

Outsourcing

In 21 jurisdictions worldwide

Contributing editor
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GETTING THE
DEAL THROUGH

Portugal

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Market overview

1 What kinds of outsourcing take place in your jurisdiction?

Outsourcing allows a company to reduce its costs by transferring part of its in-house work to external suppliers. This allows companies to be more cost-efficient and to concentrate more on their core business activities. It also reduces the need to hire and train specialised staff, reduces capital and operating expenses and turns fixed costs into variable costs.

The current importance of outsourcing can be seen not only in its continued growth but also in the possibility of using it for different types of services and purposes, allowing companies to benefit from qualified expertise.

In Portugal, the most common types of outsourcing are:

- IT outsourcing (ITO), such as the development of databases and specific applications, management of internal networks and technical assistance. Portugal also offers skilled competence centres and high-skilled e-business and e-commerce services;
- business process outsourcing (BPO), including in particular human resources (selection of candidates and recruitment according to patterns provided by the contracting company) and financial investment;
- property management outsourcing, such as managing real estate assets for the owners or occupiers of the property, collecting rent and keeping the property in good repair;
- facilities management outsourcing, such as repairing and cleaning services; and
- general business services outsourcing, such as street cleaning, waste collection or security services.

2 Describe the recent history of outsourcing in your jurisdiction. How well established is outsourcing? What is the size of the outsourcing market in your jurisdiction?

Over the last few years, outsourcing has become an important tool for service providers in Portugal, with companies increasingly contracting third parties for certain tasks in order better to focus on their core business.

Portugal has become an outsourcing centre, and is becoming increasingly attractive as a nearshore outsourcing destination, because it combines highly skilled professionals who have a good command of foreign languages and an ability to work in multicultural and cross-border environments with excellent infrastructure and competitive salaries.

Portugal has again been prominent in the international technology-based services industry as it was shortlisted for the 2014 European Outsourcing Association awards under the category 'offshoring destination of the year', and was one of the 14 developed countries selected by companies to provide ITO and BPO services according to Gartner's *30 Leading Locations for Offshore Services, 2014*, published on 19 February 2014.

Policy

3 Has the government of your jurisdiction adopted policies to encourage the development of the jurisdiction as an outsourcing centre, either for the domestic market or to provide outsourcing services to foreign customers?

There are no specific incentives or policies focused on outsourcing activities, however the Portuguese government promotes international investment in Portugal as an integral part of its economic development policy,

specifically through the government agency AICEP Portugal Global, which helps find the best incentive packages for large investment projects.

4 Are there in your jurisdiction any fiscal or customs incentives, development grants or other government incentives to promote outsourcing operations within your jurisdiction?

The Portuguese government does not currently have a specific regime for the development of the outsourcing sector. However, special regimes for investors are foreseen and corporate income tax has recently been reformed.

Portugal is very competitive in the outsourcing industry, as it boasts highly skilled human resources and a low cost of living. These two main features are very important for optimising outsourcing structures and establishments. Additionally, Portugal has a flexible labour law and the recent changes to corporate income tax enable international structures to be created without losing tax efficiency, through regimes such as the participation exemption and patent box.

Legislation and regulation

5 Is outsourcing as a commercial or operational concept specifically recognised and provided for in your legal system? How?

The Portuguese legal system does not recognise the commercial or operational concept of outsourcing, which means that there is no specific type of contract foreseen in the law and, therefore, there is no specific regulation.

In this regard, outsourcing agreements are governed by the general regulation applicable to rendering of services contracts. This general regime may be freely and contractually adapted by the parties. Considering the absence of specific regulation foreseen in the law, the agreement shall be accurately tailored and carefully negotiated. In this regard, it is advisable to agree on matters such as termination clauses, data protection, payment terms and conditions, penalty clauses and confidentiality clauses, among others.

6 Is there any legislation or regulation that directly prohibits, restricts or otherwise governs outsourcing, whether in (onshore) or outside (offshore) your jurisdiction?

No. However, outsourcing may be subject to certain sector-specific conditions (see question 8).

