



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Portugal: Employee Incentives

This country-specific Q&A provides an overview to tax laws and regulations that may occur in Portugal.

This Q&A is part of the global guide to Employee Incentives. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/employee-incentives/>

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1. What kinds of incentive plan are most commonly offered and to whom?

In the broad sense of the term, the most common incentive plans are bonuses in cash related with the fulfilment of commercial and performance targets. Usually they are granted to senior management and key employees whose functions can



influence the company's results.

Stock options plans are not widely used. They are more common in companies belonging to international groups and in the financial sector, especially for directors and high level managers. This kind of incentives is very rare in the national medium and small-sized companies (which largely prevail in Portugal), although some technology companies offer stock options plans to a broader range of employees.

Share saving plans are even rarer (see question 2.).

2. **What kinds of share option plan can be offered?**

There are no general rules restraining the kind of plans that can be offered. It depends on the type of company, its by-laws and shareholders agreements.

Share saving plans and other incentive schemes that require the implementation of trust arrangements rise specific questions, since Portuguese law does not recognise the concept of "trust", which involves a separation between legal and beneficial ownership. Nevertheless, in some few cases, Portuguese companies belonging to international groups have stock option schemes through trust arrangements outside of



Portugal.

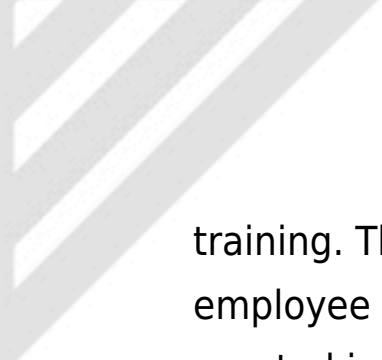
3. **What kinds of share acquisition/share purchase plan can be offered?**

As mentioned in the previous number, as there are no specific laws or regulations related with this subject, when offering share plans to their directors or employees companies are only limited by the type of company, its by-laws and, if applicable, the shareholders agreements that may exist.

4. **What other forms of long-term incentives (including cash plans) can be offered?**

In general, all long-term incentives (such as cash plans, share saving plans, performance bonus) are permitted, provided that the mentioned conditions related with the company's type and its by-laws and shareholders agreements are observed.

Retention bonus are also admissible but they must be structured in order to assure its compatibility with the legal restrictions regarding minimum-stay clauses, which are only allowed if the restriction on the employee's freedom to withdraw from the contract represents a form of compensation for exceptional expenditure by the employer on the employee's



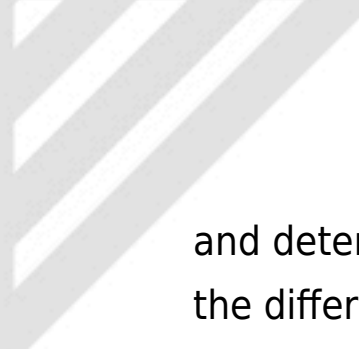
training. Therefore, the bonus should only be granted after the employee remains in the company on a given date. If it is granted in advance, subject to a minimum service period, it will not be possible to oblige the employee to return the bonus since it can't be deemed as a minimum-stay clause.

5. **Are there any limits on who can participate in an incentive plan and the extent to which they can participate?**

Incentive plans for companies directors must comply with the Companies Code rules regarding the remuneration of executive directors, according to which the remuneration can partially consist of a percentage (the maximum amount of which needs to be set out in the articles of association) of the company's profits, whereas remuneration of directors with supervisory functions (i.e. members of the audit committee) must mandatorily only consist of a fixed sum (this solution is often recommended for all non-executive directors).

There are no specific limits applicable to the beneficiaries if they are employees.

Nevertheless, when granting incentives, the company must observe the general principle of non-discrimination: Different treatment is allowed provided that it is based on a justifiable



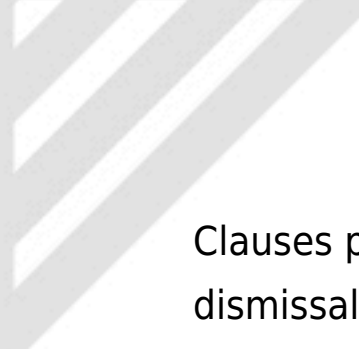
and determining requirement, has a legitimate objective and the difference in treatment is proportionate. Therefore, the incentive plan must be offered to all employees who are in the same professional situation in terms of responsibilities and position within the company.

