THE EUROPEAN REGULATIONS

IMPACT ON THE ACTIVITY OF REGISTRY OFFICERS AND NOTARIES

SUCCESSION LAW

CONTRACTUAL OBLIGATIONS

INSOLVENCY

MAINTENANCE OBLIGATIONS

DIVORCE

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European Regulations: Impact on the Activity of Registry Officers and Notaries

Foreword

The launch of this work is the result of an opportune initiative driven by the committed efforts of the Conselho Superior de Magistratura – CSM, the Portuguese High Judicial Council, and its Contact Point in particular.

The *European Regulations: Impact on the Activity of Registry Officers and Notaries* manual, originated in a CSM bid for a project co-financed by the European Union under the aegis of *Capacity Building and Research Activities for Judges and Legal Practitioners* (CB and RA-PT), managed by the Contact Point. The main objective of the manual is to create and strengthen national networks within the scope of the European Judicial Network in civil and commercial matters, as a way to guarantee improved implementation and treatment of cases under the EU civil justice system.

It is common knowledge that since the Treaty of Amsterdam became effective in 1999, the European Union has adopted over forty instruments pertaining to judicial cooperation in civil matters. These instruments have provided a direct response to the problems faced by citizens and companies within a European Union that is more and more open, one where the cross-border dimension is becoming increasingly common.

To make judicial cooperation between Member States more effective and to ensure that people involved in cross-border disputes have concrete access to justice, Council Decision 2001/470/EC of 28 May 2001 established the European Judicial Network in civil and commercial matters. Various Contact Points are responsible for ensuring the day-to-day operation of the network between authorities of the Member States, and for internal coordination with all members of the Network.

It falls to the High Judicial Council to appoint a judge as the Portuguese Contact Point to operate within the Council's offices and report to it in accordance with a protocol signed with the Portuguese Ministry of Justice in January 2003.

The High Judicial Council has played an active role in the activities of the Network during the last eighteen years. For its part, the European Judicial Network has made a substantial contribution to effective in judiciary cooperation in civil and commercial matters between Member States.

The European Commission's report on the Network's activities for 2016 mentioned, however, that there is room for improvement in the role and the functioning of the Network so that it better fulfils its potential and derives maximum benefit from doing so.

This manual aims to give tangible form to that idea. It offers a comprehensive approach to the practical implications of the main EU Regulations as regards the activities of registry officers and notaries, touching on such diverse matters as successions, maintenance obligations, divorce and parental responsibility, matrimonial property regimes, registered partnerships, the service of judicial and extrajudicial documents, contractual obligations, insolvency, international jurisdiction and enforcement of judgments. It promotes an unusual and innovative approach to the application of EU law, one that is without parallel at European level.

We express our gratitude to the multidisciplinary team who volunteered their valuable time and expertise to drawing up this manual: members of the Judiciary, Registries and Notary offices, academia and political and legislative power all made a concerted effort to bring this work together in its current format.

I am convinced that this in-depth, practical manual will ensure a better understanding of EU law in civil matters, thereby facilitating the access of EU citizens and companies to law and justice. It will also help the

Courts and the justice professionals (judges, prosecutors, registry officers, notaries, lawyers, solicitors, justice officials and registry officials) to apply common European rules more efficiently and with greater clarity.

Lisbon, February 2020

José António de Sousa Lameira
Vice-President of the Portuguese High Judicial Council
Justice at the Supreme Court

Acknowledgments

Having been designated, not only to participate in the writing of this manual, but also to coordinate it, I would like to thank all the elements of the drafting team, Blandina Soares (registry officer), Eugénia Amaral (registry officer), Pedro Lacerda (consultant in the Directorate General for Justice Policy, Specialist technician in the Office of the Secretary of State for Justice) and Professor Rute Teixeira Pedro (Faculty of Law of the University of Oporto), the effort, the enthusiasm, the rigor of the contributions despite the time limit we had to carry out the project, and the readiness with which they accepted this challenge.

I thank the Contact Point team Marisa Martins, Paula Gomes, Sara Miranda and Ricarda Melo, as well as Angelina Morais Castro, Director of Administrative and Financial Services of the High Judicial Council, who made possible the realization of all the practical and financial aspects related to the execution of the project.

Thanks also to the Center for Judicial Studies, the Institute for Registries and Notary and the Directorate General for Justice Policy, for having agreed to collaborate on this project, which the High Judicial Council immediately embraced and decided to lead.

Finally, I would like to thank the President Judge of the Leiria County Court, Carlos Manuel Correia de Oliveira, for his contribution to a brief introduction on the current inventory regime.

Paula Pott
Contact Point of the European Judicial Network in civil and commercial matters.

Introduction

The aim of this manual is to facilitate the activity of registry officers and notaries in cross-border cases whenever they have to apply in Portugal an European Regulation in the matters discussed hereunder. It also provides information to citizens, companies and their representatives in other Member States, when they have to resort to notaries or registry officers in Portugal, within the context of the application of the European Regulations included here. Lastly, it serves to familiarise other legal professionals with the functioning of civil law instruments of the European Union, also included here.

This manual is not exhaustive, nor is it binding on its authors or any entities or persons who consult it. It does not dispense with the need to consult the legislation in force at any given time. The issues studied here are subject to the evolutive interpretation of the Courts, in particular to the interpretation of the Court of Justice of the European Union (CJEU). It is a work of investigation aimed solely at supplying proposed solutions to certain practical issues that arise due to the difficulties of articulating European Union law (which has primacy) and Portuguese law.

The manual covers civil law instruments of the European Union on the following subjects: succession, maintenance, divorce and parental responsibilities, service of documents, matrimonial property regimes and registered partnerships, jurisdiction, recognition and enforcement of civil and commercial judgements, the law applicable to contractual obligations, and insolvency. Other regulations (*e.g.* public documents) or multilateral conventions will be mentioned in respect of some related issues.

The provisions of the internal law on jurisdiction, applicable law, recognition and enforcement of judgments, such as those established in the Civil Code and in the Code of Civil Procedure, should only be applied if no international instrument prevails over them, in particular an act of European law. For example, whenever the scope of application of Regula-

tions (EU) No 650/2012, No 4/2009, No 2201/2003, No 1259/2010 and No 1393/2007 are fulfilled, the norms therein contained must be directly applied. Only when the issue to be resolved has not been regulated can the internal legal regime be applied.

For a start, because of the primacy of European law over the law of Member States any conflict between the provisions of these Regulations and internal law regulations must be resolved in favour of the former [see Article 288(2) of the Treaty on the Functioning of the European Union – TFEU]. This would be the case, for instance, of mechanisms of automatic recognition of judgements.

When an EU Regulation establishes a recognition mechanism that waives *exequatur*, it shall prevail over the regime established in Portuguese legislation, in Article 978 of the Code of Civil Procedure according to which: "without prejudice of what is established in treaties, conventions, European Union Regulations and special laws, no judgement on private laws, delivered by a foreign Court is effective in Portugal, whatever the nationality of the parties, unless it has been reviewed and confirmed".

Example
A, of Portuguese nationality, usually resident in Germany, in his capacity as seller, brought a lawsuit in Portugal against B, the buyer, of Portuguese nationality, a sole trader with domicile in Belgium. In this lawsuit, A asks B to pay the price due under a purchase and sale agreement of goods – 500 bottles of wine of a particular vintage, produced in Portugal – said agreement having been signed between them, in Portugal, where B travelled to taste the wine before purchasing it. The agreement stipulated that A should deliver the goods to B's warehouse in Germany. Regulation 1215/2012 regarding international jurisdiction in civil and commercial matters establishes that B may alternatively be sued in Belgium (the defendants's domicile) or in Germany (place of delivery of the goods stipulated in the agreement) – Articles 4(1) and 7(1) of said Regulation. Accordingly, the fact that the agreement was signed in Portugal or that the goods were produced in Portugal does not allow A to invoke the rule of international jurisdiction enshrined in Article 62(b) of the Code of Civil Procedure, and use it to bring the lawsuit in the Portuguese Courts.

Useful Links	
European Judicial Atlas	https://e-justice.europa.eu
Hague Conference on Private International Law (HCCH)	https://www.hcch.net
Couples in Europe	http://www.coupleseurope.eu
European Land Register Association	https://www.elra.eu
Bureau of Documentation and Comparative Law of the Prosecutor General's Office	http://gddc.ministeriopublico.pt
Legislation	https://justica.gov.pt/Legislacao http://www.pgdlisboa.pt/leis/lei_main.php
Ministry of Justice	https://justica.gov.pt
Contact Point of the European Judicial Network in civil and commercial matters	https://redecivil.csm.org.pt
Court of Justice of the European Union	https://curia.europa.eu

Section I

Succession Law

Regulation 650/2012

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Introduction

Relevant instruments of civil law of the European Union in matters of succession

- Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (in this Section, referred to simply as the "Regulation", "Regulation 650/2012" or "EU Succession Regulation")[1].
- Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014, establishing the forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (in this Section also called the "Implementing Regulation")[2].

Note: Any articles in this section with no indication of origin refer to Regulation (EU) No 650/2012; references to a code without mentioning the country refer to Portuguese legislation.

[1] http://data.europa.eu/eli/reg/2012/650/oj

[2] http://data.europa.eu/eli/reg_impl/2014/1329/oj

Regulation (EU) No 650/2012 of 4 July 2012	
on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession	
Informal designation	EU Succession Regulation
Material scope	Succession by death
Effective from:	17 August 2015
Non-binding on these Member States	Denmark, Ireland, United Kingdom
Preceded by	-
Non-applicable internal norms	International jurisdiction: Articles 62 and 63 of the Code of Civil Procedure Applicable Law: Article 62 of the Civil Code Recognition: Article 978 *et seq.* of the Code of Civil Procedure
Enforcement instruments	Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014

Relationship with existing international conventions

The EU Succession Regulation is without prejudice to the application of international conventions to which the Member States are party at the time of its adoption and which concern matters governed by it; in particular, Member States which are Contracting Parties to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions [https://www.hcch.net/en/instruments/conventions/full-text/?cid=40], shall continue to apply the provisions of that Convention instead of Article 27 of this Regulation with regard to the formal validity of wills and joint wills.in particular – Article 75 (1) of the EU Succession Regulation. However,

notwithstanding its signature, at the time of writing this manual, Portugal did not ratify that Convention therefore Portuguese authorities are not bounded by its rules.

Regarding international wills, they are governed by the 1973 Convention Providing a Uniform Law on the Form of an International Will [https://www.unidroit.org/instruments/international-will], in which Portugal is Contracting Party (approved for accession by Decree-Law 252/75) and by the rules of the Notaries' Code regarding the approval, deposit, filing, registration and opening of closed wills.

Territorial scope

The EU Succession Regulation binds all Member States with the exception of Denmark, Ireland and the United Kingdom [see recitals (82) and (83) of the EU Succession Regulation]. Furthermore, in addition to not being bound as a Member State, the United Kingdom will be considered a third State following its departure from the European Union. Henceforth, unless otherwise specified, any reference to Member States means Member States bound by the EU Succession Regulation.

Material scope

The material scope is determined by Article 1(1) of the Regulation. It is applicable to succession by reason of death [Article 3(1)(a)], excluding all revenue, customs and administrative matters. All matters listed in Article 2(1) are excluded from its scope of application. Such issues cannot be classified as succession [see recitals (9) to (14)]. The Regulation covers all matters of private international law on succession to which neither Regulation No 1215/2012 (Brussels I recast) nor Regulation No 2201/2003 (Brussels IIa) apply, in particular the international competence

of jurisdictions to decide on the succession and the law applicable to the succession, but does not regulate material succession law, which remains in the hands of the Member States. It also provides for rules of recognition and enforcement of legal judgements, legally approved agreements and authentic instruments and creates a European Certificate of Succession (ECS).

Temporal scope

The regulation was adopted on 04.07.2012 and published in the Official Journal of the European Union on 27.07.2012. It entered into force on 16.08.2012, the twentieth day following that of its publication [Article 84(1)]. With the exception of certain general provisions (Articles 77, 78, and 79 to 81), under the terms of Article 83(1), the Regulation shall apply to the succession of persons who die on or after 17 August 2015, but under the terms of paragraphs (2), (3) and (4), temporarily safeguarding the law chosen by the deceased or the formal and material validity of dispositions of property upon death made prior to that date.

Jurisdiction of Notary Offices in matters of succession in Portugal

In matters relating to succession, Notary Offices in Portugal may execute public deeds of: entitlement of heirs and legatees (Articles 82 to 88 of the Notaries' Code); sharing of the inheritance; waiver of inheritance or legacy; and assignment of an inherited portion. Notaries may also draw up public wills, instruments of approval, deposit and open closed wills and international wills [Article 4(2)(a) of the Notaries' Code].

Competing functional jurisdiction of Notary Offices concurrent with Courts

Additionally, Notary Offices have jurisdiction to handle inventory proceedings whether as a result of death or of dissolution of the marital property, under the regime of functional jurisdiction concurrent with Courts.

At the request of the party concerned or by agreement between all the parties concerned the proceedings may be brought in Courts or Notary Offices [Article 1083(2) of the Code of Civil Procedure in the reading given by Law No 117/2019 of 13 September]. However, where proceedings involve an incapacitated person, an accompanied adult or an absent person, or the inventory is dependent on another lawsuit, the inventory proceedings must be brought before a Court.

In notarial proceedings, the notary exercises jurisdiction under the regime of functional division of tasks with the judge. The notary is responsible for handling and conducting the proceedings, ruling on disputes and declarative incidents. The judge is responsible for delivering the decision ratifying the division, ruling on all matters submitted by the notary to the judicial Courts, and examining the appeals lodged against the notary's decisions.

In the Courts, proceedings are governed by the Code of Civil Procedure (judicial inventory regime), in the reading given by Law No 117/2019 of 13 September, whilst inventory proceedings handled in Notary Offices are governed by the notarial inventory regime (annexed to Law No 117/2019 of 13 September).

The law provides for the possibility of transferring the inventory proceedings initiated at the Notary Office to the Court, following an application made by a (simple) majority of the parties concerned (in accordance with their respective inherited portions) – Article 1083(3) of the Code of Civil Procedure.

Jurisdiction of Registry Offices in matters of succession in Portugal

Certain Registry Offices, departments connected with the Institute of Registries and Notary [Instituto dos Registos e do Notariado, I.P. (IRN, I.P.)], are also competent within the scope of simplified hereditary succession proceedings. The list of said Registry Offices may be consulted on the website *Balcão Heranças*[3].

Such Registry Offices have competence to celebrate what are called simplified succession procedures, which in accordance with Articles 210-A to 210-R of the Civil Registry Code aim to perform extrajudicial titling acts regarding the inheritance, registration and guarantees as to fulfilment of fiscal obligations in respect of the hereditary succession.

Simplified procedures may be of three different kinds:

i) Entitlement of heirs, sharing-out and registration;
ii) Entitlement of heirs, with or without registration; and
iii) Sharing-out and registration.

A simplified procedure of hereditary succession that includes sharing-out may only be performed if the inheritance has movable or immovable assets or shareholdings, subject to registration. The simplified procedure of entitlement of heirs, sharing-out and registration, or simply sharing-out and registration, is not possible if the property of the deceased only had movable or immovable assets located in other States, for in this case their immediate registration is not possible[4].

Under the terms of Order in Council No 60/2017 of 7 February, simplified procedures of inheritance including sharing-out may include the execution of loan agreements entered into by credit institutions, with or without mortgage and surety, so that one heir may effect cash payments

[3] https://justica.gov.pt/Servicos/Balcao-Herancas
[4] See process CN 27/2013 SJC, IRN, I.P.

in compensation to other heirs to ensure all heirs get an equal share. If a mortgage is raised, it is mandatory for the mortgage registration to be done at once.

Competences of lawyers and solicitors in matters of succession in Portugal

Lawyers and solicitors are competent to draw up deeds of alienation, rejection and repudiation of an inheritance or legacy, and deeds of sharing-out of the estate incorporating immovable assets, in an electronically filed private authenticated document, as created and provided by Decree-Law No 116/2008 of 4 July. Together with the public deed this document is now formally valid for execution of acts established in Article 22(a) to (g) of that same Decree-Law, in particular the aforesaid deeds of alienation, waiver and renunciation of an inheritance or legacy and sharing-out of inheritance.

1. **Is it possible to register in Portugal and if so, where, a decision on matters of succession delivered in another Member State or an authentic document issued in another Member State, that:**

   – ***recognises that someone has the capacity of heir, legatee, administrator of the estate, and executor of the will?***

Yes, in principle, as regards recognition of the capacity of heir and the capacity of legatee. In Portugal, a judgement or authentic document on matters of succession is relevant registration-wise with regard to movable or immovable assets subject to registration, and to shareholdings subject to registration.

As a rule, the decision is not registrable but its repercussion as regards ownership is publicised in the sense that a particular asset is included in the patrimonial assets of the gross, undivided inheritance, in the case of the heirs, or in the assets of the legatee, where there is a will (an authentic document) that appoints one or more legatees of specific, determined assets. In other words, both the decision and the authentic document will give rise to registrations of acquisition or conveyance in favour of the legatee or the heir to whom assets have been awarded.