7 What are the consequences for breach of the laws directly restricting outsourcing?

There are no consequences, as Portuguese legislation does not foresee any general restrictions that explicitly restrict outsourcing. Notwithstanding this, the general contractual regulation (Civil Code) is applicable to outsourcing agreements, which are, therefore, subject to the general regulation applicable to the breach of an agreement. A breach may render a clause null and void, or it may imply the invalidity of the whole agreement. Depending on the specific sector or activity, specific restrictions may apply.

8 Describe any sector-specific legislation or regulation that applies to outsourcing operations.

Banking and financial services

Specific regulation is applicable to the financial sector given the strict statutory and legal framework for banking and financial activities in Portugal. Outsourcing of intermediation activities is regulated by the Securities Code (articles 308 to 308-C), as it specifically regulates the subcontracting of intermediation services. According to the Code, the outsourcing to third parties of financial intermediation activities, or operational functions that are critical for the provision of continuous, quality and competent services, presupposes that the financial intermediary will take the necessary steps to avoid undue additional operational risk. Further, it states that this type of outsourcing may only be undertaken if it does not impair the internal monitoring of the financial intermediary or the ability of the competent authority to monitor the compliance of said intermediary with the duties that are imposed by laws or regulations issued by a public authority. The Securities Code also foresees that an operational function shall be regarded as essential to the provision of investment services on a continual basis and under conditions of quality and efficiency, if a failure in its performance would materially impair an outsourcing financial intermediary's compliance with the conditions to which it is subject, its financial performance, or the continuity of its investment services and activities.

Pharmaceutical

The pharmaceutical sector is subject to extensive regulation and the activities that can be subcontracted to third parties are not an exception. Depending on the service to be outsourced, the regulatory authority may have to be informed and, in certain cases, prior authorisation is required. Activities such as manufacturing, publicity, distribution and pharmacovigilance may be outsourced, as long as they respect the regulatory provisions.

Certain phases of the medicine manufacturing process may be outsourced, subject to prior authorisation by the National Authority of Medicines and Health Products (INFARMED).

Wholesale activities may be outsourced, as long as the third party is licensed as a wholesale distributor by INFARMED. In this case, the distributor shall perform wholesale distribution according to the respective agreements and shall keep records of the agreements and any other relevant documentation that supports the warehousing of the medicines by third parties.

Publicity activities may also be performed by third parties in line with the provisions foreseen in the Medicines Act (such as prior approval by INFARMED). As determined by the law, the activity of promoting medicines may be performed and conducted directly by the owner of the marketing authorisation or by a third party acting on behalf of the owner.

Data protection

If an outsourcing agreement entails the transfer of personal data, such transfer must comply with the regulations set out in the Data Protection Act (Law No. 67/98, of 26 October).

Public sector

Outsourcing in the public sector is possible under the Public Procurement Code (Decree-Law No. 18/2008 of 29 January and further amendments), if a third party is considered to be in a better position to render the specific services. Depending on the value of the contract, the provision of services may be subject to public tender or may be contracted through private negotiation.

9 How does competition regulation apply to outsourcing contracts or structures?

Outsourcing contracts or structures are subject to the general rules foreseen in the Competition Act (Law No. 19/2012 of 8 May), which restricts certain types of agreements, concerted practices and decisions of companies' associations. As a general principle, companies are prohibited from entering into agreements or performing any other practice that aims to distort or restrict market competition or abuse a dominant position.

The Treaty on the Functioning of the European Union is also applicable in Portugal and section 101 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states. Subcontracting is also covered by the European Commission Notice of 18 December 1978 concerning

the assessment of certain subcontracting agreements in relation to article 81(1) of the Treaty (currently article 101).

10 Are there any draft laws or legislative initiatives specific to outsourcing that are being developed or are contemplated?

No. However, a draft bill regulating subcontracting in the insurance sector is awaiting approval and publication. In short, the bill stipulates that insurance and reinsurance companies are the entities responsible for performing functions and activities in this area. Thus, if such a company wishes to subcontract work to another entity, it shall inform the regulatory authority (Instituto de Seguros de Portugal) of its intentions as well as of the significant events regarding its functions and activities. In some cases, subcontracting can be rendered null and void, namely when it will significantly prejudice the quality of the governance system or when there is an undue increase in operational risk.

