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Portugal
Employee Incentives

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

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Portugal: Employee Incentives

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

In Portugal, the most common incentive plans are cash bonuses granted by employers in recognition of good service, usually dependent on the achievement of individual and/or organisational targets.

These bonuses are typically offered to directors and senior management, as well as to employees whose roles significantly impact on the company's risk exposure or overall performance.

Stock option plans are uncommon in Portugal, as most of companies are small or medium-sized. However, certain technology and innovation companies may offer such plans.

These plans are commonly offered by companies that are part of international corporate groups or that operate in the financial and venture capital sectors and are generally granted to directors and senior management.

In addition, complementary retirement plans and health or life insurance are commonly offered as long-term employee benefits and retention tools.

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

Portuguese law does not specifically regulate the types of incentive plans that may be offered. Any limitations typically arise from the company's corporate type and its articles of association.

In Portugal, companies may offer share purchase options, share subscription options, restricted stock options, stock grants, or phantom share plans.

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

See reply to previous question.

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

Other long-term incentives that may be offered include cash bonuses, phantom shares and share savings plans, subject to the limitations arising from the company's corporate form and its articles of association.

Retention bonuses may be granted, but as these restrict employees' freedom to work through a minimum stay commitment, they are permitted under Portuguese Labour Code only to compensate for extraordinary training-related expenses. Thus, they should only be granted if employees remain with the employer until the end of the agreed retention period and advance payments cannot be clawed back.

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

Outside regulated sectors, there are no specific provisions setting out who may participate in an incentive plan or the extent of such participation. These matters are instead determined by contractual freedom, subject to mandatory corporate and labour rules.

Directors are subject to specific rules under the Portuguese Companies Code (see Question 14).

Employees are not subject to specific limits. However, incentive plans must comply with the principle of non-discrimination, under which differences in treatment are permissible solely where they pursue a legitimate objective and are based on objective and proportionate criteria that ensure equal treatment of employees in comparable positions.

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

Yes. Bonuses and share plans may be made subject to performance criteria, vesting schedules and continued service (presence) conditions, provided that such conditions are lawful, proportionate and non-discriminatory, and do not breach mandatory employment law protections, such as the mandatory limitations applicable to minimum stay commitments.

Bonuses and share plans may be structured to be granted or to vest only upon completion of a pre-defined minimum service or vesting period applicable to all beneficiaries.

However, automatic forfeiture of bonuses or share plans upon termination of employment is generally not permitted under Portuguese Labour principles, except where forfeiture results from the employee's failure to complete a minimum service period.

7. Can awards be made subject to post-vesting and/or post-employment holding periods. If so, how prevalent are these provisions both generally and by reference to specific sectors?

Share plans may be subject to post-vesting holding periods and, in certain circumstances, to post-employment holding periods, particularly where awards consist of shares or other equity instruments that remain subject to contractual restrictions.

Post-employment holding periods are generally permissible, provided they are proportionate, agreed in advance and do not, in substance, operate as post-employment non-compete commitments without compensation.

However, where the retention of shares or vested instruments is made conditional upon a post-employment non-competition commitment, the mandatory regime set out in the Portuguese Labour Code applies. This regime requires a written agreement, limits enforceability to situations where the restricted activity is likely to cause harm to the employer, mandates the payment of adequate compensation and imposes a maximum duration of two years (or three years for employees in positions of trust or with access to particularly sensitive information).

Such provisions are common for directors, senior executives and key employees and are prevalent in long-term incentive plans. They are widely used in regulated financial sectors and are also common in listed companies and start-ups.

8. How prevalent malus and clawback provisions are and both generally and by reference to specific sectors?

Malus and clawback provisions are not subject to specific regulation and should therefore be expressly set out in share plans.

Malus provisions are more common than clawback provisions and are mainly used in long-term incentive plans for senior management and key employees.