Stock option plans and other long term incentives schemes are often reserved for permanent employees, which, given the specific nature of these benefits (that may imply that the patrimonial advantage will only take effect later), is, in our understating, justifiable and therefore legal.

When the feeding of a stock option plan requires the acquisition of treasury stock (what happens with non-listed companies) the principle of shareholders' equal treatment must be observed.

6. **Can awards be made subject to performance criteria, vesting schedules and forfeiture?**

Awards can be subject to different criteria, provided that the conditions are legally and don't imply a discriminatory treatment or the nonfulfillment of mandatory conditions required for certain employment related agreements, such as minimum-stay clauses (although the awarding can be subject to presence conditions).



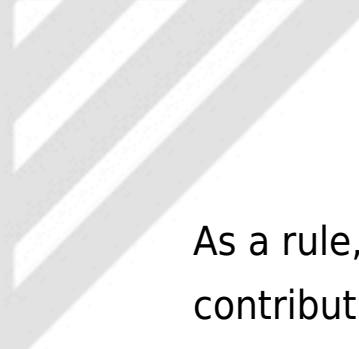
Clauses providing for the loss of benefits in the event of dismissal are not allowed, unless the loss is due to the nonfulfillment of a minimum period of service required to all beneficiaries.

- 7. What are the tax and social security consequences for participants in an incentive plan including: (i) on grant; (ii) on vesting; (iii) on exercise; (iv) on the acquisition, holding and/or disposal of any underlying shares of securities; (v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.**

Cash-based Incentives

Cash-based incentives are characterized as employment income and are subject to tax in the tax year in which the employee becomes entitled to receive them. This income is subject to the general progressive rates of up to 51% (on gross annual income in excess of approximately € 80,000).

The employer is required to withhold income tax at the time of the payment. The tax withheld is fully creditable against the employee's annual tax liability.



As a rule, the employer pays the employee's social security contributions, which are levied at the rate of 11% over the total compensation (and are not capped). Note, however, that variable bonuses are not currently subject to social security contributions.

Share Plans

Employees are not taxable on the granting and vesting of any share plans.

On the contrary, employees are deemed to receive employment income on the exercise of the options. The taxable income consists of the difference between the fair value of the shares on the exercise date and the exercise price.

There are no specific rules to determine the fair value of shares that are not listed. The general principle is that fair value consists of the value that would have been agreed for the transfer of those shares between two knowledge independent parties.

The taxable income is classed as employment income and is subject to the general progressive income tax rates of up to 51% (for gross income in excess of 80,000 euros). The top

marginal rate is increased to 54.5% on annual income in excess of € 250,000.

In case the employer or any related entity extends a loan to the employee, the difference between the agreed interest rate and the market rate for a similar loan will also be considered as employment income. This income is not subject to withholding tax.

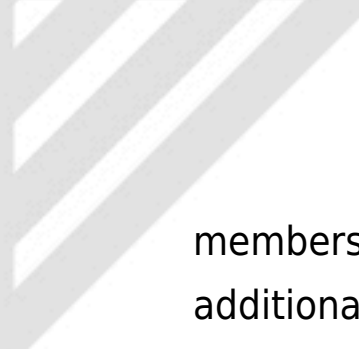
Capital gains realized on the subsequent transfer of the shares will be subject to tax at the flat rate of 28% (the employee may opt to include the gain in his gross taxable income and subject it to the general progressive rates).

Currently, compensation from share plans is not subject to social security contributions.

8. What are the tax and social security consequences for companies operating an incentive plan?

Any cost related to cash bonuses or share plans incurred by the employer are deducted for corporate tax purposes on the same year where the income is recognized as employment income by the employee.

Costs with bonuses and share plans attributed to board-




members are subject to a “penalty tax”, in the form of an additional corporate income tax liability, levied at the rate of 35%. This tax does not apply where the variable compensation (i) does not exceed 25% of the employee’s total compensation or € 27,500; or (ii) at least 50% of the compensation is deferred for 3 years and is subject to the employee’s positive performance during this period.

The employer’s social security contributions are equivalent to 23.75% of the gross compensation. As explained above, currently variable compensation is generally not subject to social security contributions.

9. What are the reporting/notification/filing requirements applicable to an incentive plan?

Requirements depend on the type of incentive plan and the scheme used to feed the plan.