A decision or authentic document recognising that someone has the capacity of heir may also give rise to optional registration in favour of the inheritance (commonly known as "communal acquisition with no determination of share or right") or the registration of an acquisition in favour of a sole heir.

– ***order, establish or ratify the sharing-out of the assets of the inheritance?***

A decision approving the sharing-out of the inheritance assets which is delivered in another Member State or an authentic document establishing the sharing-out of the inheritance assets issued in another Member State is registrable as a way to publicise the settlement of the estate and the award of its assets to the heirs and persons sharing the estate. The acquisition or conveyance of the assets is registered in favour of the adjudicatory heir in the sharing-out.

If the sharing-out is done in Portugal within the scope of simplified procedures – entitlement of heirs, sharing-out and registrations, or merely sharing-out and registrations – the Registry Office facilitates settlement and payment of all taxes regarding the sharing-out, collects the emoluments and other charges due and carries out the mandatory and immediate registration of conveyance of the immovable assets, or of the movable assets and shareholdings subject to registration that are shared out.

If the sharing-out is the result of a decision or authentic document originating in another Member State, or is titled in Portugal by public deed at a Notary Office, or by an electronically filed private authenticated document by a lawyer or solicitor, the subsequent registry of conveyance of the immovable assets, or of the movable assets and shareholdings subject to registry, must be requested at any Registry Office with competence to perform land, commercial and vehicle registrations, pursuant to the principle of instance. Requests for registration may be done in person, electronically or by post. Definitive registries of shared assets imply fulfilment of all fiscal obligations due.

2. Can Registry Offices in Portugal accept a decision in matters of succession delivered in another Member State, with no further formalities?

Yes, pursuant to the EU Succession Regulation, provided the death occurred on or after 17 August 2015. Pursuant to the provisions of Article 39 of the Regulation, decisions delivered in one Member State are recognised in the other Member States, without the need for recourse to any other procedure.

For purposes of applying the EU Succession Regulation, the definition of the decision is established in Article 3(1)(g) of said Regulation as any decision in a matter of succession given by a Court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the Court.

The term ‘Court’ means any judicial and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate

may be made the subject of an appeal to or review by a judicial authority and have a similar force and effect as a decision of a judicial authority on the same matter [Article 3(2)].

In Portugal, for purposes of Article 3(2) of the Regulation, notaries are on a par with judicial authorities when they have competence to carry out instruments and terms of inventory proceedings and the entitlement of a person as successor on the death of another, according to the legal regime of the inventory process (Law 117/2019 of 13 September 2019).

3. In general, can a decision delivered in another Member State be accepted by the registry officer with no formalities?

This must be distinguished depending on whether the decision delivered by the Court of the other Member State is: a decision solely on the matter of succession; the same decision governing the succession issue and another civil issue that is not part of succession law; or a decision merely regarding a civil issue other than that of the matter of succession.

The recognition of decisions established in the EU Succession Regulation is applicable to decisions in matters of succession. To be in the presence of a decision in matters of succession said decision must correspond to the definition established in Article 3(1)(g) of the Regulation. If the decision also regards additional matters, Article 55 of the EU Succession Regulation establishes the possibility of partial enforceability, that is, only that part of the decision that regards succession shall be recognised, accepted and enforced as per said Regulation. Where a decision has been given in respect of matters other than succession, it seems that it cannot benefit from the scheme of recognition and enforcement provided for by the EU Succession Regulation, although depending on the cases it may be enforced and executed under the terms of other civil law instruments of the Union.

Example
A Portuguese national dies in Italy, where he had his last habitual address, leaving property in Portugal. An Italian Court delivers a decision on the sharing-out of the immovable assets located in Portugal. This is a decision on the matter of succession. One of the sons, the heir to one of these properties, can present this decision to the Land Registry in Portugal to request that ownership of the asset he received in the sharing-out is recorded in a register in his favour. The recognition of the decision of the Italian Court is immediate, without the need for revision and confirmation, under the terms of the recognition set out in the EU Succession Regulation.

The only grounds for non-recognition are as established in Article 40 of the Regulation. Under the terms of Article 41 of the Regulation no decision given in another Member State may be reviewed as to the substance.

Accordingly, if a decision on matters of succession is delivered in another Member State it should in principle be accepted by the Portuguese registry officer for registration. Indeed, Article 39(1) of the EU Succession Regulation establishes automatic recognition without any special procedure being required. The party concerned has only to submit a copy of the decision which satisfies the conditions necessary to establish its authenticity [Article 46(3)(a)].

The additional presentation by the party concerned of Form I seems to be optional. If it is not presented and the registry officer deems it necessary, he must establish a time limit for the party concerned to attach it (Articles 46(3)(b) and 47(1) of the EU Succession Regulation).

Form I, *Attestation concerning a decision in a matter of succession,* is annexed to the Implementing Regulation establishing the forms mentioned in the EU Succession Regulation. It is available online in the official languages of the Union on the European e-Justice Portal, on the page of the European Judicial Atlas under Successions[5].

Form I must be issued at the request of the party concerned by the Court or competent authority of the Member State of origin that delivered the decision.

5 https://e-justice.europa.eu/content_succession-380-en.do?init=true

The EU Succession Regulation does not impose the need for the party concerned to attach a translation into Portuguese of the copy of the decision or of the form. However, it says that the registry officer may require the translation to be submitted (Article 47(2) of the Regulation). As a rule a registry officer in Portugal will require the translation. Under the terms of Article 43 number 3 of the Portuguese Land Registry Code documents written in a foreign language will only be accepted if translated under the terms of the law, unless they are written in English, French or Spanish and the competent official is familiar with any of these languages. Should a translation be required it shall be done by a person qualified to do translations in one of the Member States under the terms of Article 47(2) of the EU Succession Regulation.

Should the party concerned wish for partial recognition of a decision delivered in another Member State, only in the part that refers to successions as Article 55 of the Regulation seems to admit, he may ask the Court of origin to issue Form I, entitled *Attestation concerning a decision in a matter of succession*, requesting acceptance only of that part of the decision delivered in another Member State on the matter of the succession. The decision shall be accepted by the Portuguese registry officer under the terms of Article 39(1) of the Regulation, but only as respects that part and not the rest.

Finally, the registry officer may not accept a decision delivered in another Member State on matters that fall outside the scope of successions under the recognition scheme established in the EU Succession Regulation. However, that decision may be accepted and recognised in the light of the recognition scheme established in other civil law instruments of the Union, if it falls within the respective scope of application – *e.g.* Regulation 2201/2003 if it is a question of divorce, legal separation, marriage annulment or parental responsibilities, Regulation 1215/2012 on civil and commercial matters, included in its scope Regulation 2015/848 on insolvency proceedings, Regulation 4/2009 on maintenance obligations, or Regulations 2016/1103 and 2016/1104 on matrimonial property regimes and registered partnerships, respectively.

Example
A Portuguese national resides in Member State A. He owns a property in Portugal which he gifted to his son, who resides with him. The gift agreement was signed in Portugal. In their lifetime, both father and son have been sued in Member State A where they currently reside, in a pauliana challenge of the gift, by a creditor of the father. Although the property is in Portugal the Court of the other Member State considers itself internationally competent in the light of the CJEU ruling in connected cases C-115/88 and C-261/90, given the fact that it is the Court of the Member State where the defendants reside. During the lawsuit, the son marries and comes to live in Portugal. The actio pauliana is declared proven by decision of the Court of Member State A. Meanwhile, the son dies with his last habitual residence in Portugal and the succession process is opened here. The creditor who had won the cause asks the Portuguese registry officer to register the decision that proved the actio pauliana delivered by the Court of Member State A, under the terms of Article 3 (1) (c) of the Portuguese Land Registry Code. The registry officer may accept said decision for purposes of registration without need of any special procedure or *exequatur,* in the light of Regulation 1215/2012 and not of the EU Succession Regulation because the actio pauliana did not lead to a decision regarding succession.

4. Can Registry Offices (land, commercial and vehicle) in Portugal accept an authentic instrument in matters of succession issued in another Member State with no further formalities?

Yes, in principle. The EU Succession Regulation is applied concerning an authentic instrument in matters of succession, issued in another Member State, provided the death occurred on or after 17 August 2015. Article 59 sets out that an authentic instrument established in a Member State (of origin) shall have the same evidentiary effects in another (destination) Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy in the Member State concerned. The evidentiary effects contained in the instrument are allowed to circulate among the Member States bound by the Regulation.

Article 59 is aimed at the acceptance of the evidentiary force of

authentic instruments in matters of succession, which are allowed to circulate among the Member States. The definition of an authentic instrument is set out in Article 3(1)(i) as being “a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which relates to the signature and the content of the authentic instrument and has been established by a public authority or other authority empowered for that purpose by the Member State of origin”.

The evidentiary effect of the instrument is determined by the law of the Member State of origin. This is as set out in recital (61) which establishes that the “evidentiary effects which a given authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin”. Anyone wishing to use an authentic instrument in another Member State must ask the authority who is competent to issue the document in the Member State of origin to fill in Form II of the Implementing Regulation, describing the evidentiary effect of the authentic instrument on the Member State of origin.

Example
A, of French nationality, left a public will drawn up before a French notary (Article 971 of the French Civil Code). That will has the same evidentiary effect in other Member States as it has under French law.

Example
A, of Portuguese nationality, resident in Luxembourg, wishes to sell a building located in Oporto, part of the legacy left by his father who died on 20 August 2015, A being the sole heir. He has with him a notarised certificate of inheritance from Luxembourg confirming he is the sole heir. The Luxembourg certificate of inheritance is sufficient to demonstrate his legitimacy, as the Regulation enshrines the rule of acceptance of authentic deeds on matters of succession between Member States – Articles 59 and 62 (3) of the Regulation.

5. Does the party concerned have to submit any certificate or special form with the respective translation?

The use of the certificate-form is not mandatory but it will help judge the evidentiary effect of the authentic instrument, avoiding any difficulties relating to querying the evidentiary value granted by the law of the Member State of origin. To enable the authority to whom the document is submitted in the Member State of destination to be informed as to the evidentiary effect of the document in the Member State of origin, the EU Succession Regulation has set up a certificate form describing the evidentiary effect of the authentic instrument in the Member State of origin. Whoever wishes to use said instrument in another Member State must request the form from the authority who delivered the instrument. It constitutes Annex 2 of Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014.

Regarding translation it seems that article 47 (2) shall apply by reference of article 60 of the EU Succession Regulation.

6. What reasons may be given for refusing to recognise or declare enforceable a decision on matters of succession delivered in another Member State?

The reasons for non-recognition of a decision on a matter of succession delivered in another Member State are those listed in article 40 of the EU Succession Regulation; they are different from those resulting from the lack of requirements needed for the recording in a register as provided for by national legislation. The latter fall outside the scope of application of the EU Succession Regulation [Article 1(2)(l) of this Regulation].

The Regulation sets out four reasons for a decision on a matter of succession not to be recognised: if it is manifestly contrary to public policy; where it was given in default of appearance, if the defendant was

not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence; if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought; if it is irreconcilable with an earlier decision given in another Member State or in a third State. The grounds for such non-recognition are based on the following fundamental principles regarding recognition: respect for international public order; the principle of protection of the right to defence of the defendant; and respect for the authority of a judgement made. Insofar as the rule reproduces motives for non-recognition listed in Regulation 1215/2012 (before that in Regulation 44/2001) the corresponding jurisprudence of the Court of Justice is applicable, adapted where necessary.

Concerning enforceability, it seems that according to Article 48 the decision shall be declared enforceable immediately on completion of the formalities in Article 46 without any review under Article 40. It is question of verifying, essentially the following:

i) That the application is accompanied by the copy and the attestation referred in Article 46(3);

ii) That the decision is covered by the scope of application of the Regulation (see Article 1); and

iii) That the application was addressed to the competent Court (see Articles 44 and 45).

Article 48 excludes the possibility of the national Courts unofficially reviewing the reasons for non-recognition foreseen in Article 40. In case of an appeal based on some of the reasons for non-recognition and/or declaration of enforceability the matter may be discussed on appeal (see Articles 50 and 52).

In Portugal, and in the matter of rules governing registration of immovable or movable assets subject to registration, the registrability of

the decisions depends on the registry officer's analysis of the fulfilment of the principle of legality. According to article 68 of the Land Registry Code, applicable to the register of vehicles pursuant to Article 29 of the Vehicle Ownership Registration Code, the feasibility of the application for registration must be assessed in view of the applicable legal provisions, the documents submitted and previous registrations, during which the identity of the building, the legitimacy of the parties concerned, the formal regularity of the deeds and the validity of the instruments it contains are verified.

Although the registry officer cannot refuse the registration for reasons regarding the substance (Article 41 of the EU Succession Regulation), he may reject it in particular because the building, the vehicle in question or the subjects in the legal relation are not identified or are insufficiently identified in the decision; or because of lack of formal regularity of the document submitted; or because they do not fulfil other principles forming the registration, such as the principle of successive treatment [Article 34(4) of the Land Registry Code] whereby the right of the acquirer must be based on that of the seller; or on the basis of lack of fulfilment of tax obligations (Article 72 of the Land Registry Code).

7. What are the reasons for refusing acceptance for registration of an authentic instrument in a matter of succession issued in another Member State?

In the case of documents issued in another Member State priority must be given to the regime resulting from the EU Succession Regulation over the regime applicable to foreign documents issued in third States.

When a foreign authentic instrument, issued by a third State, is submitted for registration, the Portuguese registry officer must analyse it from three perspectives: the language used; the authenticity of the

document and its evidentiary effect; its substantive validity, which imply the determination of the law applicable to the legal situation in view of the rules in force in private international law, to ascertain whether the applicable material law was observed.

In principle, a prior translation of the document by a competent entity under the terms of the law, as mentioned above, should be demanded.

As regards verification of the authenticity of the document, Article 365(2) of the Civil Code establishes that if the document is not legalised under the terms of procedural law, and there are substantiated doubts as to its authenticity or the authenticity of the recognition, its legalisation may be required.

Hence, as a rule, legalisation is not exigible and the registry officer will only demand it when he has substantiated doubts as to its authenticity or the authenticity of the recognition. If that is the case, according to Article 440(1) of the Code of Civil Procedure, without prejudice of what is established in European Regulations and other international instruments, the authentic documents issued in a foreign country, in conformity with the law of that country, are deemed legalised provided that the signature of the public official is certified by a Portuguese diplomatic or consular agent in the respective State and the signature of that agent is authenticated with the respective consular embossed seal.

However, pursuant to the law of the European Union and of the direct application of the EU Succession Regulation, together with respect for international conventions binding Portugal [cf. Article 440(1) of the Code of Civil Procedure and Article 8 of the Constitution of the Portuguese Republic], the following regimes must be applied: for third States that ratified or acceded to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, there is no need to legalise public documents bearing the apostille; the EU Succession Regulation supersedes it in the case of authentic instruments in a matter of succession issued by a Member State, since Article 74 of said Regulation

establishes that no legalisation, apostille or other similar formalities are required in respect of documents issued by a Member State in the context of this Regulation. The registry officer may not raise reasonable doubt as their authenticity based on the lack of legalisation.

As regards evidentiary effects, given the provisions of Article 365(1) of the Civil Code, the evidentiary effects of documents issued in a foreign country as prescribed by local law are generally recognised.

In the cases where the EU Succession Regulation is applied – because it is an authentic instrument in a matter of succession from a Member State bound by the Regulation, where the death occurred on or after 17 August 2015 – Article 59 of said Regulation establishes that an authentic instrument established in a Member State (of origin) shall have the same evidentiary effects in another Member State (of destination) as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy in the Member State concerned.

Thus, within the scope of the EU Succession Regulation, non-recognition may only occur if the authentic instrument is contrary to public policy in Portugal [Article 60(2)]. In this regard, only the manifest breach of public policy could justify non-recognition of an authentic instrument originating in another Member State, as is the case with non-recognition of a decision. This exceptional course could never allow the substance or the rights and obligations contained in the instrument itself to be queried.

If the authenticity of the authentic instrument or the negotium itself are challenged – which can only be done before the Courts of the Member States indicated in Article 59(2) and (3), respectively – and whilst the challenge is pending, the authentic instrument shall not be accepted or its evidentiary effects shall only affect the Member State under the terms set out in Article 59(2) or (3), as the case may be.

As regards requirements governing registrations in Portugal, the reasons for rejection are the same as those mentioned above on question 6.

8. In the light of Portuguese law which appeal mechanisms do the parties concerned have should a Civil Registry Office refuse to accept a decision or an authentic instrument in a matter of succession delivered by another Member State?

The appeal mechanisms established in Portuguese legislation vary depending on whether we are dealing with civil, land, vehicle or companies registries.

– ***Appeal in the case of a rejection by the Civil Registry***

When refusal of acceptance leads to the dismissal of a simplified procedure of hereditary succession for which registries are competent, the registry officer writes a rejection order and delivers a copy to the parties concerned, who are therefore deemed notified and may appeal under the terms of Articles 210-L(1)(d) and 210-L(4) of the Civil Registry Code.

In that case, the parties concerned may alternatively decide on a judicial challenge before the Court of the area to which the Registry Office belongs or a hierarchical appeal.