Clawback provisions are subject to stricter limitations and are generally confined to cases of serious misconduct, fraud or gross breach of duties, provided they are clearly agreed in advance, proportionate and non-discriminatory.

These provisions are significantly more prevalent in regulated industries, especially banking, financial services and insurance. Outside these sectors, they remain relatively uncommon and are typically limited to senior-level roles.

9. 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 or securities; and (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.

As a general rule, there are no tax and social security consequences for participants in an incentive plan neither on grant nor on vesting (if such vesting does not immediately grant shares), since only a mere right to exercise an option is defined, and nothing is actually transferred to the employees' scope.

As such, a taxable event may occur when shares are in fact attributed to the employee (either if at automatic vesting or exercise). Should there be a positive difference between the market value of the shares at acquisition date and the price or cost borne by the employee at grant/vesting, that is considered as employment income (PIT category A), subject to general progressive income tax rates.

While holding the shares, if dividends are distributed, they are normally taxed as investment income (Category E), via 28% final withholding, with the possibility of opting into aggregation at progressive rates.

Once the employee disposes of the shares, there may be a capital gain (difference between sale price and acquisition value), fully taxed. However, for unquoted equity of micro and small companies the gain may be taxable only on 50%.

The taxable gain is subject to the autonomous rate of 28%. Though, capital gains arising from sale of shares are mandatorily added to the overall income and taxed according to the general rules at progressive rates whenever two conditions occur simultaneously:

(i) the shares are held for a period lower than 365 days and

(ii) the taxpayer has a taxable income (including the balance of the capital gains) equal or higher than EUR 83.696,00.

A special regime exists when the incentive plan is granted by an entity which, in the year prior to the approval of the plan, or in the year of approval if it is the company's first year of activity, is recognized as a startup under the applicable legal regime, and meets at least one of the following requirements:

i) it is legally qualified as a micro, small or medium sized enterprise, or as a small mid cap company, or

ii) it carries out its activity in the field of innovation, meaning entities that have incurred expenditure on investment in research and development (R&D), patents, industrial designs or models, or computer programs equivalent to at least 10% of their expenses or turnover.

In this case, gains are considered at 50% of their amount. Employees must keep the shares for a minimum period of one year and gains will be taxed when i) the shares are sold; ii) the employee ceases to be a tax resident in Portugal; or iii) upon a gratuitous transfer of the shares, whichever takes place first.

Regarding Social Security, it is generally understood that it is not applicable, insofar as gains constitute income linked to equity risk and are subject to a specific tax regime for personal income tax. However, if the plan resembles a cash remuneration (e.g. bonus) the application of social security contributions may be discussed.

If below market loans are granted as a fringe benefit, or result of a plan, by the employer (or a related party where the employer bears the cost) at a below market interest rate, the difference between the market rate and the rate actually charged shall be considered as employment income subject to tax at progressive rates. When the interest benefit is treated as a cash equivalent fringe benefit, it will be, in principle, part of the social security base.

10. What are the tax and social security consequences for companies operating an incentive plan? (i) on grant; (ii) on vesting; (iii) on exercise; (iv) on the acquisition, holding and/or disposal of any underlying shares or 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.

As a general rule, there are no tax and social security consequences for companies in an incentive plan neither on grant nor on vesting (if such vesting does not immediately grant shares), since only a mere right to exercise an option is defined, and nothing is actually transferred to the employees' scope.

As such, consequences take place when shares are in fact attributed to the employee (either if at automatic vesting or exercise). Should there be a positive difference between the market value of the shares at acquisition date and the price or cost borne by the employee at grant/vesting, that is considered as employment income (PIT category A for the employee). This is an in-kind income (not cash) part of social security contributions. There is no withholding tax by the company on this in-kind payment. Costs arising from this and employment remuneration are deductible costs for the company.