Share saving plans that imply the transfer of cash from the company to the employees or a trustee can be subject to reporting requirements within certain limits. Pursuant to Bank of Portugal’s instruction 27/2012, companies incorporated or resident in Portugal must comply with reporting requirements, in relation to any transfers made to or from beneficiaries



incorporated or resident abroad, to the extent that those transfers are in a value higher than a yearly EUR 100,000 threshold.

If the feeding of a stock option plan is made through the acquisition of treasury stock, the conditions and requirements set forth in the Companies Code for this operation must be complied with.

10. **Do participants in incentive plans have a right to compensation for loss of their awards when their employment terminates? Does the reason for the termination matter?**

In case of employment termination that implies the payment of compensation, for purposes of severance payments calculations, the only amounts that must be considered are the basic pay and the so-called seniority allowances. Moreover, from a Labour Law perspective, this kind of benefits is not equivalent to retribution. Thus, since the benefits emerging from the Plan do not have a retributive nature, they are not subject to the guarantee scheme granted by Labour Law regarding retribution. Also this kind of benefits is not regulated by Portuguese labour legislation and therefore any conditions related with the rights and obligations arising from the Plan can be established by the employer (provided that those conditions fulfil the general requirements of any contractual obligation,

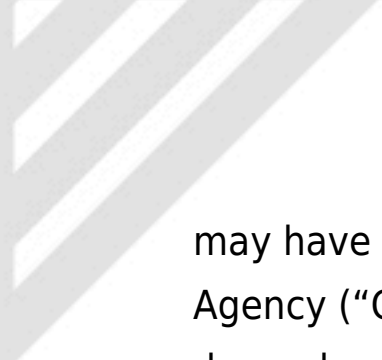
such as, the requirements related with the principle of non-discrimination).

However, if there is a dismissal deemed unfair by a court decision, the employee is entitled to receive the pay and benefits which he or she would otherwise have received from the date of the dismissal up to the date of the ruling. This may include the benefits related with incentive plans the employee would have been entitled to during that period. The employee may also be awarded damages for loss of opportunity to exercise stock options plans, although we are not aware of any case where this has happened.

11. Do any data protection requirements apply to the operation of an incentive plan?

As the implementation of incentive plans may imply the processing of some personal data of the beneficiaries it is necessary to comply with the European General Data Protection Regulation (GDPR).

For instance, if the plan is based on the fulfilment of several goals and those goals are related with the employee, the analysis of their achievement shall imply the treatment of personal data. In this hypothesis, the treatment of such data



may have to be notified to the Portuguese Data Protection Agency (“CNPD”). The necessity of the said notification shall depend on the type of data treated, since the treatment of some personal data by employers is exempted from the said notification.

In what concerns employees’ data, CNPD has issued general exemption decisions that cover the basic processing of employees’ data that is necessary in terms of staff management and also for payroll purposes. This exemption, however, does not seem to cover data processing for the purpose of management of a stock options plan. In consequence, notification of this data processing to CNPD might be advisable.

If the execution of the plan requires the transfer of personal data to other country (as it may happen with plans involving multinational companies), the transfer has to be notified to CNPD. Between EU member countries the transfer is free. When the transfer of data is made to a non-EU country, CNPD’s authorisation is required, unless it is a country listed by EU as guaranteeing an adequate level of protection.

12. **Are there any corporate governance guidelines that apply to the**

operation of incentive plans?

As general statutory rule, the approval of remuneration of members of the corporate bodies of a company is entrusted to the general meeting or to a corporate remuneration committee designated for the purpose (and enjoying of independence from the management bodies). Certain adjustments to this principle may exist depending on the corporate governance structure adopted (for instance, in dual public companies inspired by the German model, competence is transferred from the general meeting to the supervisory board).

As mentioned (*supra*, n. 5), the Companies Code allows the remuneration of executive directors to partially consist of a percentage (the maximum amount of which needs to be set out in the articles of association) of the company's profits, whereas remuneration of directors with supervisory functions (i.e. members of the audit committee) must mandatorily only consist of a fixed sum (this solution is often recommended for all non-executive directors).

Public companies are subject to enhanced corporate governance requirements on approval of remuneration for members of the corporate bodies, in particular directors and executives. The latter remuneration should be structured in a way to allow alignment with the interests of stakeholders, to be based on performance valuation and not encourage excessive

risk assumption.