If they decide on a hierarchical appeal and this is deemed not proven, the parties concerned may also judicially challenge the registry officer's initial order within the time limit of ten days, under the terms of Article 286 of the Civil Registry Code.

If they decide to judicially challenge the registry officer's initial order (without having previously lodged a hierarchical appeal), the parties concerned should present at the Registry Office the appeal petition within the time limit of 15 days subsequent to notification of the decision of rejection by the registry officer [Article 288(1) of the Civil Registry Code]. The registry officer may repair or sustain the rejection order. If sustained, he must send the appeal to the Court for a decision to be issued.

If it is a question of an authentic instrument delivered by another Member State being rejected, consisting in the refusal to accept its

evidentiary effects in full or in part, the parties concerned may judicially challenge the registry officer's decision within eight days counted from notification of the rejection order, according to Article 292(2) and (3) of the Civil Registry Code.

As a rule, the provisions of Article 138 of the Code of Civil Procedure are applied to the time limits for the appeal (the time limits are continuous).

– ***Appeal in case of rejection by the Land Registry***

As pertains to land registration, if a decision in a matter of succession delivered in another Member State or an authentic instrument in a matter of succession issued in another Member State is rejected, to prepare a registration process a rejection order or a provisional order due to doubts must be issued and the party concerned notified of it, under the terms established in Article 71 of the Land Registry Code.

In accordance with Articles 140(1) and 141(1) of the Land Registry Code, the decision to reject a recording in a register under the terms requested – *e.g.* whenever a definitive registration act is requested and it is rejected or made provisionally due to doubts or made provisionally by nature, or simultaneously made provisionally due to doubts and provisionally by nature – may be challenged by lodging a hierarchical appeal to the governing board of the Instituto dos Registos e do Notariado, I.P., or by legally challenging the Court of the district to which said registry belongs, within the time limit of 30 days counted from the notification established in Article 71.

The right to carry out the act shall lapse (cf. Article 139(3) of the Code of Civil Procedure applicable pursuant to Article 156 of the Land Registry Code) upon the expiry of the time limit Accordingly, if the hierarchical appeal is lodged after the expiry of the time limit it must be rejected outright (cf. Article 641(2)(a) of the Code of Civil Procedure).

The Portugal legal framework on this matter is as follows. Under the terms of the provisions of Article 154(1) and (2) of the Land Registry Code, the party concerned must be notified by registered letter

which is presumed to have been done on the third day after the date of registration, or, should this not fall on a working day, on the first working day thereafter. The time limit to lodge an appeal is 30 days counted continuously from the date of notification. If the time limit ends on a Saturday, Sunday, holiday or optional holiday or a day when the department where the act is to be performed is not open to the public, or not functioning during the normal period, it shall pass to the next working day, given the provisions of Article 155(2) and (3) of the Land Registry Code.

– ***Appeal in the case of a rejection by the Vehicle Registry***

As pertains to vehicle registration, if a decision in a matter of succession delivered in another Member State or an authentic instrument in a matter of succession issued in another Member State is rejected, to prepare a registration process a rejection order must be issued under the terms of Article 50 of the Vehicle Registry Regulation and the party concerned notified, pursuant to the subsidiary application of the provisions of the Land Registry Code to vehicle registration (cf. Article 29 of the Vehicle Ownership Registry).

– ***Appeal in case of rejection by the Companies Registry***

As pertains to company registration, if a decision in a matter of succession delivered in another Member State or an authentic instrument in a matter of succession issued in another Member State is rejected, to prepare a registration process by transcription (cf. Article 53-A of the Companies Registry Code) a rejection order or provisional order due to doubts must be issued and the party concerned notified, under the terms of Article 50 of the Companies Registry Code.

According to Article 101 of the Companies Registry Code, the decision to reject a recording in a register under the terms requested may be challenged by lodging a hierarchical appeal to the governing board of

the Instituto dos Registos e do Notariado, I.P., or by legally challenging the Court of the district to which said registry belongs, within the time limit of 30 days counted from the notification established in Article 50 of the Companies Registry Code. The time limit runs continuously and is counted under the terms established in Article 155(2) and (3) of the Land Registry Code (cf. Article 115 of the Companies Registry Code).

9. Which are the national documents required to order, establish or ratify the sharing-out of the assets of the inheritance?

Under the terms of Article 2102 of the Civil Code and if agreed by the parties concerned the sharing-out is made at the Registry or Notary Offices.

In the absence of an agreement, the sharing-out is made by means of an inventory before a Notary Office or a Court (Law 117/2019 of 13 September approving the notarial inventory regime and Title XVI Book V of the Code of Civil Procedure). The inventory process is the exclusive jurisdiction of the Courts in the following cases: if the Public Prosecutor believes that the interest of the incapacitated person implies the establishment of an inventory; if the inheritance is granted to the incapacitated or absent person who, as such, cannot participate in the sharing-out by agreement; if the inventory is dependent on another judicial process; if the inventory is requested by the Public Prosecutor. In all other cases, the inventory proceedings may be requested by the party concerned who applies for it or by agreement between all the interested parties before the Court or the Notary Office – Article 1083 of the Code of Civil Procedure.

The sharing-out by agreement implies the entitlement of the heirs and may be documented with:

i) a public deed made before a notary [Article 22(1)(f) of Decree-Law No 116/2008 of 4 July];

ii) a simplified procedure of entitlement of heirs, sharing-out and registries, or just sharing-out and registries (Articles 210-A to 210-R of the Civil Registry Code) at a Balcão das Heranças e Divórcio com partilha – BHDP (Counter for Inheritance and Divorce with Sharing-out of Property) at registry departments designated by IRN, I.P.; or

iii) a private authenticated document subject to electronic filing (Article 22(1)(f) and Article 24 of Decree-Law No 116/2008 of 4 July).

In the case of a sharing-out by agreement, the subsequent register of the immovable and movable assets subject to registration may occur at different times, depending on whether the sharing-out is made in a public deed or an electronically filed private authenticated document, on the one hand, or formalised through a simplified procedure of entitlement of heirs, sharing-out and registries, or just sharing-out and registries, on the other.

In the first case (public deed or electronically filed private authenticated document), the documents, settlement of taxes due and register are not temporally synchronised. The public deed or the electronically filed private authenticated document title the sharing-out; later, the respective taxes are settled before the tax authorities; finally, the register of the various acquisitions arising from the settlement of the hereditary estate is requested at the registry department, which may be made by the notary/lawyer/solicitor/ or by the persons sharing the estate. The application may be done in person, sent by post or, if requested by the notary, lawyer or solicitor, may also be made online, under the terms of Order in Council No 1535/2008 of 30 December, with the reading given it by Order in Council No 286/2012 of 20 September.

In the second case (at the "Counter for Inheritance and Divorce with Sharing-out of Property"), and given that registry departments are responsible for promoting ownership acts, register and guarantee of fulfilment of fiscal obligations regarding the succession, there is no temporal de-synchronisation, nor can there be, so that one single act will suffice to carry out the entitlement of heirs, sharing-out of the inheritance

and registries, if any. Furthermore, the registry may settle the municipal property transfer tax on conveyances and the stamp duty owed, ensuring their immediate payment.

When it is not possible to make the sharing-out by agreement under the above-mentioned terms, it is titled by a decision delivered in the inventory proceedings. A sharing-out by inventory, also called acceptance of the inheritance for the purpose of inventory, may occur if:

i) there is no agreement between all the parties concerned in the sharing-out; or
ii) the Public Prosecutor considers that the interest of the incapacitated person to whom the inheritance is deferred implies accepting in favour of the inventory; or
iii) some of the heirs cannot, due in some cases to uncertain absence or to de facto permanent incapacity, take part in the sharing-out by agreement.

10. In Portugal, can any of the above documents serve as the basis for registration of the inheritance assets in favour of the heir or legatee?

Yes. The general rule resulting from Article 43 of the Land Registry Code is that only the facts set out in and legally proven by certain documents may be registered.

In this context, the sharing-out of the inheritance done by public deed, the sharing-out done by simplified procedure and the sharing-out done through an electronically filed private authenticated document, legally prove the sharing-out of the inheritance, and may serve as the basis for registration of the acquisition in favour of the heir who was awarded the assets.

However, regarding the register of acquisition in favour of the legatee (who inherits certain specific assets), as a rule the will is sufficient when the beneficiary is a certain and specific person.

The certificate of the decision delivered in the inventory proceedings, passed into matter adjudged, serves as the basis for the definitive register of the inheritance assets in favour of the heir or legatee.

The public deed and the documents signed within the scope of simplified procedures are authentic documents in that they are written and accepted, with all legal formalities, by the notary or another public official competent for the act, and are ample proof thereof, under the terms of the provisions of Articles 363 and 371 of the Civil Code. For that purpose, private authenticated documents have the evidentiary effects of authentic documents, in accordance with the provisions of Article 377 of the Civil Code.

11. What other documents, other than those titling the sharing-out mentioned above, are required to register inheritance assets in favour of the heir or legatee?

As a rule, additional documents are always required to register inheritance assets in favour of the heir who has been awarded assets, in addition to the documents titling the sharing-out.

Registering the acquisition of the asset acquired is titled by a public deed of sharing-out, by the simplified sharing-out procedure or by an electronically filed private authenticated document, which must at all times be accompanied by the public deed of entitlement of heirs or the simplified procedure of entitlement of heirs.

Both the entitlement of heirs done before a notary and the entitlement of heirs done within the scope of simplified procedure of inheritance have as their object the statement made by the administrator of the estate or by three creditable persons that the persons applying for such entitlement are indeed the heirs of the deceased and there are no other heirs or beneficiaries competing with them (Article 83 of the Notaries Code and Article 210-O of the Civil Registry Code). With the exception of the electronically filed private authenticated document, the other documents titling the sharing-out may already contain the entitlement of heirs.

Accordingly, the public deed of entitlement of heirs and sharing-out or the simplified procedure of entitlement of heirs and sharing-out may serve as the basis for registration. In this case, the registries are done immediately, within the scope of the procedure.

In the case of a sole inheritance, with only one heir, no sharing-out takes place and the document serving as the basis for registration will be the entitlement of heirs, in one of the abovementioned ways permitted.

The document needed to register the bequeathed asset is the will, but it must always be accompanied by a public deed of entitlement of legatees or a simplified procedure of entitlement of legatees when they are not determined or generically instituted or when the inheritance is all distributed in legacies (Article 85 of the Notaries Code and Article 210-P of the Civil Registry Code).

In the case of register of transmission by a will, in universal terms, the document for purposes of registration is the will, albeit accompanied by the entitlement of heirs.

Should the register be based on a decision delivered in inventory proceedings, the title alone is sufficient to carry out the definitive registries of acquisition in favour of whoever acquired such assets in the inventory. Under the terms of Article 92(1)(j) of the Land Registry Code, a provisional registration of the sharing-out by inventory is made before the respective approval decision becomes final. Under the terms of paragraph 11 of that same Article 92 the registration is not subject to any expiry date.

For that purpose the certificate of the decision delivered in the inventory proceedings must contain the following data: identification of the inventory with the name of the deceased person and the one making the inventory; indication that the party concerned is an heir or legatee in the proceedings; the contents of the decision of the sharing-out as regards the same party concerned, mentioning that the sharing-out when drawn up by a notary was approved by the Court; and the list of assets that fell to the applicant – Article 1096 of the Code of Civil Procedure.

Additionally, in any case, in order to carry out the registration, it is necessary to prove that fiscal obligations have been fulfilled. As regards tax

law, including the excess of the share belonging to the acquirer through the deed of sharing-out, the concept of transmission of immovable properties, on that excess the Municipal Property Transfer Tax and Stamp Duty must be paid. If under the same title together with the deed of sharing-out there is a renunciation concerning the value of the cash payments according to binding information of the Tax Authority, the value is still a tax matter and subject to Stamp Duty, as a free of charge acquisition[6].

As regards land registry, the registration consists of the property description – providing the physical and tax identification of the real estate – and the recording in a register – serving to define the legal situation of the real estate, by an extract of the pertinent facts (Articles 76 to 91 of the Land Registry Code). Registration may concern: real estate not yet described; real estate that are described but lack any recording of acquisition or similar in force (because the description was done subject to the registration of a charge, for example); or real estate described and with the acquisition recording or similar in force.

If the real estate has not been registered, in order for the acquisition fact to be entered, it is necessary to attach not only the document titling the sharing-out, but also the document that specifies the entitlement of heirs, if they differ. If, between the moment of the entitlement and the moment of the sharing-out, there were conveyances of the inherited portions of the entitled heirs, the titles proving said conveyances must also be attached, together with proof of fulfilment of tax obligations due, under the terms of Article 72 of the Land Registry Code. The definitive register also presupposes, in this case, the statements set out in Article 42(6) (indication of prior holders) and 42(7) (indication of co-owners) of the Land Registry Code.

If there is a description of the real estate, all that is required is the documentation mentioned above is required only if there is no optional

[6] On the subject of this tax and the classification made by the registry officer cf. Opinions of the Advisory Board (IRN, I.P.) Process R.P. 128/2018 STJSR-CC, accessed at: https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

prior register in favour of the inheritance, in which case it is essential for the real estate to be registered in favour of the deceased (Article 34(4) of the Land Registry Code).

12. When are the rules of international jurisdiction provided for in Regulation 650/2012 applicable to Registry Offices, notaries or other professionals dealing with a succession in Portugal?

According to Recital (20) of the EU Succession Regulation, the term ‘Court’ or judicial authority must be given a broad meaning so as to cover not only Courts in the true sense of the word, but also the notaries or registry officers who, in certain matters of succession, exercise judicial functions like Courts, and the notaries and legal professionals who exercise judicial functions in a given succession by delegation of power by a Court.

Recital (21) of the EU Succession Regulation clarifies that notaries are bound by the rules of jurisdiction set out in this Regulation if they act as a ‘Court’.

Recital (22) of the EU Succession Regulation states that when notaries exercise judicial functions they are bound by the rules of international jurisdiction of the Regulation, and the decisions they give benefit from the provisions on recognition, enforceability and enforcement of decisions set out in Section IV.

Such principles are applicable to the activity of notaries, registry officers or other national professionals with jurisdiction in matters of succession.

In order to know when such authorities and professionals must apply the rules of international jurisdiction established in the EU Succession Regulation, we must first know when notaries, registry officers and other professionals can exercise judicial functions like Courts. This is the case when their activity falls under the provisions of Article 3(2) of the Regulation.

When such authorities or professionals cumulatively fulfil the following requirements:

- They have competence in matters of succession; and
- They exercise judicial functions or act pursuant to a delegation of power by a Court or act under the control of a Court; and
- They offer guarantees with regard to impartiality; and
- Guarantee the right of all parties to be heard; and
- Their decisions may be made the subject of an appeal to or review by a Court; and
- Their decisions have a similar force and effect as a decision of a Court on the same matter.

Whenever their activity falls within these prerequisites notaries, registry officers and other professionals must apply the rules of international jurisdiction of the EU Succession Regulation (see in this regard judgement C-658/17 do CJEU).

In Portugal, in particular, the following are subject to the rules of international jurisdiction established in the EU Succession Regulation:

- The Courts, when handling issues covered by the material scope of this Regulation;
- Notaries in a contested inheritance when dealing with inventory proceedings;
- Registry officers, when they issue the EU Succession Certificate pursuant to Article 64 of the EU Succession Regulation.

As a rule, Courts must always apply the rules of international jurisdiction established in the EU Succession Regulation regardless of whether the proceedings before them are contentious or non-contentious (see judgement C-20/17 CJEU).

Below are the rules on international jurisdiction established in the EU Succession Regulation:

- Article 4 establishes that the Courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole;
- Additionally, Articles 5 to 11 accept deviations from the general rule of international jurisdiction pursuant to Article 4, taking into account the autonomous will of the parties, the situation of certain assets, or the need to remedy situations of denial of justice;
- Article 13 simplifies the issuing of declarations by the heirs or legatees concerning the acceptance or waiver of the succession or a legacy, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, derogating the rules of jurisdiction established in Articles 4 to 11, to allow said persons to make these declarations before the Court of the Member State where they habitually reside;
- Article 64 aligns the international jurisdiction of the authorities that issued the Certificate with the rules of jurisdiction established in Article 4, Article 7, Article 10 or Article 11.

However, notaries, registry officers and other professionals with jurisdiction in matters of succession do not always have to apply the rules of international jurisdiction established in the EU Succession Regulation.

The term Court or judicial authority body does not cover non-judicial authorities such as the notaries, registry officers or other professionals where they are not exercising judicial functions [Recital (20) of the EU Succession Regulation], that is, when the respective activity does not come under the provisions of Article 3(2) of said Regulation.

The use of the European Certificate of Succession is not mandatory and does not substitute internal documents established in national law, which may continue to be issued and used for similar purposes. If the authorities issuing the documents established in national law are not Courts in the true meaning of the word, they do not have to observe the rules of international jurisdiction established in the EU Succession Regulation.