Contractual considerations

11 What are the typical corporate or quasi-corporate structures or vehicles used to create outsourcing arrangements?

Joint ventures contractually agreed with service providers are the typical structure applied in outsourcing arrangements.

The following corporate or quasi-corporate outsourcing structures can be implemented in Portugal: offshore corporate subsidiaries, namely captives; 'hybrid' structures, such as build-operate-transfer (BOT) vehicles; 'virtual captives', namely parts of supplier operations, staff and premises that are dedicated to a particular outsourcing customer, but which are owned and employed by the supplier; 'carveouts'; and corporate joint venture vehicles.

12 What forms of outsourcing contract are usually adopted in your jurisdiction?

Outsourcing in Portugal is usually subject to a services agreement that regulates the obligations of the parties. The increase in the provision of services to foreign companies brought complexity to the outsourcing market and the need for tailored, complex agreements to be negotiated and drafted carefully.

In some cases, the rendering of outsourcing services is agreed in an outsourcing agreement, where the service provider acts before third parties on behalf of the counterparty. In this arrangement, the service provider appears as belonging to the organisational structure of the latter, but both parties keep their juridical autonomy even if sharing the same structure.

In certain sectors (eg, in IT) staff secondments are common, and seconded staff are generally employed to carry out specific work or to handle specific projects.

Portuguese law allows for a wide range of potential outsourcing structures. In this regard, the parties may agree on: global or local framework agreements plus subsidiary, call-off, local or other contracts; master services agreements plus call-off contracts (statements of work, work orders, etc); staff secondments and staff augmentation; straightforward outsourcing contracts (ie, without call-off arrangements); and a combination of any of the above forms of contract combined with one or more of the corporate or quasi-corporate structures listed in question 11.

13 Outline the contractual approaches that are adopted in your jurisdiction to address regulations affecting outsourcing.

Portugal does not have legislation regarding outsourcing in general terms, only in specific areas such as the pharmaceutical, financial and banking sectors. However, in general and in practice, companies conclude written outsourcing agreements enabling them to freely agree on specific clauses referring to, among other things, termination, liability, duration and services to be performed.

Data protection

14 Identify the principal data protection legislation applicable to outsourcing operations.

Outsourcing activities must respect the provisions of data protection legislation, namely Law No. 67/98 of 26 October, which transposed European Directive 95/46/EC.

Other pieces of legislation may also be applicable, such as Law No. 41/2004 of 18 August (amended by law 46/2012 of 29 August), which

transposed Directive 2002/58/EC concerning data protection in the electronic communications sector.

The Labour Code (Law No. 7/2009 of 12 February and further amendments) also foresees specific rules regarding data protection connected with employment relationships.

15 How do rules on the ownership, location, processing and distribution of data apply to outsourcing in your jurisdiction?

Law No. 67/98 of 26 October on personal data protection protects individuals regarding the treatment of their personal data and the free movements of such data.

For the purposes of this Law, 'personal data' is any information of any kind and in any form, including sounds and images of an identified or identifiable natural person (the 'data holder'). An identifiable person is one who can be identified directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. 'Processing personal data' means any operation or set of operations that is performed on personal data, whether wholly or partly by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking and erasure or destruction.

The Law defines 'controller' as the natural or legal person, public authority, agency or any other body that, alone or jointly with others, determines the purposes and means of the processing of personal data. Where the purposes and means of processing are determined by laws or regulations, the controller shall be designated in the act establishing the organisation and functioning or in the statutes of the legal or statutory body competent to process the personal data concerned. 'Processor' is defined as the natural or legal person, public authority, agency or any other body that processes personal data on behalf of the controller.

The controller shall implement appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration and unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. Taking into account current technology and the cost of its implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing of the data to be protected and the nature of that data.