In this context, there are various recommendations in relation to performance evaluation criteria, growth of company and value obtained to shareholders, adoption of a variable remuneration component payable on a deferred basis, remuneration caps, etc. Clawback and recoupment provisions may be considered, particularly in the context of executive directors agreements, although no express requirements exist on the matter (but without prejudice of any event of statutory provisions on directors liability vis-à-vis the company).

13. **Are there any prospectus or securities law requirements that apply to the operation of incentive plans?**

According to Portuguese securities law, a share plan has regulatory implications solely if it can be qualified as a public offer.

An offer is deemed to be public in the following circumstances:

- If the offer of securities is addressed, wholly or partially, to unidentified recipients;
- If the offer is addressed to all the shareholders of a public company;
- If the offer is, wholly or partially, preceded or accompanied by a prospecting or a solicitation for investment's intentions from unidentified addressees or promotional material;
- If the offer is addressed to at least 100 persons who are non-qualified investors resident or established in Portugal.




The application of these criteria to share plans is not always straightforward, the key question lying on the qualification of the plan as an offer of securities. For example, “phantom” stock purchase plans, in principle, should not be qualified as offer of securities, as they do not involve effective acquisition of securities.

If the share purchase plan involves a public offer, a filing will be required with the Portuguese Securities Market Commission (CMVM) and the need to approve a prospectus. Acceptances of the offer have to be transmitted through an authorized financial intermediary.

An important exemption of the prospectus requirement is granted for public offers of securities to existing or former directors or employees by their employer which has securities already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.

Otherwise, registration with CMVM is not required in connection with the offering of securities to current or former members of the management or workers' bodies by their respective employer, company in a controlling or group relationship with the latter or by a company subject to common ownership,



provided that the issuer has its statutory or effective place of business in the European Union and a document providing information on the number and nature of the securities as well as the reasons and characteristics of the offer is available.

Directors of an issuer of securities admitted to trading on a regulated market (or of a controlling company), as well as related persons, shall notify the CMVM, within five working days, of all transactions carried out on their own account, on account of third parties or on their behalf, involving shares of said issuer or related financial instruments, where the value of such transactions reaches five thousand euros.

In addition to the general rules of information on inside information, issuers and persons acting on their behalf or account have to draw up insiders lists (e.g. lists of persons with access to privileged information), with the law providing for a set of specific duties associated with this obligation (comprising obligation to include in the list *inter alia* the person's identity, the reasons for their inclusion and the date of inclusion; to keep the list strictly up to date; to inform the relevant person of his/her inclusion in the list and the legal consequences in case of disclosure or misuse of inside information; to keep the list for a period of five years; and to immediately forward the updated list to the CMVM whenever it so requests).

14. **Do any specialist regulatory regimes apply to incentive plans?**


There are special rules applicable to the financial sector that could impact in stock options plans and other incentive schemes.

Portugal has implemented the EU regulations and the European Banking Authority orientations on remuneration on the financial sector, which cover remuneration of the members of the board and also staff members whose professional activities have material impact on the institutions' risk profile. In these cases, it is necessary to implement specific remuneration policies that must follow certain guidelines and are subject to some restrictions, in particular regarding variable remuneration (see EU Overview chapter).

There are also specific rules on remuneration of Directors and management board members of companies owned or controlled by the government, although executives under employment contracts are not covered by those rules.

15. **Are there any exchange control restrictions that affect the operation of incentive plans?**

Portugal does not have any general control exchange



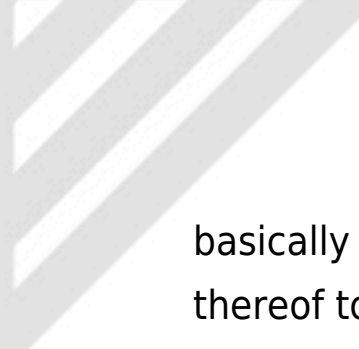
regulations which could impact the operation of stock option plans.

16. **What is the formal process for granting awards under an incentive plan?**

There is no general procedure applicable to all incentive plans.

When the beneficiaries of the plan are the company's directors, the Companies Code rules regarding their remuneration must be followed (supra n. 12). The competent body to decide on remunerations (including the type of benefits emerging from the plan) varies according to the beneficiaries. If those are members of the board the competent body is the shareholders' meeting or a remuneration committee appointed by the shareholders. For other beneficiaries the plan should be approved by the board of directors.