In Portugal, the following are not subject to the rules of international jurisdiction established in the EU Succession Regulation:

– Lawyers and solicitors when drawing up a private authenticated document directing how the shares are divided;
– Registry officers when drawing up the document titling the sharing-out in simplified succession procedures;
– Registry officers and notaries when drawing up a deed of entitlement of heirs;
– Notaries when drawing up a public sharing-out deed.

13. Does an agreement on the sharing-out of an estate concluded by the guardian ad litem on behalf of the minor children in a succession proceeding, constitute a measure to which Regulation 650/2012 (Successions) or Regulation 2201/2003 (Parental Responsibilities) is applicable?

Obtaining approval for an agreement on the sharing-out of an estate concluded by the guardian ad litem on behalf of the minor children in a succession proceeding, constitutes a measure relating to the exercise of parental responsibility to which is applicable Regulation 2201/2003 (the Brussels IIa Regulation), including the rules of jurisdiction therein established, and not a measure regarding succession. This was the judgement delivered by the CJEU in case C-404/14.

CJEU jurisprudence in case C-404/14:

- This was a case of knowing whether obtaining approval for an agreement on the sharing-out of an estate, to which the parties are the parent (surviving spouse) and minor children, concluded by the guardian ad litem on behalf of the minor children constitutes a protective measure for said minor children, within the meaning of Article 1(1)(b) of the Brussels IIa Regulation, or if, having been adopted in the context of ongoing succession proceedings, it should rather be classified as a measure falling within the law on successions and as such excluded from the scope of application of the Brussels IIa Regulation pursuant to Article 1(3)(f) of said Regulation.
- The CJEU ruled that approval for the agreement on the sharing-out is a protective measure of the minor and is directly linked to his legal capacity. The fact that the approval is obtained within the context of succession proceedings (*e.g.* inventory) does not determine that said measure is covered by the succession law. The need to obtain approval from the Court is a direct consequence of the status and capacity of the minor children, relating to the administration, conservation or disposal of the children's property in the exercise of parental responsibility.
- Furthermore, if the national law that governs succession provides for the intervention of a legal representative of the minor heir, his or her appointment is governed by the rules applicable to parental responsibility. Article 1(2)(b) of the EU Succession Regulation excludes the legal capacity of natural persons from the scope of its application to avoid duplication of rules in the two Regulations and a legal vacuum.
- Although declaring that the EU Succession Regulation was not applicable to the case in point, ratione temporis, the CJEU clarified the frontier between the scope of application of that Regulation and the Brussels IIa Regulation. In other words, it

defined what belongs to the area of parental responsibility and what belongs to the area of succession.

14. As a rule, when do Portuguese notaries or Courts have international jurisdiction to the inventory proceedings? Are there exceptions to that rule?

In inventory proceedings notaries act in similar fashion to Courts and are therefore subject to the rules of international jurisdiction of the EU Succession Regulation.

Under the terms of the provisions of Article 4 of the EU Succession Regulation Courts in the Member States where the deceased has habitual residence at the time of death are competent to decide on the succession as a whole.

It is not enough for the last residence of the deceased to have been in Portugal at time of death for Portuguese notaries to have international jurisdiction; this must have been the last habitual residence at the time of death.

Even if a Portuguese Notary Office concludes that it has international jurisdiction for the inventory proceedings because the deceased's last habitual residence was in Portugal at the time of death, there may be exceptions to this rule of jurisdiction in the event of any of the situations established in the following legal provisions of the EU Succession Regulation:

– Article 5, when the deceased has chosen the law of another Member State to govern the succession and the parties concerned make the choice of Court exclusively in that Member State;
– Article 6, when the notary declines jurisdiction on verifying one of the situations stipulated in this legal provision.

Furthermore, even if the deceased did not have last habitual residence in Portugal at the time of death, the Portuguese notary or the Court may assume international jurisdiction to handle a succession accepted on behalf of the inventory in the event of any of the situations established in the following legal provisions of the EU Succession Regulation:

- Article 7, when the deceased has chosen the applicable succession law to be that of a Member State – in this case Portugal – provided the other requirements established in this article and if necessary the additional requirement established in Article 9(1) are cumulatively in place;
- Article 10, where the habitual residence of the deceased at the time of death is not located in a Member State, provided one of the other situations therein established alternatively is verified, as mentioned below.

Should the last habitual residence of the deceased not be located in a Member State, a Portuguese Court, in particular a notary, has jurisdiction to decide on the succession as a whole, that is, on all assets of the deceased, if:

- The deceased has left assets in Portugal;
- If at the time of death the deceased had Portuguese nationality (the nationality of the Member State where the assets are located) or, failing that, the deceased's last habitual residence was in Portugal provided that a period of not more than five years has elapsed since that habitual residence changed to a State outside the European Union where the deceased resided habitually at the time of death.

Under the terms of Article 10(2), even if at the time of death the deceased did not have Portuguese nationality or last habitual residence

in Portugal, the Courts of the Member State of the European Union in which the assets of the estate are located, in particular Portuguese notaries if some of those assets are located in Portugal, shall nevertheless have jurisdiction to rule on the succession of the assets located in Portugal, should no Court in a Member State have jurisdiction pursuant to Article 10(1).

By attributing jurisdiction to the Courts of the Member State in which the assets of the estate are located to handle the succession as a whole or at least the succession of that part of the assets located in said Member State, in accordance with the cases established in (1) or (2) of that article, Article 10 of the EU Succession Regulation allows the heirs to choose the Courts of a Member State of the European Union to which the deceased was connected, by nationality, habitual residence or the location of the assets of the deceased. In the cases mentioned above, the Courts of the Member State where the assets are located will, as a rule, apply the law of the country where the deceased had last habitual residence.

The above mentioned scheme of international jurisdiction applies when a succession is accepted on behalf of the inventory, be it filed before a notary or before a Court in Portugal.

15. What are the criteria to ascertain that the last habitual residence of the deceased was in Portugal?

The connecting factor set out in the EU Succession Regulation – *the habitual residence of the deceased at the time of death* – must be autonomously interpreted, having as its criteria the elements mentioned in Recitals (23) and (24) of the Regulation. The *habitual residence* shall be the location where the deceased fixed his or her permanent centre of interests, rather than a temporary or occasional presence, and should indeed express stability. Under the terms of Recital (23) the deceased should "reveal a close and stable connection with the State concerned".

The habitual residence is determined by an overall assessment of the circumstances of the life of the deceased during the years preceding death and at the time of death, taking account of the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence.

In principle, personal and family connections should prevail over professional activity. As indicated in Recital (24), "[...] where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin […] the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located."

If the person does not work, the deceased's personal and family interests shall be the deciding factors. Even so, determining the habitual residence may raise doubts, as shown in the following examples:

Example
A, of French nationality, works in Liège (Belgium), where he has a second residence, maintaining his habitual residence in France, to which he travels regularly to be with his wife and children. Determining his habitual residence will be harder if his travels to the country of origin are sporadic. If A incorporates a company in Liège and spends most of his time in Belgium, namely his spare time, we may then consider that the centre of interests is located in Belgium.

Example
A, of German nationality, retired, lives many months of the year in his apartment in Portugal, in the Algarve, returning to his home in Germany only to visit his children and grandchildren. Can we conclude that A merely has a holiday apartment in Germany or in Portugal? Time spent in both countries should be taken into account but cannot be decisive, if it varies from year to year due to other circumstances, such as his health or weather conditions.

To settle these or other doubtful cases Recitals (23) and (24) of the EU Succession Regulation indicate, not exhaustively, some of the factors for the purposes of determining the last habitual residence of the deceased at the time of death. Such factors include:

- The duration and regularity of the deceased's presence in a country;
- The conditions and reasons for the deceased's presence in a country;
- The presence of his family and his social life;
- The location of the greater part of the deceased's assets;
- The nationality of the deceased.

16. Can the parties concerned enter into a choice-of-court agreement?

Under the terms of Article (5) of the EU Succession Regulation, the Court determined by the habitual residence of the deceased at the time of death may not have jurisdiction for the succession in the following circumstances: if the deceased chose the law of his or her nationality to govern succession under the terms of Article 22 of this Regulation; the law chosen is that of a Member State; and the parties concerned made a choice-of-court agreement attributing exclusive jurisdiction to the courts of the Member State which law has been chosen.

Regarding the formal validity, such a choice-of-court agreement shall be expressed in writing, dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing – Article 5(2).

Regarding the substantive validity, although the Regulation does not rule on the law applicable to the verification of the substantive validity of

the agreement, it would appear, drawing inspiration from Article 25(1) of Regulation 1215/2012, that the law of the designated Member State is applicable.

Example
A, of Belgian nationality, dies in 2016 in Portugal, where he had his habitual residence. He owned immovable assets in Belgium, Portugal and Italy. He is survived by two children, his heirs (cf. Information on the Belgian law applicable to successions[7]). Should the estate have to be accepted for the benefit of inventory owing to lack of agreement of the heirs as to the sharing-out, the Portuguese Courts (notaries or Courts as the case may be, under the terms of Law 117/2019) shall have international jurisdiction – Article 4 of the EU Succession Regulation.

Example
A, of German nationality, dies in 2016 in Portugal, where he had his habitual residence. He owned immovable assets in Germany and Portugal. He is survived by two children, his heirs (cf. Information on the German law applicable to successions[8]). In his will A had named German law as being applicable to his succession. Which authority is competent to decide on the succession as a whole? If the children enter into a choice-of-court agreement establishing that the German Courts have international jurisdiction then they have international jurisdiction to handle the succession. Failing a choice-of-court agreement, Portuguese Courts (notaries or Courts, should the estate have to be accepted for the benefit of inventory) shall have international jurisdiction and in this case will have to apply German law.

7 https://e-justice.europa.eu/content_general_information-166-be-en.do?member=1

8 https://e-justice.europa.eu/content_general_information-166-de-en.do?member=1

17. Can the authority in one Member State which is competent to handle a succession handle the succession of the estate as a whole even if such assets are located in another Member State or are not in the European Union?

As a rule, yes. The competent authority to handle a matter of succession in a Member State must handle the succession of all the assets of the deceased even if such assets are located in another Member State or are not in the European Union. This is set out in Article 4 and Article 10 which mention that the competent jurisdiction shall decide on the succession as a whole.

If the deceased had his habitual residence at the time of death in a Member State bound by the Regulation, its Courts shall have jurisdiction to rule on the succession as a whole.

However, where the habitual residence of the deceased at the time of death is located in a third State (or is located in a Member State that is not bound by the EU Succession Regulation), Article 10(1) of the Regulation establishes the residual jurisdiction of the Member State where the assets are located. In that case, the Courts of a Member State in which the assets of the estate are located have jurisdiction to rule on the succession as a whole, if: a) the deceased had the nationality of that Member State at the time of death; or, failing that, b) the deceased had previous habitual residence in that Member State, provided that, at the time the proceedings are instituted, a period of not more than five years has elapsed since that habitual residence changed.

Example
A Russian national, habitually resident in Italy, changed his habitual residence to France and then from France to Russia, four years before his death. He owns assets in all three countries. When he died, one of his heirs took legal action in the French Courts to regulate the deceased's succession. These authorities have international jurisdiction to decide on the whole of the succession under Article 10(1)(b). Quite a different matter to jurisdiction is the law applicable to the succession. The French Courts, under the terms of Article 21(1) should apply the law of the last habitual residence of the deceased, unless an exception to this rule is applicable, such as for instance that arising out of Article 21(2) or Article 30, or a law has been chosen that is valid under Article 22, all of the EU Succession Regulation. If none of these alternatives are in place, the law applicable to the succession shall be Russian law, including the provisions of Russian law that provide for renvoi in the cases set out in Article 34(1) of the EU Succession Regulation.

Example
A United States national dies in Florida, where he had his last habitual residence at the time of death. Two years prior to his death he resided habitually in France, where succession proceedings began in the two years following the death. He left movable and immovable property in Florida and one immovable property in France. As he had one immovable property in France, the French Courts have international jurisdiction to decide on the whole of the succession as per the provisions of Article 10(1)(b). Having settled the issue of jurisdiction, the French Courts should apply the law of Florida to the whole of the succession. In conformity with the law of Florida, said law is applicable to the succession of the movable and immovable property situated in Florida, with renvoi to French law as regards the immovable property located in France. This renvoi must be taken into account under the terms of Article 34(1)(a) of the EU Succession Regulation.

18. In what cases can the authorities of different Member States each have jurisdiction to handle a part of the succession?

There are residual cases to which the rule set out in Article 10(2) is applicable. In that case there may be multiple jurisdictions which shall each decide on the part of the assets of the estate. Accordingly, where no Court in a Member State has jurisdiction pursuant to paragraph 1, the Courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

Example
A French national with habitual residence in New York and assets in France makes a choice of law, opting for French law. On the date he chose the law applicable to the succession he had French nationality. At the time of his death he had acquired the nationality of the United States and lost his French nationality. The French authorities cannot invoke Article 10(1)(a) to decide on his succession as a whole, given that at the time of death the deceased no longer had the nationality of this Member State. The French authorities will, however, have jurisdiction, under the terms of Article 10(2), to decide on the succession of the assets located in France, to which they will apply French law, given that the choice of law is still valid. Although the deceased no longer had French nationality on the date of death, Article 22(1) of the EU Succession Regulation allows a person to choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

19. Can the parties concerned limit the inventory proceedings to certain assets of the estate?

Yes, according to Article 12 of the EU Succession Regulation, at the request of the parties, should the estate include assets located in a third State, the Court competent to decide on the succession in one Member State may decide not to rule on one or more of such assets if it is likely

that its decision in respect of those assets will not be recognised nor, if applicable, declared enforceable in that third State.

Example
A French national dies in Switzerland, where he had his last habitual residence (his last domicile in the light of Swiss law). He left assets both in Switzerland and in France. The Swiss judicial authorities of the last domicile have jurisdiction over the succession as a whole [Article 86(1) of the federal code on private international law of 18.12.1987 (CPIL Switzerland)]. The French Courts are equally competent to rule on the succession as a whole pursuant to the provisions of Article 10(1)(a) of the EU Succession Regulation. However, in the above-referred legal context, the decision of the French Courts may not be recognised in Switzerland. In effect, pursuant to Article 96 CPIL, and lacking a choice of law, only decisions made in the State of the last domicile or in the State where the immovable assets are located are recognised in Switzerland. Pursuant to Article 12 of the EU Succession Regulation, the French judicial authorities may decide not to rule on the assets located in Switzerland and limit the object of the succession proceedings in France to the remaining assets.

20. Can the heirs and legatees accept or waive the estate before the competent authorities of the Member State where they reside even if such authorities are not competent to handle the succession?

Yes. Article 13 of the EU Succession Regulation provides for an additional special jurisdiction – the Courts of the Member State of the habitual residence of the heir or legatee are competent for a specific category of acts by means of declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or declarations designed to limit the liability of the person concerned in respect of the liabilities under the succession.

In accordance with Recital (32) of the EU Succession Regulation, the aim of this rule is the following: “In order to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, this Regulation should allow

any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, in the form provided for by the law of the Member State of his habitual residence before the Courts of that Member State".

21. Is the authorisation to accept or waive an estate or legacy on behalf of a minor a measure to which Regulation 650/2012 (Successions) or Regulation 2201/2003 (Parental Responsibilities) is applicable?

As results from the case mentioned earlier, to obtain approval for an agreement on the sharing-out of an estate concluded by the guardian ad litem on behalf of the minor in a succession proceeding, the authorisation to be given to the parents or guardian ad litem of the minor, to accept or waive an estate or legacy on behalf of said minor, if required, also constitutes a measure relating to the status and capacity of the persons and is not covered by the law on succession.

It is a measure relating to parental responsibility and must be examined in the light of Regulation 2201/2003 (the Brussels IIa Regulation), (CJEU jurisprudence in case C-565/16, reaffirming the jurisprudence set out in case C-404/14).

The rules of international jurisdiction or recognition, enforceability and enforcement established in the EU Succession Regulation, do not appear to be applicable to this request for authorisation.

In Portugal, the special proceeding for accepting or waiving inheritance on behalf of a minor is established in Article 4 of Decree-Law 272/2001 of 13 October. This Decree-Law and subsequent amendments thereto may be consulted online[9]. The case is handled by the Public Prosecutor which is competent to deliver the decision.

[9] http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=581&tabela=leis&-ficha=1&pagina=1&so_miolo=&

That being the case, under the terms of Article 2(1) and (4) of the Brussels IIa Regulation, the Public Prosecutor is equal to a Court and the decision it delivers falls within the definition established in that legal provision. Consequently, the Public Prosecutor must apply the rules of international jurisdiction established in the Brussels IIa Regulation, the respective decision being subject to the recognition, enforceability and enforcement established in this Regulation. In particular, whenever requested by a party, the Public Prosecutor must issue the certificate of the decision authorising the acceptance or waiver of an inheritance for a minor, through form II annexed to the Brussels IIa Regulation, as established in Article 39 of that same regulation, thus allowing the decision to be recognised and enforced in another Member State.

However, the provisions of the EU Succession Regulation (Article 23(2)(e) of the EU Succession Regulation) are applicable to the acceptance or waiver of any ensuing estate or legacy following obtaining of approval by the minor's legal representatives.

