securities; (iv) bonds that entitle its holder to acquire one or more voting or non-voting ordinary or preference shares, ; (v) bonds that confer subordinated receivables, payable upon satisfaction of ordinary creditors; (vi) bonds that result from the conversion of other shareholder claims or other third party claims against the company; or (vii) bonds that provide specific collateral over assets or asset incomes; or (viii) provide a premium on issue.

Corporate bodies. Under Portuguese law, a share company may adopt a single-tier or a two-tier structure based on the following corporate governance models:

The *latin structure:* consists of a board of directors and an auditing board (or auditor), appointed by the general meeting.

The *dualist* or *german structure:* consists of an executive board of directors, general and supervisory board and auditor, elected by the shareholders with the exception of the members of the executive board of directors which, as a rule, are appointed by the general and supervisory board, unless the by-laws provide that the same are appointed by the general meeting.

The *Anglo-Saxon structure:* consists of a board of directors, which includes an audit committee formed by non-executive members of the board of directors and an auditor, all appointed by the general meeting.

On a final note, the by-laws may provide that the company will have a sole director whenever the company's share capital does not exceed Euros 200.000,00.

Company secretary (*secretário da sociedade*). Appointment of a company secretary is optional for non-listed companies. The company secretary and his deputy shall be appointed by the shareholders in the act of incorporation or upon the incorporation by the board of directors / executive board of directors.

Ordinary distribution of dividends. Shareholders are entitled to a share in the profits. Distributions of dividends must comply with the following requirements: (a) the annual profits must first cover the losses of the previous tax years and create or restore the statutory reserve; and (b) the shareholders' funds (*capital próprio*) of the company before and after distribution may not be lower than the sum of the nominal share capital and the mandatory restricted (non-distributable) reserves. Provided that the above rules are complied with, the shareholders may distribute the remaining profit in the proportion of their shareholding. At least half of the net distributable profit must be distributed to the shareholders. Different rules regarding the distribution of profits can be stipulated in the by-laws or in accordance with a resolution passed by a majority of three quarters of the votes at a general meeting specially convened for that purpose.

Rules for interim dividend distributions. (dividends distributed during the financial year they refer to must comply with the following corporate law requirements: (i) permitted by the by-laws; (ii) the company's board of directors approves the distribution; (iii) the statutory auditor consents to the distribution; and (iv) an interim balance sheet is prepared, no more than thirty days prior to the board resolution (certified by the company's sole supervisor) evidencing the existence of amounts available for distribution (considering the profits obtained up to that date during the course of the financial year), in compliance with the following requirements: (a) the shareholders' funds (*capital próprio*) of the company cannot be lower than the sum of the company's nominal share capital plus the restricted reserves and will not become lower as a consequence of the distribution; (b) the statutory reserves as well as the company's losses are duly covered by the company's profits; (c) no more than one interim distribution can be carried out and only during the second semester of the financial year; and (d) the interim distribution of dividends cannot exceed half of the distributable dividends as reflected in the interim balance sheet.

Winding up and liquidation of the company. The rules on winding up and liquidation described above in respect of quota companies shall apply. However, where the winding up is determined by a general meeting resolution, at least a one-third quorum in a first meeting is required and the resolution must be approved by a two-thirds majority, unless a higher quorum/majority or other specific conditions are set out in the by-laws.

Shareholders' agreements. Shareholders' agreements are dealt with both in the Companies' Code. There are no specific requirements as regards the form of shareholders' agreements. Shareholders' agreements bind only the signatories and therefore no action taken by the company or by another shareholder against the company can be challenged on the grounds of breach of a shareholders' agreement. Shareholders' agreements may include clauses on voting in general meetings of shareholders, but not (i) on instructing the company's management or supervision or (ii) provide that a shareholder is required to vote according to instructions of the company's directors or in favour of proposals made by the latter; or (iii) provide that voting or abstaining therefrom shall be against consideration. Given the above, a breach of a shareholders' agreement will quite often give rise only to liability for indemnification or compensation, usually provided for in penalty clauses inserted in those agreements.

Controlling relationship. A controlling relationship exists between two companies whenever one of them can exercise a dominant influence over the other. Such a dominant influence is presumed where: (i) a company owns the majority of another company's share capital or voting rights; (ii) a company is able to nominate more than half of the members of another company's Board of Directors/Managers or Audit Committee.

Group relationship. A group relationship exists where (i) a company owns, directly or indirectly, the totality of another company's share capital (such a relationship can be either established *ab origine* - by incorporating a wholly-owned company - or subsequently, by means of the acquisition of the totality of the controlled company's share capital); or (ii) a joint contract stipulating a group relationship is concluded; or (iii) a subordination contract is entered into.