Where processing is carried out on his or her behalf, the controller must choose a processor that provides sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out, and must ensure compliance with those measures. Processing by way of a processor must be governed by a contract or legal act binding the processor to the controller and stipulating, in particular, that the processor shall act only on instructions from the controller and that the abovementioned obligations on the controller shall also be incumbent on the processor.

Furthermore, any person acting under the authority of the controller or the processor, including the processor him or herself, who has access to personal data shall not process it except on instructions from the controller, unless he or she is required to do so by law.

The National Data Protection Commission (CNPD) is the entity responsible for monitoring and supervising compliance with legal provisions and regulations on personal data protection, while respecting human rights, freedoms and guarantees under the Constitution and other laws.

The CNPD has special competence to authorise and register, on a case-by-case basis, the treatment of personal data. The data processing shall be previously notified to the CNPD and, if the data to be processed is considered sensitive, prior authorisation is required.

Labour and employment

16 What is the relevant labour and employment legislation for outsourcing transactions?

Under Portuguese labour law there is no specific regulation for outsourcing transactions. Nevertheless, the case law related to outsourcing is mainly connected with the employment perspective. Outsourcing transactions are not covered by employment law, but issues related to the identification of the real employer and the entity that shall issue instructions, or the

distinction between the outsourcing and assignment of employees or temporary work, have led to several decisions being issued by the Portuguese courts.

The Acquired Rights Directive 2001/23/EC was transposed by the Portuguese Labour Code, which foresees in articles 285 to 287 the procedural provisions applicable to the transfer of undertakings. This regime aims to protect employees, safeguarding their acquired rights arising from their contract with the initial employer when the business is being assigned.

17 In the context of an outsourcing, how does labour and employment law apply to a change in initial or subsequent service providers, or transfers of undertakings or parts of undertakings?

The labour law has mandatory rules regarding the transfer of undertakings, which means that when an employer prepares a transfer of his or her undertaking, he or she must inform the employees and allow them to have their say on the transfer.

In the case of a business sale, Portuguese law sets out that the employment agreements are automatically transferred with the business to the acquirer, unless otherwise agreed with the employee. There is an obligation to inform the employees' representatives (or the employees directly if no representative structures exist) in writing regarding the date and grounds of the transfer and its legal, economic and social consequences for employees, as well as the measures that will be applied to them. Such information shall be provided in writing at least 10 days before consulting the employees' representatives.

Prior to the transfer, consultation and information meetings between the former and new employer and the employees' representatives shall take place, in order to try to obtain an agreement on the measures to be applied to employees after the transfer. It is not mandatory to reach an agreement and, as such, the transfer of the employees is valid and effective even if no agreement is reached.

18 Are there any requirements to consult or negotiate with organised labour, works councils or employees regarding an outsourcing?

No. However, if there is a transfer of an undertaking the employees must be involved by informing their representatives, or the employees directly if no representative structures exist (see question 17).

19 Are there any notification or approval requirements that apply to an outsourcing transaction?

No, although specific notification duties may be applicable in operations that may be connected with outsourcing transactions in some way, such as: transfer of undertakings proceedings, termination of employment contracts, changes in the working conditions of certain employees and relocation of employees.

20 What are the legal implications, including penalties, for non-compliance with the labour and employment rules and procedures?

Under the Labour Code, sanctions and penalties can be applied according to the specific provisions violated.

Considering specifically the regime of transfer of undertakings regulated by articles 285 and 286, a penalty can be imposed if the employer does not comply with the obligations foreseen in such mandatory provisions.

As a consequence, not transferring the contracts to the new employer constitutes a very serious offence, and not communicating with the employees' representatives is considered a minor offence.

The offences generate the obligation to pay a pecuniary fine to the public entity in charge of these matters.

The minimum and maximum amounts foreseen for labour offences are the following:

- minor offences range from €204 to €1,530;
- serious offences range from €612 to €9,690; and
- very serious offences range from €2,040 to €61,200.

The amount of the fine is based on the degree of guilt and the turnover of the company in the previous year.

21 What are the key immigration and visa requirements for employees of customers or providers entering your jurisdiction to manage outsourced operations or to receive or provide training?