22. Where authorisation is required to accept or waive the inheritance or legacy in favour of a vulnerable adult, are the rules of the EU Succession Regulation applicable?

The special process to waive the inheritance or legacy in favour of a vulnerable adult is also established in Article 4 of Decree-Law 272/2001 of 13 October, mentioned above. The proceeding is heard by the Public Prosecutor which is competent to rule.

For the reasons given in the reply to the previous question, this authorisation concerns the status and capacity of persons and is not covered by the law on succession.

As opposed to parental responsibilities, in the matter of vulnerable adults there are no European Union norms as yet (at the date on which this manual is being drafted). The Public Prosecutor in Portugal should apply

the rules of international jurisdiction established in the Hague Convention of 13 January 2000 on the International Protection of Adults (HC 2000), to which Portugal is a party. Any decision delivered as to authorisation for the legal representative of a vulnerable adult to accept or waive an estate or legacy is recognised, enforceable and enforced as per HC 2000 in the States that are a party to this Convention.

The text of the Convention and the status of accessions may be consulted on The Hague Conference website[10].

However, the provisions of the EU Succession Regulation (Article 23(2)(e) of the EU Succession Regulation) are applicable to the acceptance or waiver of any ensuing estate or legacy following approval obtained by the vulnerable adult's legal representatives.

23. What is the law applicable to the formal validity of a waiver?

Pursuant to Article 28 of the EU Succession Regulation, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of:

- ***i)*** the law applicable to the succession pursuant to Article 21 or Article 22; or
- ***ii)*** the law of the State in which the person making the declaration has habitual residence – Article 28(b).

[10] https://www.hcch.net/en/instruments/conventions/full-text/?cid=71

24. What is the law applicable to the succession of a person who died on or after 17 August 2015?

The law applicable to the succession of a person who died on or after 17 August 2015 is as determined by the EU Succession Regulation and shall in general be the law of the Member State where the deceased had his habitual residence at the time of death and not the law of his nationality (Articles 21 and 23). However, Article 22 of the Regulation sets forth the limited autonomy of the author of the succession to choose the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

The EU Succession Regulation entered into force on 16.08.2012. With the exception of the application of certain general provisions (Articles 77, 78, and 79 to 81) under the terms of Article 83(1), the Regulation shall apply to successions occurring after 17.08.2015, temporarily safeguarding, under the terms of (2), (3) and (4), the choice of law made by the deceased or the formal and substantive validity of the disposition upon death made prior to that date.

Example
On 20 July 2015 A, of Dutch nationality, living in Oporto (Portugal), died in Oporto. His heirs wish to effect the sharing-out through a simplified procedure before a Registry Office in Oporto. Are the rules of conflict set out in the Regulation applicable? No, the Portuguese rules of conflict are applicable, in particular Articles 31(1) and 62 of the Civil Code, for A died before 17 August 2015. That is, the law of the nationality of the deceased at the time of death is applicable to the succession. In principle, the registry officer will perform the sharing-out pursuant to Dutch law. Should Dutch law indicate another law there may be renvoi under the terms established in Articles 17 and 18 of the Civil Code.
Taking the above example, if A died in August 2015, does the EU Succession Regulation apply? Yes, in this case, in the absence of choice of law, pursuant to the rule in Article 21 of the EU Succession Regulation, substantive Portuguese law is applicable to the succession as a whole, as it was the law of the last habitual residence at the time of death.

25. Should Portuguese Registry Offices and notaries determine the law applicable to the succession according to the rules established in Regulation 650/2012?

Yes. Whether or not they are subject to the rules of international jurisdiction established in the EU Succession Regulation (whether or not they are acting as Courts), Portuguese Registry Offices and notaries dealing with a succession are always bound by the rules governing the applicable law established in this Regulation provided it is applicable ratione temporis.

Accordingly, given the need to draw up an entitlement of heirs and/or sharing-out in a succession with an international dimension, one must first consult the rules of the EU Succession Regulation regarding the law applicable to succession (*e.g.* the connecting elements therein contained) and determine the applicable law to the succession as a whole, by applying in particular the rules of Chapter III of said Regulation (Articles 20 to 38) and the material succession law therein designated.

The fact is that the rules in Chapter III of the EU Succession Regulation are designed to replace in their entirety all rules of conflict in force in matters of succession in the Member States bound by this Regulation.

26. If the applicable law is that of a third State should that law be applied in accordance with Regulation 650/2012?

Yes. The EU Succession Regulation has a principle of universal application : pursuant to Article 20, the law specified by this Regulation shall be applied whether or not it is the law of a Member State. The Regulation is applied whatever the nationality of the deceased, the heirs, legatees, creditors in the succession or the location of the assets, with no reciprocity reservation.

So, conflict-of-law rules in the EU Succession Regulation may lead to application of the law of a third State or a Member State not bound by the Regulation, such as Denmark, Ireland and the United Kingdom.

Regulation 650/2012 does allow renvoi in certain conditions [Article 34 and Recital (57)] whenever the applicable law designated by the Regulation (Article 20) is the law of a third State and no law has been chosen. Inspired by the Hague Convention on the law applicable to succession of the estates of deceased persons, in 1989, this solution has no parallel in Rome I or Rome II Regulations, which never admit renvoi. But it also admits the possibility of refusing certain provisions of the foreign law when such application is manifestly incompatible with the public policy (ordre public) of the forum [Article 35 and Recital (58)].

Example
A, of French nationality, has his last habitual residence in Quebec. He left immovable assets in France, a factor that gives the French Courts jurisdiction to handle the succession [Article 10(1)(a)]. Pursuant to Article 21(1), the law applicable to the succession as a whole is Quebec law. Supposing that said law considers the law of the location of the immovable assets, French law shall be applicable to the succession as a whole, because it is the law of a Member State [Article 34(1)(a)].

Example
A, a national of third State X, has his last habitual residence in third State Y and a bank account in Member State W. He is succeeded by one son and two daughters. The Courts of Member State W, which are competent to handle the succession of the assets (bank account) based on Article 10(2) of Regulation 650/2012, should apply the law of third State X, supposing that there is renvoi from third State Y to the law of third State X and the latter considers it applicable, pursuant to Article 34(1)(b) of Regulation 650/2012. However, because of public policy in the forum (Member State W), the application of the designated law (law of third State X), which attributes succession rights to the son that are twice those attributed to the daughters, may be refused as it is contrary to the principle of the national public policy of Member State W of non-discrimination based on gender. The remaining legal dispositions of State X may be applied as they are not incompatible with public policy.

27. Can the person choose the applicable law to govern his succession?

Yes, pursuant to the provisions of Article 22 of the EU Succession Regulation.

In the absence of choice, the law of the State in which the deceased had his habitual residence at the time of death is applicable under the terms of Article 21(1) of the EU Succession Regulation: “Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had habitual residence at the time of death”.

The “last habitual residence” connecting factor may be revoked if the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under the terms of Article 21(1) of Regulation 650/2012, in which case the law applicable to the succession as a whole shall be the law of that other State under the terms of Article 21(2) of said Regulation: “Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State”. Article 21(2) therefore establishes a clause of exception which is not subsidiary but a safeguard clause and appears to apply only where there is no choice of law.

Article 22 of the EU Succession Regulation recognises a limited autonomy (conflictual autonomy), to make a choice of law (professio iuris) in matters of succession, so as to enable the author of the succession to organise the succession in advance. This conflictual autonomy is limited. Accordingly, the author of the sucession may choose the applicable law within certain limits: it must be the law of the State whose nationality he or she possesses or, possessing multiple nationalities, he or she may choose the law of any of the States whose nationality he or she possesses at the time of making the choice or at the time of death. Article 22(1) of Regulation 650/2012 reads as follows: “A

person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death". As a rule, the chosen law is applicable to the succession as a whole (Article 23 of the EU Succession Regulation).

A choice of law other than one admitted under Article 22 of Regulation 650/2012 will not be accepted, in particular a choice of law on the location of the assets, or the law applicable to a matrimonial property regime. This results from Recital (38) of the EU Succession Regulation which provides that "this choice should be limited to the law of a State of his nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share".

Example
A, a Portuguese national, with habitual residence in Nantes (France), chose French law to govern his succession after the Regulation started to apply. Having returned to Portugal after he retired, he died two years later in his home village where he established his habitual residence. Despite the choice he made, his succession will not be governed by French law because the Regulation does not recognise the validity of that choice (which would only be valid if A had meanwhile acquired French nationality).

28. How can a person make the choice of law applicable to the succession: in a will, outside a will?

The choice of law applicable to the succession may be made in a will, or in a declaration in compliance with similar formal requirements (a deed before a notary, for instance). The choices may result from

clauses in the will. In Portugal a public choice of law deed or a will may be drawn up.

Article 22(2) of Regulation 650/2012 establishes that in a legal succession the choice of law must be expressed, but in a voluntary succession, the declaration may be explicit or implicit (the result of the terms of the disposition of property upon death).

The substantive validity of the choice of law shall be governed by the law that is chosen [Article 22(3) of Regulation 650/2012].

The provisions of Article 27 of Regulation 650/2012 or one of the laws therein designated shall govern formal validity of the choice of law.

Pursuant to the definition of Article 3(1)(d) of the EU Succession Regulation, the reference to 'disposition of property upon death' means a will, a joint will or an agreement as to succession. In some countries, such as Portugal, the succession law does not allow agreements as to succession (see Articles 1701 and 1703 of the Civil Code) or joint wills (see Article 2181 of the Civil Code). In these cases, even if internal substantive law restricts or forbids the use of such provisions, their admissibility and substantive validity should be verified in accordance with the provisions of Articles 24 and 25 of the EU Succession Regulation.

Example
A and B, a married couple of German nationality and habitual residence in Portugal, signed in Germany a bilateral succession agreement, choosing German law to govern their succession. The agreement as to succession complies with German law. In the meantime, A dies and the Portuguese Courts have jurisdiction to deal with the succession. If we admit that the agreement as to succession is forbidden by Portuguese law, the Portuguese Courts will apply German law to the succession and must recognise not only the validity of the bilateral succession agreement under the terms of Article 25(2) but the validity of the choice of law therein contained, under the terms of Article 22 of Regulation 650/2012.

29. Can a tacit choice of law be applicable to the succession?

Yes, a tacit choice of law may be applicable to the succession provided the wish of the deceased was implicit in the content at the time of the disposition upon death. Article 22(2) allows the choice of law to be demonstrated by "the terms" of such a disposition upon death. Recital (39) includes some indications that may help define the tacit choice of law: "A choice of law should be made expressly in a declaration in the form of a disposition of property upon death or be demonstrated by the terms of such a disposition. A choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law".

Consequently, to ascertain whether a tacit choice of law applicable to the succession has been made, one must consider the circumstances of the case and specifically analyse the various dispositions of the will or agreement as to succession. Factors such as the deceased's reference to provisions of national law or the celebration of a bilateral succession agreement acceptable only under his own nationality, may indicate that the deceased wished to choose the law of his nationality as the law applicable to his succession.

30. Is a choice of law applicable only to the assets in one country valid?

No, only one choice of law is valid to govern the succession as a whole. There can be no *dépeçage* of the succession. Given the provisions of Article 23(1) determining the principle of unity of succession, the law chosen under the terms of Article 22 should as a rule govern the succession

as a whole (see Recital (42): “The law determined as the law applicable to the succession should govern the succession from the opening of the succession to the transfer of ownership of the assets forming part of the estate to the beneficiaries as determined by that law. It should include questions relating to the administration of the estate and to liability for the debts under the succession […]”.

31. Is the applicable law chosen pursuant to Regulation 650/2012 applicable even if the deceased is a national of a third State?

Yes, pursuant to Articles 20 and 21 thereof, the EU Succession Regulation not only has universal application (any law specified by this Regulation shall be applied even if it is the law of a third State), but also chooses as the connecting factor the last habitual residence of the deceased at the time of death and not his nationality.

Example
On 20 August 2015, A, a Brazilian with last habitual residence in Coimbra (Portugal), died in Coimbra. His heirs wish to effect the sharing-out through a simplified procedure before a Registry Office in Coimbra. What is the law applicable to the succession? The law applicable to the succession is Portuguese law, pursuant to Article 21(1) of the Regulation, the law of the habitual residence at the time of death.

Example
A, of English nationality, has been living with B, his partner, in Madeira (Portugal), since 2000. They have two children in England, both of English nationality. He died on 20 August 2015. Although the United Kingdom has not adopted the EU Succession Regulation, Portuguese law is applicable under the terms of Article 21 of the Regulation. In this case, the rules of reserved share are applicable (two thirds of the estate) if there are two children. Portuguese law would not be applied only if A had made a will expressly or tacitly choosing English law; or if he had made an agreement as to succession, choosing English law in case of a legal succession, which should conform to one of the forms required by any of the laws indicated in Article 27 of the EU Succession Regulation on making a will.

32. Does the applicable law as results from Regulation 650/2012 still apply even if the deceased at time of death had his habitual residence in a third State?

The law determined by the EU Succession Regulation is applicable, even if the deceased at the time of death had his habitual residence in a third State. In this situation, too, the rules of conflict of the Regulation (*e.g.* Articles 20 and 21 of the EU Succession Regulation) replace Article 62 of the Civil Code.

Example
A citizen of Portuguese nationality dies in Switzerland where he had his habitual residence, leaving immovable assets in Portugal and a bank account, also in Portugal. The Portuguese Courts have jurisdiction to deal with the succession as a whole under the terms of Article 10(1)(a) of the EU Succession Regulation and will determine the law applicable to the succession in the light of Articles 20 and 21 of said Regulation, in this case applying Swiss law.

33. Failing a choice of law, should the law of the deceased's last habitual residence always be applied? When can the registry officer, the notary or the Court, disregard application of the law of the last habitual residence?

Failing a choice of law, the law of the last habitual residence is not always applicable, as in this case the registry officer, the notary or the Court may apply the exception (safeguard clause) established in Article 21(2) of the EU Succession Regulation.

As results from the final section of Recital (25) of Regulation 650/2012, resorting to the closest connection established should not be used to overcome the difficulties felt by the Court to determine the habitual residence of the deceased, nor should it be subsidiary.

Example
A, of Portuguese nationality, decides to work in Switzerland. He moves home and ceases to have his residence in Portugal. His habitual residence is now in Switzerland. However, his entire family lives in Portugal, where the deceased's assets are also located. In this case, if A dies without making a choice of law applicable to the succession, his connection to Portugal is manifestly closer than the one he had established with Switzerland.

Example
A, of German nationality, decides on retirement, to move to a home in Belgium. However, his entire family lives in Germany, where all his movable and immovable assets are located. All he had in Belgium was a bank account through which to pay the home. In this case, if A dies without making a choice of law, his connection to Germany is manifestly closer than the one he had established with Belgium.

34. In what situations may the registry officer or notary have to apply various laws to one succession?

Certain provisions of the EU Succession Regulation, mentioned below, provide for exceptions to the principle of unity of succession pursuant to Article 23:

- Different laws may be applied due to the application of special connections enshrined in provisions of the EU Succession Regulation establishing that the validity and admissibility of dispositions upon death are governed by the law that would govern the succession of the person who made the disposition if he had died on the day on which the disposition was made [Article 24(1) and Article 25(1];
- A person may choose the law to govern his disposition of property upon death, as regards its admissibility and substantive validity (Article 24(2)), and a party may choose as the law to govern his agreement as to succession, as regards its admissibility, substantive validity and its binding effects on the parties [Article 25(3)], laws that differ from the law applicable to the succession, which law will govern the other aspects of the succession;
- Applying different laws to a succession (*e.g.* to the sharing-out in the true sense of the word) may result from Article 30, where certain categories of assets which for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession;
- The application of different laws may also arise when renvoi is possible, particularly when the law specified by this Regulation

is that of a dualist third State, for example a State that in a succession applies to each immovable asset the law of its location (Article 34);
- Application of a provision of the law of any State specified by Regulation 650/2012 may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum, which often results in the application of different laws to a succession (Article 35).

Some of these cases are discussed in greater detail below.

The EU Succession Regulation [Articles 24(2) and 25(3)] determines that a person may choose the law applicable to dispositions of property upon death, in particular to wills and agreements as to succession, so that these are not considered invalid by the law applicable to the succession determined pursuant to Article 21. The law chosen shall govern the admissibility and the substantive validity of the dispositions of property upon death and, in the case of agreements as to succession, their binding effects on the parties. It might so happen, however, that the law determined pursuant to Article 21 above, may continue to govern other aspects of the succession as listed in Article 23 of the EU Succession Regulation, in particular the determination of the beneficiaries, the capacity to inherit and the sharing-out of the inheritance. Although the aim of EU Regulation 650/2012 is to apply one single law to the succession, there may be two laws governing the succession, given the application of these special connections.

