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# Practical Guide 2014

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## SALES AND PURCHASES OF REAL ESTATE IN PORTUGAL

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### 1. Contracting Parties

**In general:** If the seller is unmarried, divorced or married in matrimonial property regime of separation, he can sign the purchase (pre)contract himself.

**For the Portuguese:** Is the seller Portuguese and married under Portuguese matrimonial regime of community of property (acquired during marriage), both spouses have to sign the purchase (pre)contract and act as sellers both together. *Attention:* Is the seller married under Portuguese matrimonial property regime of separation, the consent of the spouse is mandatory, if the real estate is the shared marital home.

**For co-owner:** If the real estate is owned by several persons (e.g. co-owner association or

community of heirs) all owners have to sign the purchase (pre)contract together.

**For corporations:** If the real estate is sold by a Portuguese corporation (*e.g. a Limitada*), the signature of the director is not sufficient for the conclusion of (pre)contract, when the purchase of real estate is not listed in the commercial register as the corporate object. It is rather necessary to authorize the transaction of real estate by a shareholder resolution.

## **2. Documents**

At the latest on the day of the certification of the final notarial contract (*Escritura*) the following documents must be available and reviewed competently:

### **a) Portuguese tax numbers of all contracting parties**

**Notice 1:** A contracting party which is less than 183 days resident in Portugal and does not habitually live in a EU-State or EFTA-State needs a tax representative in order to apply for a portuguese tax number. Since the tax representative possibly is liable to tax liabilities along with the taxable person, in Portugal there are professional service provider which act as tax representatives for an annual fee.

**Notice 2:** A foreign entity with legal capacity in the state of registration can purchase property in Portugal after registration for tax purposes and receiving a tax number.

**b) Identity card and passport of the contracting parties. An entity has to submit an excerpt from the current commercial register and, if necessary, the resolution which authorizes the transaction.**

**Notice 1:** If a contracting party is not in possession of a valid identity card, this lack can be cured by the statement of two witnesses, which attest the identity of the party.

**Notice 2:** Non EU citizens are obliged to submit their valid passport (this affects e.g. the Swiss).

**Notice 3:** Both contracting parties can be represented by power of attorney. A legal representation of the seller and buyer is common but the powers of attorney have to comply with the formalities.

**c) Excerpt from the land register, which is not older than 6 months or a valid access code to the electronic land register via internet (*Certidão*)**

**d) Cadastral map excerpt, which is not older than 1 year (*Caderneta*)**

**Notice 1:** Was the real estate not registered at the tax office, the submission of the officially

confirmed application for registration (*IMI-Modelo I*) which must not be older than 1 year is sufficient.

**Notice 2:** The data from the cadastral map excerpt must not contradict with the data from the land register.

**e) In case of a building: Original certificate of occupancy or a copy certified by the municipality** (*Alvará de Licença de Utilização/Habitação*)

**Notice 1:** If the municipality did not issue the applied certificate of occupancy yet, the submission of the building permit (*Alvará de Licença de Construção*) is sufficient. But the seller needs to prove that the issuance of the certificate of occupancy was applied for more than 50 days ago and declare that he did not receive a notice concerning the payment of the issuing fee, that the construction is completed and the application of issuance of a certificate of occupancy was not refused.

**Notice 2:** Since the Portuguese building legislation came into effect on Aug. 7<sup>th</sup>, 1951 (only with regard to several communities), buildings constructed before Aug. 7<sup>th</sup>, 1951 are exempt from the liability of a certificate of occupancy. In that case, the age of the building has to emerge from the cadastral map excerpt or a certificate of the municipality must be submitted, declaring that the building was constructed before the above mentioned date.

**f) In case of a building: Technical confirmation of accommodation** (*Ficha Técnica de Habitação*)

**Notice 1:** The submission of a technical confirmation of accommodation is only obligated for completed buildings with residential purposes for which the certification of occupancy was applied for after Apr. 4<sup>th</sup>. 2004.

**Notice 2:** The liability to submit a technical confirmation of accommodation does not exist for buildings constructed before Aug. 7<sup>th</sup>. 1951 which were rebuild, expanded or changed in its structure.

**g) Energy certificate** (*Certificado Energético*):

**Notice 1:** The „liability of certification“ exists in Portugal since Jan. 1<sup>st</sup>, 2009 for new as well as existing buildings.

**Notice 2:** For some time the energy certificate must be submitted when signing a purchase (pre)contract. The number of the certificate must be stated in the contract.

**Notice 3:** The certificate is valid for 10 years.

**h) For housing estate (*Loteamentos*): Expenditure certification of the municipality or evidence for paying a security deposit which guarantees the expenditure costs (*Certificado da Câmara Municipal de que as obras foram objecto de recepção ou de que foi prestada caução*)**

**Notice 1:** The liability to submit a expenditure certificate or the evidence for paying a security deposit exists only for the *first-time* sale of the particular living unit in the housing estate.

**Notice 2:** This regulation is not applicable to housing estates constructed before march 1992.

**i) For real estate under monument conservation, cultural heritage or which is located in a protected area: proof, that the intended sale was reported to the Portuguese authorities for care of monuments and the municipality.** The state has a pre-emptive right.

**Notice:** If there are doubts about the existence of a pre-emptive right of the state, it is advisable to obtain a negative attestation from the authorities for care of monuments (*Certidão negativa do Instituto Português do Património Arquitectónico*).