All employees of customers and providers who enter into Portugal with the purpose of rendering services require a visa, except citizens of EU countries and countries of the European Economic Area (EEA). The fact that immigrants come to Portugal to manage outsourced activities has no special relevance for immigration visa purposes. What is relevant is whether they come to Portugal under an employment contract or a services agreement.

The granting of a visa to obtain a residence permit for the purposes of subordinated professional activity is dependent on the existence of job opportunities that cannot be filled by Portuguese nationals, EU nationals, EEA nationals, citizens of third states with which the EU has signed a free movement of persons agreement or third-country nationals who legally reside in Portugal. Thus, the Council of Ministers approves, on an annual basis, a global quota that indicates the availability of job offers, which are presumed not to have been taken by the aforementioned persons, and that may exclude specific sectors or activities that do not require further workers, provided the market circumstances so indicate. Up to the limit of the quotas and for job positions not taken by the aforementioned persons, a residency visa may be issued to third-country nationals for performing a subordinated professional activity, provided it fulfils the requirements established by law, and as long as these persons: hold an employment contract or promissory employment contract; or hold qualifications, competencies or expertise that has been recognised for the performance of the activities described in the preceding paragraph and benefit from declared interest by the employer.

The visa for the purpose of obtaining a residence permit for taking up an independent professional activity may be granted to a third-country national who holds a contract or written proposal for a supply of services contract, and who has the necessary qualifications to engage in that independent activity. A residency visa is granted to immigrant entrepreneurs who intend to invest in Portugal, provided that they have made investments or they can prove they possess available financial means in Portugal, including those deriving from loans obtained from a banking institution in Portugal, and they demonstrate by any means their intention to carry out an investment action within Portuguese territory.

Taxation

22 Outline the taxation rules that apply to the establishment and operation of outsourcing captives or similar establishments in your jurisdiction.

In Portugal, there is no special regime for the establishment and operation of outsourcing captives or similar establishments.

Therefore, outsourcing activities and companies fall under the general tax rules. The government has, nevertheless, carried out a corporate tax reform to increase the competitiveness of the tax system and to attract foreign investment, which has led to changes in tax law.

Nowadays, the general rate of corporate income tax is 23 per cent. This is the first step of the government programme that aims to lower the tax

rate to 17 per cent by 2018. Additionally, a reduced rate of 17 per cent was introduced for the first €15,000 of taxable corporate profits.

However, if a corporate structure involves a 'blacklisted jurisdiction' (ie, a low tax jurisdiction or tax haven), some anti-avoidance rules have to be taken into consideration, as a higher tax or withholding tax rate might be applicable.

In any case, according to the general transfer pricing principle, transactions between related parties are carried out on an arm's-length basis and, in certain cases, a transfer pricing file might be mandatory.

Participation exemption

The 2014 tax reform introduced new rules regarding both inbound and outbound profit distribution. According to this new regime, dividends and capital gains that a Portuguese company receives from its affiliates will be fully exempt from taxation, as long as it holds at least 5 per cent of the share capital or voting rights, for a period of at least 24 months and if the subsidiary is based in an EU country or subject to a corporate tax rate of at least 13.8 per cent. If these requirements are met, the distribution of dividends from a Portuguese company to its shareholders shall be exempt from a Portuguese perspective.

Patent box

According to this new regime, income arising from the disposal or temporary use of registered patents and industrial designs or models is only taxed at half of its value. This regime also applies to income arising from breaches of the industrial property rights.

Permanent establishment

From a Portuguese point of view, an entity may be considered as having a permanent establishment in Portugal if it has a fixed base, in the form of an office, through which it executes commercial, industrial or agricultural activity. Portuguese tax law considers that a company has a permanent establishment in Portugal if a person, who is not an independent agent, acts with the necessary powers to bind the company in Portuguese territory.

23 Outline the indirect taxes in your jurisdiction that apply to the import of offshore outsourcing services by companies within your jurisdiction.

The general VAT tax rate is 23 per cent. In Portugal, there are three VAT rates: the lower rate of 6 per cent, the medium rate of 13 per cent and the normal rate of 23 per cent. Taking into account the business-to-business rule, the place of supply is the place of the acquirers' residence. Therefore, if a Portuguese company is the acquirer and the supplier is based in another country, the VAT is due to be paid by the Portuguese company, via the reverse charge mechanism.