According to Article 30: "Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession". Consequently, special rules imposing restrictions concerning or affecting the succession in respect of

those assets shall be applicable even if they do not correspond to the law applicable to the succession. The scope of application of this rule is not restricted to the cases in which only the application of the legal forum is at stake. Article 30 imposes the application of the imperative dispositions of the State of the situation of the assets, the designated rules of necessary and immediate application, whether they are dispositions of the forum or dispositions of a third State. This is why in France, for instance, there are laws relating to the preferential attribution of an agricultural estate and laws relating to the temporary right of the surviving spouse to the conjugal home. Germany and Austria also have dispositions relating to the transmission mortis causa of certain agricultural estates. In Portugal, examples of restrictions include preferential attributions, that is, the right of the surviving spouse to live in the family home, attributed at the time of the sharing-out, established in Article 2103-A of the Civil Code, and the right in rem to live in the communal home attributed to the surviving partner, pursuant to Article 5 of the Regime of Non-marital Relationships, approved by Law No 6/2001 of 11 May, amended by Law No 82-E/2014 of 31 December.

As regards renvoi, and given the provisions of Article 34, the EU Succession Regulation accepts renvoi in two situations: when the law of habitual residence is the law of a third State which by force of its rules of conflict does not consider itself competent and makes a renvoi to the law of a Member State; or when the law of habitual residence is the law of a third State which by force of its own rules of conflict does not consider itself competent and makes a renvoi to the law of another third State which considers itself competent. In all other cases, it seems that renvoi should not be accepted, rather the law determined by EU Regulation 650/2012 should be applied, with the exclusion of its rules on private international law. Thus, no renvoi shall be made if the last habitual residence of the deceased is in a Member State and that is the applicable law or if the deceased made a choice of law [Article 34(2)]. In an unitary succession system as intended by Regulation 650/2012, one of the drawbacks of renvoi

is the possibility that it might lead to a split in the succession or, to put it another way, to the application of several laws to the same succession, in those situations in which the applicable law follows a dualist system, submitting the succession to two or more laws.

Example
A, French, with last habitual residence in New York, dies and leaves bank accounts and three apartments: one in Paris, another in Rome and another in London. The French authorities have jurisdiction for the succession as a whole [Article 10(1)(a)], but should apply New York law to the succession of the movable assets; and regarding immovable assets it should apply the renvoi from New York law to French law, to Italian law [Article 34(1)(a)] and to English law, respectively [Article 34(1)(b)].

The reservation made concerning public policy (ordre public) established in Article 35 may lead to dismissal of a provision of the applicable law which foresees a result that is unacceptable to and shocking in the face of the fundamental values and principles of the legal order of the forum and/or of the rights enshrined in the Charter of Fundamental Rights of the European Union. This reservation regards concrete provisions and not, overall, foreign law systems. It may only be invoked in the presence of provisions regarding matters of succession for the purposes of the Regulation and not others which although contrary to ordre public are not specifically applicable. Under Recital (58), this is a restrictive conception of public policy, which can only lead to the foreign law being dismissed in “exceptional circumstances”. This incompatibility with public policy should be viewed specifically in the light of the effects that application of a foreign law would have on a specific case and, furthermore, is only admissible if there are sufficient ties between the circumstance in question and the forum, or if values of universal vocation are at stake. Non-application of a foreign law may create an omission which can be filled only by the analogical application of other provisions of the applicable law or, if that is not possible, by the application of provisions of the law of the forum.

Public policy may be invoked in the following cases:

- When the principle of equality is breached because a foreign law provides for discriminatory treatment between the legatees by reason of religion, gender or the circumstances of birth (*e.g.* negative discrimination of children born out of wedlock);
- When the protection of the relatives of the deceased is breached. This is a very controversial matter, however, considering that common law countries attribute no reserved share to certain categories of successors. Considering the exceptional nature of the reservation of public policy, it must be considered that the applicable law should only be disregarded if it deprives "totally or in a substantial part" the relatives of the deceased of the succession rights they would have in accordance with the imperative laws of the forum. Thus, public policy cannot intervene if what is at stake is merely a different proportion or modality of the succession right (1/3 instead of half; usufruct instead of property, for example). Neither should it be invoked when the application of the foreign law excludes from the category of mandatory heirs relatives other than descendants and the surviving spouse;
- If succession as a way to transmit assets is excluded or if all such assets are attributed to the State, or if testamentary freedom is totally excluded;
- If the applicable foreign law does not recognise the institutions of disqualification or disinheritance;
- In polygamous marriages public policy may be invoked to protect the succession rights of the first wife whenever, in a concrete situation, it might be expected from her point of view that she was entering into a monogamous marriage, given the fact that said first marriage was celebrated in a State that forbids polygamy, or due to the circumstance of the first wife's nationality or residence being in a State that forbids polygamy.

In principle, public policy cannot be invoked in the following situations:

- Attribution of succession rights to same-sex spouse or partner;
- A trust replacement subject to time limits; and
- The inadmissibility of agreements as to succession [cf. Recital (49)].

35. According to the Regulation in the light of which law are the validity and form of a will and an agreement as to succession assessed?

Pursuant to the definition of Article 3(1)(d) of the EU Succession Regulation, the reference to 'disposition of property upon death' means a will, a joint will or an agreement as to succession.

Article 24 of the EU Succession Regulation establishes rules designating the law applicable to the admissibility and substantive validity of dispositions of property upon death that differ from agreements as to succession.

Article 25 of the EU Succession Regulation establishes rules designating the law applicable to the admissibility, substantive validity and binding effects between the parties of agreements as to succession.

Article 27 of the EU Succession Regulation establishes the formal validity of dispositions of property upon death made in writing.

Article 1(2)(f) of the EU Succession Regulation excludes from the substantive scope of application of the Regulation the formal validity of dispositions of property upon death made orally.

Pursuant to Article 24(1) of the EU Succession Regulation, a disposition of property upon death other than an agreement as to succession shall be governed, as regards its admissibility and substantive validity,

by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made. This rule provides a connection to a hypothetical succession law which must be determined by reference to the day on which the disposition upon death was completed. Thus, determining this hypothetical succession law should take into consideration Article 21 and Article 22 of Regulation 650/2012, as well as the connecting factors present in these legal provisions: depending on the case it might be the law of the habitual residence of the testator at the time the will was made [Article 21(1)]; the law of the State to which the deceased was more closely connected at the time the will was made [Article 21(2)]; or the law of the nationality of the testator if on that date that law were applicable to the succession because the person made a choice of law (Article 22).

The connection to the hypothetical succession law may nevertheless lead to dépeçage of the succession. In fact, the substantive validity of the will is assessed by this hypothetical law, crystallised at the moment the will was made, whilst key issues of the succession (including the issue of the existence of a reserved share in the inheritance and the possibility of reducing unofficial gifts) will be governed by the law applicable to the succession, only determinable at the time of death, pursuant to the provisions of Article 21 and Article 22 of Regulation 650/2012.

Article 24(2) of Regulation 650/2012 establishes that a person may make a choice of law to govern disposition of property upon death, as regards its admissibility and substantive validity, in the conditions established in Article 22 for the choice of law applicable to the succession.

Article 27 of the same Regulation contains the rules of conflict regarding the form of dispositions upon death. A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law:

i) of the State in which the disposition was made;

ii) of a State whose nationality the testator possessed, either at the time when the disposition was made, or at the time of death;

iii) of a State in which the testator had his domicile, either at the time when the disposition was made, or at the time of death;

iv) of the State in which the testator had his habitual residence, either at the time when the disposition was made, or at the time of death; or

v) in so far as immovable property is concerned, of the State in which that property is located.

It results from Article 27(3) that any conditions imposed by reference to the age, nationality or other personal conditions of the testator are also deemed to be matters of form.

The regime mentioned above applies without prejudice to the provision of Article 75 of the Regulation regarding the relationship with existing international conventions as already mentioned at the beginning of this chapter.

36. What are joint wills in the light of Portuguese law?

A joint will is one in which two or more people make their dispositions, either in favour of each other or of a third party. It therefore constitutes a unitary deed consisting of the statements of intent of more than one person. Under Portuguese law joint wills are not allowed, as per Article 2181 of the Civil Code.

Thus, in Portuguese law a will is characterised necessarily by its singleness and unilaterality. In fact, as can be read in Article 2179 of the Civil Code, a will is a “unilateral and revocable deed by which a person makes disposition upon death of all or part of his or her assets”. Revocability is an essential attribute of the will, and not even the testator can waive the faculty of revoking his will in whole or in part (Article 2311(1) of the Civil Code). Indeed, any clause contradicting the faculty of

revocation is deemed not to have been written pursuant to Article 2311(2) of the Civil Code.

The prohibition of joint wills has been perceived as the solution adopted as the instrument to ensure free revocability of the will, for if two or more people wrote their will in the same deed, it is considered that each one's faculty to revoke their respective dispositions mortis causa would be affected. The very gratuitous nature of the will could be defrauded in that the dispositions made by one of the testators might be connected with the dispositions made by the other testator, leading to a type of onerosity.

37. Are agreements as to succession admitted in the light of Portuguese law?

In principle, agreements as to succession are forbidden in Portuguese law when made before the succession is opened, as can be deduced from Article 2028 of the Civil Code. Consequently, in the light of Portuguese law, an agreement as to succession is null, in principle, pursuant to Article 294 of the Civil Code. The bilateral nature of the agreement, which is a contract, and the consequent requirement for mutual consent for its alteration or revocation (Article 405 of the Civil Code), implies a reduction in the private autonomy of the author of the succession. Among other reasons, that principle can be explained by the objective of ensuring the exercise of such autonomy by the author of the succession at the time of death. Moral reasons are also invoked to uphold this rule.

However, there are exceptions to that prohibition. Agreements as to succession are valid if they correspond to one of the types admitted by law. The three subparagraphs of Article 1700(1) of the Civil Code contain the three types of agreements as to succession that may validly be made in the light of Portuguese law. On the one hand, an agreement as to succession instituting an heir or appointing a legatee in favour of either

spouse, done by the other spouse or by a third party, is allowed. On the other hand, agreements are also allowed instituting an heir or appointing a legatee in favour of a third party, done by either spouse. Added to these two agreements as to succession (designative, institutive or attributive), whose admissibility was already set out in the Civil Code in force, since its initial version, another agreement was added by force of Law 48/2018 of 14 August (which entered into force on 1 September 2018): a succession agreement concerning the reciprocal waiver of the condition of legitimate heir of the other spouse.

They have in common the fact that the validity of the agreement in the three cases mentioned above depends on inclusion within the pact of a prenuptial agreement [Article 1700(1) of the Civil Code]. This law establishes requirements as to form and publication. Pursuant to Article 1710 of the Civil Code, "prenuptial agreements are valid if they are made by means of a statement before an employee of the Civil Registration or by public deed". Pursuant to Article 1711 of the Civil Code, for prenuptial agreements to be effective with regard to third parties [which do not include the heirs of the spouses and of the other parties to the prenuptial agreement, as per Article 1711(2)], they must be registered.

Note that according to Article 1711(3) of the Civil Code, "registration of the prenuptial agreement does not dispense the need for registration in the land registry of the facts therein contained". If the agreement as to succession is not included in a prenuptial agreement it is null (Article 294 of the Civil Code).

It should be remembered, also, that pursuant to Article 946(2) of the Civil Code, a donation mortis causa that is not valid as an agreement as to succession shall be converted *ope legis* into a testamentary disposition, provided the formalities of the wills have been observed, as laid out in Articles 2204 et seq. of the Civil Code.

38. How are the validity and form of an agreement as to succession contained in a prenuptial agreement or in a nuptial agreement assessed in the light of Portuguese law?

As can be seen from the reply to the preceding question, in the light of Portuguese law for an agreement as to succession to be validly entered into it must necessarily be included in a prenuptial agreement [Article 1700(1) of the Civil Code]. In Portugal, the principle of immutability of prenuptial agreements is still in force (Article 1714(1) of the Civil Code) so that no agreements of this type may validly be entered into during the course of the marriage. Agreements as to succession must necessarily be included in the prenuptial agreement regarding the marriage in question.

39. If the law of the succession attributes a right in rem on an asset in Portugal which is not recognised by Portuguese law, how should the registry officer proceed?

As regards rights in rem in Portugal, there is a principle in force of typicality or *numerus clausus*. In fact, pursuant to Article 1306(1) of the Civil Code "no restrictions on rights over property or parts of these rights may be established in practice except in the cases provided for by law; any restriction resulting from a deal, which is not in these conditions, shall have the nature of an obligation".

In addition to the right to property, there are other rights of a real nature, either rights in rem of enjoyment (such as usufruct, the right of use, the right of habitation), rights in rem of guarantee (such as mortgage, attachment, lien) and rights in rem of acquisition (such as the position of the promissory buyer or seller in the situation foreseen in Article 413 of the Civil Code, or of the holder of the right of pre-emption in the case of Article 421 of the Civil Code).

The legal rule that can be applied to the adaptation of rights in rem in succession cases is in principle Article 15 of the Civil Code (*e.g.* when the adaptation is carried out by the Court in legal proceedings).

Article 15 of the Civil Code (Qualifications) reads as follows: "The competence attributed to a law covers only those rules whose content and function in that law are included in the regime of the institution mentioned in the rule of conflicts".

Both the Court, in legal proceedings, and the registry officer, at the time of registration, may proceed with the adaptation.

When the adaptation is done by the registry officer at the time of registration, he or she may require proof of the foreign law, to be presented as established in Article 43-A of the Land Registry Code.

Article 43-A of the Land Registry Code (*Proof of foreign law*) reads as follows: "When the feasibility of an application for registration has to be assessed based on foreign law, the party concerned must present proof of the respective content by means of an authoritative document".

An appeal may be lodged against the decision of a registry officer who refuses to perform the registration under the terms requested, to the Court of the jurisdiction of the registration services (Articles 140 to 146 of the Land Registry Code).

In addition to these legal rules, rules of interpretation have developed through doctrine. According to such doctrinal rules, the broad concept of adaptation encompasses at least two different situations. One is adaptation in the strict sense, occurring when there is a technical problem resulting from the application of two different laws, (*e.g.* one legal system is applicable to the matrimonial property regime and another is applicable to successions) leading to a result that is not favoured by either law in question. In this case, the Court must settle the matter through adaptation. The other situation is no longer one of adaptation in the strict sense, but of replacement or transposition, which occurs when one institution enshrined in another law is replaced by an institution that is known to the internal law.

Cases of adaptation of rights in rem as established in Article 31 of Regulation 650/2012 fit better into the idea of replacement or transposition.

That would be the case, for example, of replacing the institution of "leasehold" (enshrined in the law of another State, but which does not exist in Portuguese law) by the right of land use (enshrined in Portuguese law).

Example
A, testator, leaves a trust in a will on an immovable property located in Portugal. As English law is the law of the succession, the trust is a right in rem as therein established, but not provided for in Portuguese law, where such right is invoked. Pursuant to Article 31 of Regulation 650/2012, given that Portuguese law does not recognise that right in rem, it should be adapted to the closest equivalent right in rem under Portuguese law, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.

If the registry officer, in his qualified capacity to interpret the concrete legal business of the establishment of a trust, who must understand the adaptation of the right in rem, decides that the property is consolidated in the trustee which is to administer it/hold it in trust on behalf of the beneficiary, he may conclude that the establishment of a "substituição fideicomissária", as provided for in Article 2286 of the Civil Code, fulfils a similar function. In that case, he will register the acquisition in favour of the trustee, mentioning the clause in the trust in favour of the beneficiary, also indicating in the registration that this is a "transposition to Portuguese law of the legal institution of a trust, created in accordance with the law applicable to the succession, which is English law".

Another possible solution, given the trust created, is for the registry officer to conclude that he merely has to register the acquisition of a property, in favour either of the trustee or of the beneficiary.

Notes:

- Article 1(2)(j) of the EU Succession Regulation states that "the creation, administration and dissolution of trusts (…) fall outside the scope of this Regulation". However, this subparagraph should be read in conjunction with Recital

(13), which establishes the exclusion of trusts created through business deals *inter vivos*, not trusts created in connection with a will or the law.

– In Portugal, specifically in the Autonomous Region of Madeira, trusts may be registered but only in the context of offshore activities (see Decree-Law No 352-A/88 of 3 October, last amended at the date on which this manual is being drafted, by Law No 89/2017 of 21 August)[11].

40. Which is the law applicable to the:

- ***substantive validity,***
- ***legitimacy, and***
- ***formal validity***

of acceptance or waiver of an inheritance or a legacy?

The substantive validity of the acceptance or waiver of the inheritance or legacy and the legitimacy to accept or waive, are governed by the law applicable to the succession, which as a rule results from application of Article 21 and Article 22 of the EU Succession Regulation.

The formal validity of the acceptance or waiver of the inheritance or legacy, on the other hand, may alternatively be governed either by the law applicable to the succession pursuant to Article 21 and Article 22 of the EU Succession Regulation, or by the law of the State in which the person making the declaration has habitual residence, which may be a

[11] On this matter see the Opinion of the Technical Board of the Directorate General of Registrations and Notaries, published in Boletim dos Registos e do Notariado 7/2004, II caderno, Proc. n.º R.Co 137/2003 DSJ-CT, accessible at: http://bit.ly/2OBoPDj.

Member State of the European Union or a third State (Article 28 of the EU Succession Regulation).