Should the plans be applicable to company directors, administrative tax interpretation considers that variable remuneration based on shares — including stock option plans/share plans — falls within the concept of variable remuneration and may therefore be subject to 35% corporate income tax autonomous rate when the conditions for incidence are met and the exclusion conditions are not satisfied (deferral of ≥50% for ≥3 years and conditioning on the company's positive performance over that period).

While the shares are held by the employee, should dividends be distributed, the company shall withhold due tax at 28% rate.

If the company lends money to employees, interest received is business income for the company and interest expense is deductible as usual, subject to general rules on thin capitalisation, transfer pricing and interest limitation regimes. If the loan is interest free or below market rate, the difference is qualified as an additional employment benefit to the employee and may be subject to social security payment.

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

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

Share saving plans which 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 (in its current wording), 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 250,000 threshold.

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

12. 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?

Participants generally do not have a right to compensation for the loss of incentive plans upon termination of employment. Where compensation is payable due to termination of employment, it is only base salary and seniority allowances that are considered, as share plans are not regarded as remuneration under the Portuguese Labour Code.

As previously mentioned, incentive plans are not subject to general rules and their terms may therefore be defined by the employer in the contract, provided that they comply with general principles such as non-discrimination.

The reason for termination may be relevant in cases of unlawful dismissal. If a dismissal is deemed unfair, the employee is entitled to any pay and benefits that would have accrued between the dismissal and the court's final decision, which may include incentive plan benefits. Although uncommon in practice, damages for loss of opportunity to participate in incentive plans may also be awarded.

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

Yes. The operation of an incentive plan is subject to the GDPR and the Portuguese Data Protection Law.

Employers must identify an appropriate lawful basis for the collecting and processing of participants' personal data, taking into account the specific circumstances of the plan (such as the performance of the employment contract).

Employee consent is subject to heightened scrutiny and is, in practice, only considered valid in exceptional cases where the processing is genuinely voluntary and clearly in the employee's interest, given the inherent imbalance in employment relationships.

Additional safeguards apply to cross-border data transfers, particularly where personal data are transferred outside the EEA to jurisdictions that do not ensure an adequate level of protection, requiring the implementation of appropriate transfer mechanisms, such as standard contractual clauses approved by the European Commission or binding corporate rules.

Employers must also ensure that participants receive all mandatory information regarding data processing and their data protection rights.

14. Are there any corporate governance guidelines that apply to the operation of incentive plans?

In general, 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).

The Portuguese 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).

For public companies there are disclosure requirements to the Portuguese Securities Market regulator (CMVM) regarding remuneration policy and share/option plans, which are included in the corporate governance report and the remuneration report. Such reports must describe, inter alia, how variable remuneration promotes alignment with the long term and discourages excessive risk, includes deferral, retained portions and (if applicable) instruments (shares/options) and integrates predetermined and measurable performance criteria and clawback mechanisms.

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

In practice, many offers to employees benefit from prospectus exemption/waiver regimes if they meet certain conditions (e.g. offers to employees, equivalent information provided, or where there is no relevant 'offer to the public'). This is the case with:

- Employee Share Schemes: Offers to existing or former employees by their employer (or affiliate) are generally exempt if the company is listed on an EU regulated market or has its headquarters (HQ) in the EU;
- Small Offers: Offers below EUR 1 million (total consideration over 12 months) may be exempt;
- Limited Persons: Offers to fewer than 150 non-qualified persons per EU Member State are exempt.

If the share purchase plan involves a public offer, rather than a targeted employee benefit, a filling with the Portuguese Securities Market regulator (CMVM) is required, together with the approval of prospectus. Acceptance of the offer must be channelled 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 HQ 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 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 EUR 5,000.

16. Do any specialist regulatory regimes apply to incentive plans?

Yes. There are specialized regimes that impose specific rules on the design, approval, payment and disclosure of incentive plans, particularly in financial sectors and for listed companies:

- Credit institutions (banking)
- Investment companies (MiFID)
- Collective investment undertakings (CIUs) management entities (asset management)
- Insurance and reinsurance companies.