Stamp duty is in force in Portugal. However, contracts issued by an outsourcing company in the course of its normal activity are, in general, outside of the scope of stamp duty.

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Current issues

24 Identify and give details of any notable cases or administrative or regulatory determinations within the past three years in your jurisdiction that have directly involved outsourcing.

Portugal offers several advantages for the development of outsourcing activities, as it is now more attractive for international investors. In May 2014, Portugal successfully completed the adjustment programme agreed with the International Monetary Fund, European Commission and European Central Bank. The programme supported deep legislative reforms and prepared the economy for new challenges. Employment legislation was amended in order to simplify some procedures and to obtain a better balance between the interests of employees and employers. As a result, labour costs presently represent approximately 10 per cent of the costs employers had to face before the amendments were approved. Reforms in the public sector were designed to reduce red tape costs and improve efficiency in public services. The reforms approved in tax legislation enabled the recent reduction in the corporate income tax rate and launched new relevant investment incentives. Portugal presents several advantages for foreign investors. Portuguese people boast strong language skills due to a long history of migration and have a good level of technical education. Portugal has also modern infrastructure and an attractive coastline, with excellent services and social facilities.

25 What are the main challenges facing outsourcing within, from or to your jurisdiction?

Portugal is investing heavily in nearshoring – outsourcing to a partner in the company's own country or a nearby country – which is seen as being competitively advantageous in comparison with offshore outsourcing provided by India or Canada. Portugal is benefiting from a nearshoring trend that brought many businesses closer to home from Asia – where the Philippines and China rival India's traditional global offshoring dominance – as well as BPO centralisation in Europe. Nearshoring allows for savings of between 30 and 50 per cent on current costs for a contract lasting three to five years. The advantages of nearshoring also include the fact that neighbouring countries, in general, have similar cultures and sometimes the same language and time zone.

Portugal is seen as a location with great potential in third-party logistics (TPL) activities due to its strategic geographical location. The use of logistic operators in Portugal can be considered a success, since the great majority of companies are satisfied with the use of TPL and nearly half of companies are willing to increase their use of these services. Operations in TPL activities include management, analysis and design of activities related to the transport and warehousing of all kinds of products, as well as warehouse, transport, distribution and supply chain management.

The BPO market is also growing in Portugal and several national and multinational companies are providing BPO activities to Europe, the United States and Brazil. The most common BPO services provided are human resources and payroll, finance and administration, management consulting, accountability, procurement, document processing, customer relationship management (CRM) and business analytics services.

The IT sourcing market is expanding at a rate of over 30 per cent due to investments made by local and multinational companies. It includes among other things, data centre, workload and cloud services and IT infrastructure outsourcing.

Getting the Deal Through

Acquisition Finance	Dispute Resolution	Licensing	Public-Private Partnerships
Advertising & Marketing	Domains and Domain Names	Life Sciences	Public Procurement
Air Transport	Dominance	Mediation	Real Estate
Anti-Corruption Regulation	e-Commerce	Merger Control	Restructuring & Insolvency
Anti-Money Laundering	Electricity Regulation	Mergers & Acquisitions	Right of Publicity
Arbitration	Enforcement of Foreign Judgments	Mining	Securities Finance
Asset Recovery	Environment	Oil Regulation	Ship Finance
Aviation Finance & Leasing	Foreign Investment Review	Outsourcing	Shipbuilding
Banking Regulation	Franchise	Patents	Shipping
Cartel Regulation	Gas Regulation	Pensions & Retirement Plans	State Aid
Climate Regulation	Government Investigations	Pharmaceutical Antitrust	Tax Controversy
Construction	Insurance & Reinsurance	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Insurance Litigation	Private Client	Telecoms and Media
Corporate Governance	Intellectual Property & Antitrust	Private Equity	Trade & Customs
Corporate Immigration	Investment Treaty Arbitration	Product Liability	Trademarks
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