If as a result of the dispositions mentioned above Portuguese law is the applicable law, the following is established:

- Having opened the succession (Article 2031 of the Civil Code), the successors called to the succession are those in possession of the three conditions for succession (ownership of prevalent successor designation, successor capacity and existence), as a rule verified by reference to the moment the succession is opened.
- The successors called to the succession acquire *ius delationis*: the right to accept or waive the inheritance or legacy in question. Acceptance of the inheritance is regulated in Articles 2050 et seq., and waiver of the inheritance regulated by Articles 2062 et seq. of the Civil Code. These norms are applied, adapted where necessary, to acceptance and waiver of the inheritance, *ex vi* Article 2249 of the Civil Code. In accordance with the following provisions of the Civil Code, acceptance and waiver of the inheritance are deemed legal deeds that are irrevocable (Articles 2061 and 2066) and indivisible [Article 2054(2) and Article 2064(2), without prejudice of the provisions of Article 2055 for the inheritance and of Article 2250 for the legacy], which may only be performed after the succession has commenced (Article 2032). Pursuant to Article 2059(1) of the Civil Code, "the right to accept the inheritance lapses after ten years, counted from the date when the successor becomes aware of having been called to the succession". Paragraph (2) of that same article establishes that if a successor is established under a condition precedent, the time limit counts from the date when the successor became aware of verification of said condition and, in the case of a "substituição fideicomissária", from the date when the death of the trustee or the winding up of the legal

person becomes known. The comminatory proceedings for accepting or waiving the inheritance are established in Article 2049 of the Civil Code for a successor who has been called and who, being known, has neither accepted nor waived the inheritance in the following fifteen days (Article 1039 of the Code of Civil Procedure).

- Under Article 2056 of the Civil Code, the successor may accept the inheritance or legacy in question, either expressly (which occurs when the successor called to the inheritance declares in a written document acceptance or assumes the title of heir with the intention of acquiring it), or tacitly (by adopting behaviour from which one can conclude it is a manifestation of the intent to accept, although for the purpose the practice of deeds of administration of the inheritance or legacy are not valid in this regard: see paragraph 3 of the article in question). A married successor, whatever the matrimonial property regime, does not require the consent of the spouse to accept the inheritance or legacy in question (Article 1683 of the Civil Code).
- As opposed to acceptance, in case of waiver a special form is required: the waiver must be done in the form required for alienation of the inheritance (Article 2126 of the Civil Code and Article 80(d) of the Notaries' Code): a public deed in the case of immovable assets or a private written paper in all other cases.
- If the successor is married, under any of the matrimonial property regimes, the consent of the spouse must be obtained for the waiver, pursuant to Article 1683(2) of the Civil Code.
- If the beneficiary is a minor, the authorisation of the Public Prosecutor is required [Articles 1889(1)(j), 1890(1) and 1938(1)(a) of the Civil Code]. Authorisation is also required should the beneficiary be an accompanied adult (Articles 138, 139 and 145 of the Civil Code). The authorisation process is established in Decree-Law No 272/2001 of 13 October and falls within the jurisdiction of the Public Prosecutor.

41. What is the European Certificate of Succession?

EU Regulation 650/2012 provides for the European Certificate of Succession (hereinafter referred to as “ECS” or “the Certificate”). In successions with cross-border implications this instrument makes it possible for the heir, legatee, executor or administrator of the estate to demonstrate his or her status and/or rights and powers in another Member State, in particular in the Member State where the succession property is located “In order for a succession with cross-border implications within the Union to be settled speedily, smoothly and efficiently” [cf. Recital (67)], a specifically European instrument was created which, as established in the Regulation, is not a simple instrument for documents constituted on the basis of national laws for circulation among Member States, but an autonomous instrument proving the status of the heirs and other persons with an interest in the succession. EU Regulation 650/2012 provides for the European Certificate of Succession (hereinafter referred to as ‘the Certificate’). In successions with cross-border implications this instrument makes it possible for the heir, legatee, executor or administrator of the estate to demonstrate his or her status and/or rights and powers in another Member State, in particular in the Member State where the succession property is located [cf. Recital (67)]. “In order for a succession with cross-border implications within the Union to be settled speedily, smoothly and efficiently”, a specifically European instrument was created which, as established in the Regulation, is not a simple instrument for documents constituted on the basis of national laws for circulation among Member States, but an autonomous instrument proving the status of the heirs and other persons with an interest in the succession.

The ECS is therefore a European certificate relating to the succession of a person and may be issued for use in another Member State, enabling the heir, legatee, executor or administrator of the inheritance to demonstrate his or her status and/or rights and powers in another Member State. Although it may only be requested for use in another Member State, once issued, the ECS will also be valid in the issuing Member State, as shall be seen below.

42. Who can apply for the Certificate?

The Certificate is issued upon application. Persons who may make an application are the heirs, legatees, executors or administrators of the inheritance [Article 65(1) of the EU Succession Regulation]. Considering the important effects associated with the ECS (cf. Article 69 of the Regulation), not just anyone is allowed to submit an application for issue. Article 63 of the EU Succession Regulation determines who may use the Certificate but also, by referral to Article 65, who may make the application: heirs, legatees having direct rights in the succession, and executors and administrators of the estate who need to invoke their status or to exercise their rights in another Member State.

43. Is the European Certificate of Succession mandatory?

No. The Certificate is an optional instrument that is made available to the parties. The use of the Certificate by the people who are entitled to apply for it is not mandatory, even if the succession has an international dimension. This results expressly from Regulation 650/2012: *cf.* Article 62(2) and Recital (69).

44. Does the European Certificate of Succession take the place of internal documents with an equivalent content?

No, it is not the intention of the Certificate to take the place of internal documents used for similar purposes in the Member States [Article 62(3) of Regulation 650/2012]. In addition to public internal documents relating to succession, there is this optional public European document. The last part of Recital (67) reads as follows: "In order to respect the principle of subsidiarity, the Certificate should not take the place of internal documents

which may exist for similar purposes in the Member States". However, the Certificate may have internal effects. It should not be possible to request a Certificate if it is not intended to be used in another Member State but, once issued, it shall also produce its effects in the Member State of origin, that is, in the Member State that issued the European Certificate of Succession (Article 62(3) of the EU Succession Regulation).

45. When may the parties concerned apply for a European Certificate of Succession to be issued?

The parties concerned may apply for a European Certificate of Succession on the death of the author of the inheritance, provided this occurred on or after 17 August 2015.

46. In which cases may a European Certificate of Succession be requested in Portugal?

A European Certificate of Succession may be requested in Portugal in cases where the Courts (the Registry Office) has jurisdiction by force of Article 4, Article 7, Article 10 and Article 11 (see Article 64 of Regulation 650/2012).

International jurisdiction concerning the issue of a Certificate is based not on specific rules of national jurisdiction but on the rules of jurisdiction established in Chapter II of Regulation 650/2012:

– An application for a Certificate may be submitted to the authorities of the Member State of habitual residence of the deceased (Article 4);

- The jurisdiction of the national authority regarding the issue of the Certificate may be based on Article 7, that is, on the jurisdiction of the authorities of a Member State whose law had been chosen by the deceased as regards the succession, as provided for in the said article;
- A Certificate may also be requested before an authority of a Member State who has subsidiary jurisdiction, based on the fact that the assets of the estate are located there, provided that the habitual residence of the deceased at the time of death is not located in another Member State (*cf.* Article 10 of the EU Succession Regulation);
- Finally, in exceptional circumstances under the terms of Article 11 of Regulation 650/2012, whenever any other of the rules of jurisdiction of the Regulation cannot be applied, the competent authorities of a Member State may issue a Certificate, provided the case has sufficient connection with that Member State and the Certificate is for use in another Member State [Article 62(1) of Regulation 650/2012].

Example
A, of Belgian nationality, dies in 2016 in Portugal, where he had his habitual residence. He owned immovable assets in Belgium, Portugal and Italy. He is survived by one son. Which Courts have jurisdiction to issue the European Certificate of Succession? The only authority with jurisdiction is the Court in Portugal (Article 4 of Regulation 650/2012).

Example
B, of German nationality, dies in 2016 in Portugal, where he had his habitual residence. He owned immovable assets in Germany and Portugal. He is survived by two children. In his will he had expressly designated German law as being applicable to his succession. Which Courts have jurisdiction to issue the European Certificate of Succession? If his children agree on the exclusive jurisdiction of the German Courts, the German Courts shall be competent. In the absence of agreement, it will be the Portuguese Courts [Articles 5 and 7(b) of Regulation 650/2012].

Example
C, of Portuguese nationality, with last habitual residence in France, dies on 20 August 2015. The heirs live in Portugal and wish to use a European Certificate of Succession to prove their status. Could a Portuguese registry officer issue this Certificate, if requested? No. In this case, only the French authorities may issue the Certificate provided it is for use in another Member State [Articles 4 and 62(1) of Regulation 650/2012].

47. To which authority in Portugal should the application for a European Certificate of Succession be addressed?

In Portugal, the authorities with jurisdiction to issue the European Certificate of Succession are the registry officers, in particular those with jurisdiction within the scope of simplified hereditary succession proceedings, as provided for in Articles 210-A to 210-R of the Civil Registry Code.

Article 64 of Regulation 650/2012 allows the Certificate to be issued by two types of authorities: Courts and other authorities which, under national law, are competent to deal with matters of succession (Article 64(a)(b)).

Under Recital (70) of the EU Succession Regulation: “It should be for each Member State to determine in its internal legislation which authorities are to have competence to issue the Certificate, whether they be Courts as defined for the purposes of this Regulation or other authorities with competence in matters of succession, such as, for instance, notaries. It should also be for each Member State to determine in its internal legislation whether the issuing authority may involve other competent bodies in the issuing process, for instance bodies competent to receive statutory declarations in lieu of an oath”.

Article 78(1)(c) of that same Regulation imposes on Member States the duty to communicate to the Commission all pertinent information

regarding the authorities competent to issue the Certificate. The Commission shall publish all information in the Official Journal of the European Union, so that it may be made available to the public[12].

48. Is there a national website where practical information can be obtained on how to submit the application and on the cost of a European Certificate of Succession issued in Portugal?

Yes, the IRN, I.P. website[13].

49. Can several European Certificates of Succession be requested regarding the same succession?

Yes, this may occur given the different purposes for which the Certificate can be issued. It may be the case that a legatee requires a Certificate merely to prove that he was bequeathed a particular asset or that the administrator of the estate requests a Certificate merely to prove his status in another Member State where he needs to locate assets of the inheritance (for example, to discover if the deceased left bank accounts there). The content of each Certificate should take into account its intended purpose [cf. Articles 65(3)(f) and 68 of Regulation 650/2012]. Indeed, this last norm establishes that it is — "to the extent required for

[12] This information can be found at https://e-justice.europa.eu/content_succession-380-pt-en.do?init=true&member=1; the list of registries competent to issue the European Certificate of Succession is available at: https://irn.justica.gov.pt/Certificado-Sucessorio-Europeu

[13] https://irn.justica.gov.pt/Certificado-Sucessorio-Europeu

the purpose for which it is issued (…)" – leading to the conclusion that a type of principle of purpose applies to the issue of a European Certificate of Succession.

50. Can the European Certificate of Succession only be issued individually when dealing jointly with the succession of two deceased spouses?

Yes, the European Certificate of Succession can only be issued individually. This appears to result from Chapter VI of Regulation 650/2012 which always mentions "the deceased" in the singular.

51. What is the period of validity of the European Certificate of Succession?

The original of the European Certificate of Succession must remain on file at the issuing authority who may not dispose of the original but provide certified copies to the applicant and any other person demonstrating a legitimate interest. The certified copy shall be valid for a period of six months. Pursuant to Article 70(3) of Regulation 650/2012, the issuing authority may, in exceptional, duly justified circumstances, extend the period of validity.

52. What are the purposes of the European Certificate of Succession?

Pursuant to Article 63(2) of the EU Succession Regulation, the Certificate may be used to demonstrate, in particular: the status and/or

the rights of each heir or each legatee and their respective shares of the inheritance; the attribution of a specific asset or specific assets forming part of the inheritance to the heir or the legatee; and the powers of the person mentioned in the Certificate to execute the will or administer the estate. This norm seeks to clarify the purposes of the Certificate, in particular its probative function. The exact effects of the Certificate are determined in a specific provision: Article 69 of the EU Succession Regulation.

53. Can these purposes vary as per indications given by the applicant?

Yes. In the application the applicant must indicate the intended purpose of the Certificate, pursuant to Article 65(3)(f) of the Regulation.

54. In that case, does the content of the European Certificate of Succession vary depending on the intended purpose?

Yes, Article 68(1) of Regulation 650/2012 determines that the certificate shall contain the information required for the purpose for which it is issued.

55. Depending on the intended purposes of the European Certificate of Succession, can it mention any of the following in respect of the assets of the inheritance:

– ***a mortgage?***
– ***an attachment?***

– ***a seizure in criminal proceedings?***
– ***other rights, onuses or charges?***

Yes, if the intended purpose of the ECS is to prove the status and rights of the heirs or legatees and whether such rights, respective onuses or charges are registered. In that case, such information should be mentioned in Form V, Annex IV(9) or Annex V(5), respectively.

As the principle of the typicality of rights in rem is in force in Portugal under Article 1306 of the Civil Code, no restrictions on rights over property or parts of these rights may be established in practice unless provided for by law, as is the case with mortgages, attachments and criminal proceedings mentioned below.

A mortgage is a special guarantee of obligations which gives the creditor the right to be paid the value of the mortgaged asset with preference over other creditors (Article 686 of the Civil Code), and so must also be qualified as a guarantee right in rem. Mortgages are regulated by Article 686 et seq. of the Criminal Code.

An attachment is a legal deed seizing assets of the debtor, so that the creditor may be paid what he is due. Attachments are regulated by Article 735 et seq. of the Code of Criminal Procedure.

A seizure in criminal proceedings is a type of guarantee regulated by Article 178 et seq. of the Code of Civil Procedure.

The Land Registry Code, in particular Article 1(1), subparagraph (h) provides for the registration of the aforesaid restrictions on rights over property – mortgage, assignment or modification thereof, assignment of the degree of priority of the respective registration and antichresis; subparagraph (i) – the transfer of credits guaranteed by a mortgage or antichresis, when it involves transfer of collateral; subparagraph (n) – attachment (…); subparagraph (o) – lien, attachment, seizure or sequestration of credits guaranteed by mortgage or antichresis and any other deeds or injunctions related to such credits; subparagraph (p) – seizure in criminal proceedings.

56. Depending on its intended purpose may the European Certificate of Succession mention:

– ***the decision declaring that one of the parents surviving a child is disqualified from exercising parental responsibilities?***

No, not if the applicable law is Portuguese law, because in Portugal disqualifying a parent from parental responsibilities does not, of itself alone, prejudice the status of successor.

Parental responsibilities are exercised under the terms of Article 1901 et seq. of the Civil Code. Pursuant to Article 1904(1), when one parent dies the exercise of parental responsibilities falls in principle on the surviving parent.

In addition to the situations in which disqualification of parental responsibilities occurs by force of the law (full disqualification), under Article 1913 of the Civil Code, the disqualification of parental responsibilities may be ordered by a legal decision (judicial disqualification). This decision is issued whenever the parent wrongfully infringes his or her duties on behalf of the children, seriously damaging them, or when due to inexperience, sickness, absence or other reasons, is not in a position to fulfil any of those duties [Article 1915 of the Civil Code and Articles 3(h) and 52 et seq. of the General Regime on Civil Guardianship Processes adopted by Act No 141/2015 of 8 September, last amended by Act No 24/2017 of 24 May].

– ***the decision issued in criminal or civil proceedings declaring one of the heirs disqualified from the succession?***

Yes, if the Portuguese law is applicable, Form V (the form governing the issue of the European Certificate of Succession provided for in Regulation 1329/2014), Annex IV(7) can if necessary mention this fact

in order for the European Certificate of Succession to comply with the intended purposes in the specific case.

If any of the situations provided for in the subparagraphs of Article 2034 of the Civil Code is present, the debarred successor will lack the capacity to inherit, which is one of the prerequisites for being a successor. Discounting the cases in which the debarred person is in possession of assets of the inheritance (in which case the need for a judicial declaration of debarment is undisputed), the need is discussed in Portugal for a judicial decision that declares said debarment in order for the lack of capacity to inherit due to debarment to be effective. In any case, the causes for debarment provided in Article 2034(a)(b) of the Civil Code will always presupposes a criminal conviction with *res judicata* for having committed the crimes provided for under those norms. In such cases, the declaration of debarment may take place during the criminal proceedings. Should the debarment of the successor not have been declared during criminal proceedings, then if a conviction for either actual or attempted, co-authored or complicit voluntary homicide of the author of the succession or his/her spouse, child, parent, adopter or adoptee is passed, the conviction must be communicated to the Public Prosecutor who will file an action for the declaration of debarment of the successor.

– ***a legacy of maintenance?***

Yes, this may be mentioned in Form V, Annex V(5) with additional information in (7) if necessary.

The duty to provide maintenance is regulated in Article 2003 et seq. of the Civil Code and may result from the law or be the subject of a deed (Article 2014 of the Civil Code), such as a will. Article 2073 of the Civil Code mentions the legacy of maintenance, to which are applied the provisions of Article 2273(1) pursuant to paragraph 2 of that same article of the Civil Code.