If the company/organization falls within one of these sectors it will need to design and operate plans in accordance with deferral percentages, instrument composition, withholdings and malus/clawback mechanisms, as well as robust transparency and reporting.

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

Portugal does not have any general control exchange regulations which may impact the operation of stock option plans.

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

There is no general procedure applicable to all incentive plans.

The process combines corporate governance steps (approval of the remuneration plan and policy), specific deliberations for issuing instruments (if applicable), annual operational execution (definition of metrics, evaluation and awarding) and regulatory reporting. The granularity varies according to the type of company (and whether it is a public company), whether the plan involves cash or instruments (shares/options) and if it falls within a regulated sector (banking, asset management, investment companies, insurance companies).

When the beneficiaries of the plan are the company's directors, the Portuguese Companies Code rules regarding their remuneration must be followed. The competent body to decide on remunerations (including the type of benefits emerging from the plan) varies according to the beneficiaries. Where the beneficiaries 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 Companies Code 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 procedures foreseen in the Portuguese Companies Code.

For plans whose beneficiaries are the employees the most common procedure includes the issuance of award letters or the signing of agreements to join the plan containing:

- Number of units (target bonus, RSUs, options), vesting/deferral terms, retention period, termination events (good/bad leaver), malus/clawback, international mobility treaties, and compliance provisions (insider trading/sanctions/AML).
- For options/RSUs, identification of exercise price (if applicable), exercise window, and procedures (custody/execution);
- Collection of acceptances/consents and verification of conflicts of interest.

19. Can an overseas corporation operate an incentive plan?

Overseas companies may freely operate incentive plans by granting share plans to employees in Portugal.

20. Can an overseas employee participate in an incentive plan?

Overseas employees may freely participate in incentive plans operated by Portuguese companies. However, where the host company grants an incentive plan on more favourable conditions, the employee shall be entitled to participate in such plan for as long as the employee remains working abroad.

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

The treatment will depend on the tax residency of the employee.

In any case, and as a general rule, there are no consequences neither on grant nor on vesting (if such vesting does not immediately grant shares), since only a mere right to exercise an option is defined, and nothing is actually transferred to the employees' scope.

If the employee is tax resident in Portugal at grant and at shares' attribution, all is subject to tax in Portugal as previously described.

Should the employee be tax resident in Portugal at grant but not at shares' attribution (taxable moment), Portugal may tax the portion of equity income attributable to Portuguese source workdays. This interpretation derives from (i) the Portuguese Personal Income Tax Code, which limits the taxation of non-residents to Portuguese source income (in particular, employment income relating to work physically performed in Portugal), and (ii) the provisions of Portugal's double tax treaties, which generally follow Article 15 of the OECD Model Convention and allocate taxing rights over employment income (and stock-option income is employment income) to the state(s) where the employment is actually exercised.

In this case, employment income will be subject to 25% withholding tax.

Capital gains on disposal of shares may be taxed in Portugal. However, double tax treaties may provide an exemption in Portugal or an obligation to give foreign tax credit in the state of residence, so the effective Portuguese rate depends on this.

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

Cash-based incentives will have the same treatment as share options or awards. This is considered as employment income (PIT Category A) at the moment the cash is paid or becomes unconditionally due.

If the employee is tax resident in Portugal at attribution, the gross amount is taxed at the progressive PIT rates, with standard salary-type withholding and full exposure to Portuguese social-security contributions, unless a specific exemption applies.

For a non-resident, Portugal can tax only the part of the cash incentive that qualifies as Portuguese source employment income, usually determined by reference to the work physically performed in Portugal which gave rise to the bonus; that portion is typically subject to the standard 25% non-resident withholding rate on Portuguese source employment income, subject to any reduction or relief under the applicable double tax treaty.

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

To the best of our knowledge, there have been no material recent developments or notable trends in the design of incentive plans.

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

See reply to the previous question.

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