**j) In case of the purchase of rural estate by several persons: evidence, that the municipality approves the purchase by the co-owners.**

**Notice:** This regulation is also applied to, if couples, married under the matrimonial property regime of community of acquisitions or separation intend to purchase the property together. This often is overlooked.

**k) If the real estate is charged with a mortgage which is not transferred to the buyer: Submission of the certification of the mortgagee with the irrevocable declaration to authorize the buyer to delete the mortgage from the land register.**

**Notice:** The signature of the mortgagee under this declaration has to fulfill certain authenticate requirements.

**l) Is the real estate sold by a minor (represented by his parents): Proof of the judicial authorisation of the sale.**

**Notice:** A judicial authorisation is also to obtain, when a minor buys a real estate which is burdened with rights of a third party (e.g. a mortgage).

**m) For each transfer of real estate against payment (purchase): Proof from the tax office, that the land transfer tax was paid or that the purchase was exempted from the land transfer tax.**

**Notice:** The current tax tables for the land transfer tax are available here <http://www.lawyer-portugal.com/resources/Gewerbesteuer2013.pdf>.

**n) For each transfer of real estate against payment (purchase): Proof from the tax office, that the stamp duty was paid (0,8-stamp-duty)**

**Notice:** According to recent jurisdiction, the 0,8-stamp-duty is not to be paid to the notary but prior to the purchase to the tax office along with the land transfer tax.

### **3. Important Notices**

**a) Is the ownership of the seller registered in the land register?**

**Notice:** Since ownership is transferred with conclusion of the contract, it is advisable to examine the contract with which the seller acquired property of the real estate. The entry in the land register often is false.

**b) Is the real estate otherwise burdened with rights of third parties (e.g. mortgages, usufruct rights, rights of use, distraint, legal proceedings)?**

**c) Did the seller display the upcoming purchase to the party holding the pre-emptive right according to the regulations?**

**Notice:** If the party holding the pre-emptive right was ignored, it has the right to sue the seller and buyer.

**d) Is the seller not only owner but also the sole and rightful occupant?**

**Notice 1:** If the house which should be sold is inhabited, the seller should ensure that it is uninhabited at the latest on the date of the final contracts notarization. Otherwise an expensive eviction proceedings could be necessary.

**Notice 2:** Shall the estate be sold rented, the consisting rental agreement should be reviewed formally and concerning the contents.

**e) Did the seller pay the real estate tax in the last 4 years prior to the purchase?**

**f) Does the certificate of occupancy include the house/apartment as a whole or were illegal expansions or changes conducted?**

**Notice 1:** If there are doubts about the legality of the construction (e.g. concerning a swimming pool or a covered terrace), the submission of the official architectural plans is to recommend; they must be furnished with a stamp of approval.

**Notice 2:** Furthermore it should be assured that the certificate of occupancy allows the intended utilization (a building can be authorized to residential use, commercial use or other purposes).

**g) Before a building plot is purchased, the actual development potential must be ensured.**

**Notice:** The safest way is the presentation of the outline building permit of the municipality, which verifies the approvability of the building projects. It is to note, that the outline building permit is only valid for 1 year and can lose its validity by change of legislation.

**h) Is the purchased apartment part of a condominium owners' association, it is to examine if the regular administration fee was paid by the seller.**

**i) Shall the house be constructed by the seller, it is to check if the seller is sufficiently solvent; in particular the file of insolvency should be determined.**

#### **4. Actions of the Buyer after the Purchase**

The buyer has to fulfill several legal obligations and take care of applications in due time (e.g. tax exemption) after the sale. *Examples:*

**a) Display of the purchase to the tax office (deadline: 60 days);**

**c) Registration of the purchase at the land registry office (deadline: usually 2 months);**

**d) Application for exemption from the real estate tax if necessary (deadline: usually 60 days);**

**e) Display of the purchase to the municipality (e.g. for purchasing a restaurant; deadline 30 days).**

#### **5. Actions of the Seller after the Sale**

After the sale, the seller must submit a **tax return** in Portugal regarding the capital gains (**transfer profit tax**). It should be noted that the seller has to submit a tax return even if he did not have any profit.

#### **6. Final important Notices**

**1. Notaries (Notários), Lawyers (Advogados) and legal counsels (Solicitadores)**

The notary in Portugal carries out a sole function of authenticating, that means he determines the presence of the contracting parties (respectively the proper representation), authenticates the signatures of the contracting parties, reads the text of the contract aloud and asks the parties if they understood the content of the contract. **The consultation and drafting of the contract is incumbent upon lawyers.** It is to note that the „Solicitador“ (legal counsel) is not a fully qualified lawyer. The legal counsels in Portugal are rather qualified for acts related to the land register or other bureaucratic business actions.

## **2. Client Accounts**

In Portugal the amount of the purchase prize is temporarily stored on client or escrow accounts. The notary does not take up this function.

## **3. Expert Advise is of importance**

Who buys or sells a real estate in Portugal can be recommended to take extensive legal advice for the transaction. Besides of the real estate law, tax law with its sophistication is of importance and not to neglect. It also can be advantageous if the real estate is purchased by a Portuguese corporation or a corporation located abroad. When selling a real estate it can be advantageous, to first transfer the real estate to a corporation and afterwards to transfer the corporation (which holds the real estate) to the buyer. It is of importance that the advisor has deep knowledge in the law of the home state of the client. The matrimonial property law, law of succession and tax law of the native country plays an important role for most real estate transactions.

*This practical guide is supposed to serve as a first orientation. It can not replace the individual legal advice of a lawyer. Our law firm would be glad to assist and advise you under a mandate with your individual case.*

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