For stock option plans granted by non-listed companies the company needs to make available the shares to be delivered to the beneficiaries upon exercise of the respective options. Since, unless expressly agreed otherwise by the shareholders, shareholders cannot be forced to sell the beneficiaries the shares needed to satisfy the exercise of the respective options, the two main alternatives under Portuguese Company Law are



basically the acquisition of treasury stock (and subsequent sale thereof to the beneficiaries exercising the options) or the carrying out of one or more capital increases destined to the beneficiaries to whom the company has previously granted options to subscribe shares. The setting up of these operations requires the fulfilment of several requirements, set forth in the Companies Code.

For plans whose beneficiaries are the employees the most common procedure includes the following steps:

- Drawing up of the plan, which is not mandatory to be in Portuguese, provided that the beneficiaries know the used language;
- There is no obligation to inform the employee's representatives (work council or union representatives at company level - union delegates) in advance about the plan. However, the law grants works councils several rights, being one of them the right to information upon its request. Therefore, if there is a work council at the company (which is not mandatory) it may request the company information regarding the plan. In this case, the employer must provide the requested information, in writing, within the period of eight days (or fifteen days when justified by the complexity of the information);
- The company shall inform in writing each of the beneficiaries of the Plan's conditions;
- The subsequent procedures depend on the type of plan and benefits.

17. **Can an overseas corporation operate an incentive plan?**

There are no general restrictions on this matter. Companies registered in other countries may grant stock options or share plans to those employed by their Portuguese branch.

18. **Can an overseas employee participate in an incentive plan?**

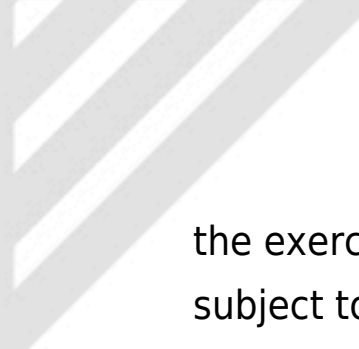
Employees working abroad can participate in incentive plans in the same conditions applicable to those employed by the Portuguese company.

19. **How are share options or awards held by an internationally mobile employee taxed?**

Employees that were resident in Portugal at grant but are not resident in this territory at exercise will not be subject to tax in Portugal to the extent that the cost of the award is not deducted by the former Portuguese employer for Portuguese corporate income tax purposes. If it does, the cost is deemed to be employment income paid by a domestic entity and will be subject to tax in Portugal (subject to a withholding tax at the rate of 25%).

If the employee is resident in Portugal on the date of exercise, the full amount of the employment income will be taxable in Portugal. This rule applies even if the employee was resident abroad on the date of the grant.

Resident employees will include the amount of the income from



the exercise of the options in his/her gross income that will be subject to personal income tax in Portugal at the general rates (up to 51% on income in excess of approximately € 80,000). If the employer is a non-resident entity, no withholding taxes will apply to this income (assuming the cost will not be attributed to a Portuguese subsidiary).

Individuals that did not reside in Portugal in the previous five years are eligible to the “non-habitual residents” regime. Under this regime, the employee may benefit from a reduced individual income tax rate of 20%. This rate applies only to a limited number of listed activities.

20. **How are cash-based incentives held by an internationally mobile employee taxed?**

The rules above described for the exercise of the options will apply to cash-based incentives.

21. **What trends in incentive plan design have you observed over the last 12 months?**

There are no significant developments or trends in incentive plans design in the last months.

22. **What are the current developments and proposals for reform that will affect the operation of incentive plans over the next 12 months?**

The tax regime and its constraints are likely to continue their influential role on how remuneration schemes are designed, particularly with regard to executives. Considering the high tax burden in Portugal, any changes in income taxes of both individuals and companies will certainly influence how remuneration schemes are organised. However, at the moment, there are no relevant reforms announced in this field.

The increasing pay gap between executives and workers in general, especially in large companies, has been making the headlines for the past few months. In view of that, one of the political parties that support the present government has announced the intention to propose legislation that would penalise the companies, either public or private, when the abovementioned pay wage exceeds a certain limit. However, so far those measures weren't proposed and it is not expected that such legislation ever sees the light of day.