A legacy of maintenance as provided for in Articles 2073 and 2273 of the Civil Code constitutes a testamentary disposition establishing maintenance, to which it appears that the EU Succession Regulation should be applied by force of Article 1(2)(e).

– ***the appanage of the surviving spouse?***

This matter should not, in principle, be mentioned in the European Certificate of Succession. Doubts exist as to whether or not the appanage (spousal support) of the surviving spouse is encompassed in the application of the EU Succession Regulation, bearing in mind the provisions of Article 1(2)(e) of said Regulation. If it is considered that the appanage of the surviving spouse as provided for in Article 2018 of the Civil Code does not establish a right of succession attributed to the spouse but rather a maintenance obligation governed by the general principles thereof, the EU Succession Regulation is not applicable.

Under Article 2028 of the Civil Code, in the case of the death of a married person, the surviving spouse is allowed the right of appanage provided for in Article 2018 of the same Code. Therefore, the surviving spouse is entitled to receive maintenance from the assets of the deceased estate.

A surviving spouse who entered into an agreement of the type provided for in Article 1700(1)(c) of the Civil Code (repudiating the condition of legitimate heir) still maintains the right to appanage *ex vi* Article 1707-A(2) of that same Code.

– ***a disposition regarding the matrimonial property regime resulting in an alteration to the share of the surviving spouse?***

Until Law No 48/2018 of 14 August came into force, the law in Portugal provided protection for the succession of the spouse, which was standard and independent of the matrimonial regime. The spouse was included in

the succession as a forced heir ("*herdeiro legitimário*") pursuant to Article 2157, and as a legitimate heir *("herdeiro legítimo")* in the light of Article 2133(1)(a)(b) of the Civil Code. Inclusion as a forced heir, bearing in mind the nature of the forced succession, was imperative: with the exception of the situations of disinheritance provided for in Article 2166, the surviving spouse was always included as a forced heir in the succession of the deceased spouse and necessarily received a share of the inheritance (the subjective legitimate share) which could never be less that ¼ of the global legitimate share calculated pursuant to Article 2159. Furthermore, the surviving spouse could also be included in the succession as a legitimate heir if the deceased had not made a valid and effective disposition of all the assets that could be disposed (the disposable share).

The entry into force on 1 September 2018 of Law No 48/2018 of 14 August acknowledged the possibility that the contractants can waive their status as forced heirs provided that the following requirements are cumulatively in place: i) the celebration of the marriage of the repudiating persons under the separation of property regime, either by application of Article 1720 or by deed performed in a prenuptial agreement (Article 1698); ii) the repudiation of the condition of forced heir is reciprocal; iii) the waiver agreement is included in the prenuptial agreement; iv) given the latter requirement, it is imperative that the agreement be signed before the marriage is celebrated.

As results from the first requirement, this is an agreement that, despite its effects being reflected in the successor protection of the spouse, has a clear connection with the application of a determined property regime to the marriage: the separation of property regime. Once this agreement has been signed, the surviving spouse is not included as a forced heir in the succession of the deceased spouse. The surviving spouse will still be considered a legitimate heir if the deceased has not made a valid and effective disposition of all the assets that could be disposed and if the surviving spouse has not waived inclusion as a legitimate heir, which does not result from the simple celebration of the agreement of renunciation provided for in Article 1700(1)(c) of the Civil Code. Note that if the

contractants have not made a valid and effective succession agreement in the light of said Article 1700(1)(c) of the Civil Code, the surviving spouse will still be included in the succession as a forced heir (and as a legitimate heir).

Nevertheless, a disposition regarding the matrimonial property regime or a similar property regime whose effect is to alter the share of the surviving spouse in case of death of the other spouse may be classified as a provision of succession in certain cases. As such, it must be mentioned in the European Certificate of Succession in Form V, Annex IV, which refers to the status and rights of the heirs.

On the other hand, mention of a disposition regarding the matrimonial property regime or a similar property regime which cannot be classified as a provision of succession, can be made in the European Certificate of Succession, merely for information purposes, in Form V, Annex III, regarding information as to the matrimonial property regime or a similar property regime.

In order to ascertain whether the abovementioned legal provisions of the Civil Code, which acknowledge the possibility of the contractants reciprocally waiving their status as forced heirs in the prenuptial agreement, concern the matrimonial property regime or the succession regime, it is necessary to consult the interpretation by the CJEU in case C-558/16.

CJEU jurisprudence in case C-558/16:

- In this judgement, the CJEU interprets the scope of application of the EU Succession Regulation established in Article 1(1), delimiting it with regard to the scope of application of the Matrimonial Property Regime Regulation (Regulation 2016/1103).
- The key issues concerns the following. Under Paragraph 1371(1) of the Bürgerliches Gesetzbuch (the German Civil Code; the BGB), if the property regime is ended by the death of a spouse, the equalisation of the accrued gains shall be effected by increasing the surviving spouse’s share of the estate on

intestacy by one-quarter of the estate; it is irrelevant in this regard whether the spouses have made accrued gains in the individual case.

- It is a question of finding out whether in this case that provision of German law came under matrimonial property regimes or successions. The CJEU decided that it came under successions, to which Regulation 650/2012 is applicable.
- According to the reasoning of the CJEU, this legal provision of the BGB concerns not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate. Accordingly, that provision does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs. Such a provision therefore principally concerns succession to the estate of the deceased spouse and not the matrimonial property regime.
- Accordingly, the CJEU concluded that classification of the share falling to the surviving spouse under a provision of national law such as Section 1371(1) of the BGB, allows information concerning that share to be included in the European Certificate of Succession, with all the effects described in Article 69 of Regulation No 650/2012.
- Taking this consideration into account, the CJEU did not answer the additional question which was to know if a provision of the matrimonial property regime which cannot be classified as inheritable under the above terms may be included in the European Certificate of Succession, for information purposes only, on account of the increase in the legitimate share resulting therefrom. However, it seems that the need to include this information results from Form V, Annex III of the European Certificate of Succession.

Both the Courts and other national authorities with jurisdiction in matters of succession, such as registry officers and notaries, are bound by the CJEU's interpretation of Article 1(1) of Regulation 650/2012 mentioned above.

From this interpretation it can be taken that the factor of differentiation between a legal provision relating to the matrimonial property regime and a legal provision relating to succession, adopted by the CJEU, lies in the final purpose of that legal provision: if its main purpose is to allocate the assets or liquidate the matrimonial property regime, it concerns the matrimonial property regime; if its main purpose is to determine the size of the share of the estate to be allocated to the surviving spouse as against the other heirs, it concerns succession.

Thus, if its main purpose is to determine the size of the share of the estate to be allocated to the surviving spouse as against the other heirs, the relevant information must be included in Form V, Annex IV of the European Certificate of Succession. If its main purpose is to allocate the assets of the conjugal property or liquidate the matrimonial property regime, the relevant information may be mentioned in Form V, Annex III of the European Certificate of Succession, depending on its purpose.

57. What information and documents must be submitted to or requested by the Portuguese registry officer for the issuing of a European Certificate of Succession?

The Certificate is issued on application by the party concerned. To make this application, the Regulation suggests the use of Form IV approved by Implementing Regulation (EU) No 1329/2014 of 9 December 2014 [Article 65(2) of Regulation 650/2012]. The parties may decide whether or not to use this form, but this method will provide the registry officer with a complete document in which certain mentions can quite easily be reproduced in the Certificate.

The application must be accompanied by all relevant documents and contain mandatory elements. The authority issuing the Certificate will verify the information contained in the application as well as in all documents provided by the applicant. These elements will be used as the basis to assess the application as provided for in Article 66 of Regulation 650/2012. Article 65(3) of that same Regulation indicates the detailed information to be provided when applying for the Certificate, which may be necessary for the issuing authority to establish their authenticity as requested by the applicant.

According to the following legal provisions of Regulation 650/2012, the information to be included in the application can be grouped into three categories:

- Details concerning the deceased [Article 65(3)(a)], the applicant [Article 65(3)(b)], the representative of the applicant (Article 65(3)(c)), the spouse or partner of the deceased [Article 65(3)(d)]; other beneficiaries to the succession [Article 65(3)(e)];
- Details concerning the succession - Article 65(3)(h)(i)(j)(k) and (m);
- Specific information in the Certificate and its intended purpose – Article 65(3)(f).

The register officer will then examine the application, verifying the information and declarations and the documents and other evidence provided by the applicant (Article 66 of Regulation 650/2012). The important effects produced by the Certificate (Article 69 of the Regulation), which are valid in all the Member States, are based on this examination.

The EU Succession Regulation requires that during examination of the application the issuing authority shall inform the known beneficiaries of the application submitted for a Certificate. Additionally, once the Certificate is issued, the issuing authority must inform again the beneficiaries that the Certificate has been issued [Article 67(2) of Regulation 650/2012]. They are the beneficiaries in the succession by virtue of the applicable

law or a disposition upon death [see Recital (47)]. The purpose of the duty to inform is to allow the parties concerned to intervene in the Certificate-issuing process. It also gives beneficiaries unknown to the issuing authority "the opportunity to invoke their rights", as emphasised in the last portion of Article 66(4) of Regulation 650/2012, for which purpose public announcements are admissible. These steps established at the issuing stage reinforce the authority of the Certificate.

58. Is there a record of the European Certificates of Succession issued in Portugal?

Yes, Portugal has a digital record of all European Certificates of Succession issued. This record provides an annual, sequential numbering of the Certificates issued, to avoid the issue of Certificates concerning the same succession which contradict each other.

Identifying elements of each succession are gathered, such as the name of the deceased, the date of death and the name of the Registration service that handled the process to issue the Certificate.

Only Registries with competence to issue European Certificates of Succession for the intended purposes have access to the digital record.

59. Is the European Certificate of Succession issued in Portugal recorded in the Civil Registry?

That has not been costumary at Civil Registries. Pursuant to Article 1 of the Civil Registry Code, the civil registration is mandatory, its aim being to list the facts mentioned in subparagraphs (a) to (q). To the extent that only facts considered by law to be subject to registration can be registered, arising out of the relevant Portuguese Code or of another law, and as there

is no legal provision establishing civil registration of the Certificate, it is not subject to civil registration in Portugal.

60. Can a European Certificate of Succession issued in another Member State be recorded on the death certificate of the deceased, should he be a Portuguese citizen, who at the time of death had habitual residence in the Member State which issued the European Certificate of Succession?

That has not been customary at Civil Registries. Article 202-A of the Civil Registry Code establishes that the entitlement of heirs and the opening of the inventory proceedings must be mentioned in the death certificate of the deceased. It makes no reference to the European Certificate of Succession, nor has its legal formula "independent of the form of its titling" been interpreted as including said Certificate. The understanding has been that the norm intended encompassing the various forms of titling of the entitlement of heirs as per national law: through the notarial offices or by a simplified entitlement procedure.

61. Can a European Certificate of Succession issued in another Member State serve as a valid document for a recording to be made in (land, vehicle or company) Registry Offices, in Portugal in respect of:

– ***the communal ownership of undivided assets of the inheritance on behalf of the heirs, without determining which share of the property is allocated to which heir?***

Yes, provided the purpose of the Certificate is, at the very least, to verify the status and/or rights of all the heirs or legatees.

Pursuant to Article 69(5) and Recital (18) of the EU Succession Regulation, the European Certificate of Succession is a valid document for the recording of a right, in particular in land registers. Legal requirements regulating the recording in a register and the effects of such a recording are governed by the law of the Member State where the registration takes place [cf. Recital (19)].

If the European Certificate of Succession states who the heirs of the deceased are, the Certificate may result in the optional registration on behalf of the inheritance (commonly known as "communal acquisition with no determination of shares or rights").

In this case, for purposes of registration, the Certificate will have the same effects as an entitlement of heirs.

– **the ownership of specific assets of the inheritance in favour of each heir when the sharing-out is mentioned in the European Certificate of Succession?**

Yes, if in addition to the sharing-out agreement, the Certificate provides information on the list of assets and/or rights allocated to each heir. In that case, for purposes of registration this document has a similar function to that of an out-of-court sharing out or an inventory.

– ***the ownership of assets of the inheritance in favour of one single heir, when there is only one heir?***

Yes, if the Certificates provides information not only about the sharing-out agreement but also the list of assets and/or rights of the inheritance and that there is only one heir. For purposes of registration this document allows said assets to be recorded in favour of the sole heir.

– ***the ownership of assets of the inheritance in favour of one or more legatees, when the inheritance is to be shared out completely among legatees?***

Yes, if the Certificates provides information about the list of assets and/or rights of the inheritance allocated to a legatee who wishes to register the assets in his favour.

62. Can a European Certificate of Succession issued in Portugal also be used in Portugal and in that case for what purpose?

Yes, according to Article 62(3). The Certificate should not be issued solely for internal purposes. In other words, although verification of the existence of a foreign element is not exigible as a pre-condition to issue the Certificate, pursuant to Article 62(1) of Regulation 650/2012 the Certificate "shall be issued for use in another Member State". This rule is confirmed by Article 62(3) of the same Regulation, which establishes: "once issued for use in another Member State".

It should not be possible to request a Certificate if it is not intended to be used in another Member State but, once issued, it shall also produce its effects in the Member State of origin, that is, in the Member State that issued the European Certificate of Succession [Article 62(3) of the EU Succession Regulation]. Therefore, application for the Certificate should not be made if it is not to be used in another Member State, but once issued, it shall also produce its effects in the Member State of origin [Article 62(3)], that is, in the Member State where it was issued. So, for instance, if the Certificate contains a statement that the applicants are the deceased's sole heirs and there are no other heirs to the succession, it may have similar effects in the issuing Member State of an entitlement of heirs, benefiting from the presumption of accuracy assigned to the Certificate pursuant to Article 69 of Regulation 650/2012.

Jurisprudence

Judgement of the Court of Justice of 26 March 1992
C-261/90, ECLI:EU:C:1992:149 39

Judgement of the Court of Justice of 23 May 2019
C-658/17, ECLI:EU:C:2019:444 56

Judgement of the Court of Justice of 21 June 2018
C-20/17, ECLI:EU:C:2018:485 56

Judgement of the Court of Justice of 6 October 2015
C-404/14, ECLI:EU:C:2015:653 58,70

Judgement of the Court of Justice of 19 April 2018
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Useful Links	
European Judicial Atlas: successions	https://e-justice.europa.eu/content_succession-380-en.do
European Judicial Network in civil and commercial matters – information sheets	https://e-justice.europa.eu/content_information_on_national_law_information_sheets-439-en.do?init=true
Opinions of the Advisory Board (IRN, I.P.)	https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal
Registry offices with jurisdiction to issue the European Certificate of Succession	https://irn.justica.gov.pt/Certificado-Sucessorio-Europeu
The Hague Convention of 13 January 2000 on the International Protection of Adults	https://www.hcch.net/en/instruments/conventions/full-text/?cid=71
A Citizen's Guide to Cross-border Successions: how EU rules simplify international inheritances	https://publications.europa.eu/s/m6Lc
Frequently Asked Questions about the European Certificate of Succession (IRN, I.P.)	https://irn.justica.gov.pt/Certificado-Sucessorio-Europeu

Section II

Maintenance Obligations

Regulation 4/2009

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Introduction

Relevant instruments of civil law of the European Union in matters of maintenance obligations

– Regulation (EU) No 4/2009 of the Council of 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[14].

Note: Any articles in this section with no indication of origin refer to Regulation (EU) No 4/2009; references to a code without mentioning the country refer to Portuguese legislation.

[14] http://data.europa.eu/eli/reg/2009/4(1)/oj

Regulation (EU) No 4/2009 of 18 December 2008	
on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations	
Informal designation	EU Maintenance Regulation
Material scope	Maintenance obligations arising from a family relationship, parentage, marriage or affinity,
Effective from:	18 September 2010 [Article 2(2), Article 47(3) and Articles 71 to 73] 18 June 2011
Non-binding on these Member States	-
Preceded by	Council Regulation (EC) No 805/2004 Council Regulation (EC) No 44/2001, as regards maintenance obligations
Non-applicable internal norms	International jurisdiction: Articles 62 and 63 of the Code of Civil Procedure Applicable law: Article 57 of the Civil Code Recognition: Article 978 et seq. of the Code of Civil Procedure

Lugano Convention of 30 October 2007	
on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano II Convention)	
Effective from	1 January 2010 between the EU and Norway, 1 January 2011 between the EU and Switzerland, 1 May 2011 between the EU and Iceland
Contracting parties	All Member States of the European Union (including Denmark), Iceland, Norway and Switzerland
Preceded by	Lugano Convention of 1988
Non-applicable internal norms	International jurisdiction: Articles 62 and 63 of the Code of Civil Procedure Recognition: Article 978 et seq. of the Code of Civil Procedure
Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance	
to improve cooperation among States for the international recovery of child support and other forms of family maitenance (Hague Convention 2007)	
Effective from	1 August 2014
Contracting parties	Member States of the European Union (except Denmark), Albania (1.1.2013), Belarus (1.6.2018), Bosnia-Herzegovina (1.2.2013), Brazil (1.11.2017), Kazakhstan (14.6.2019), United States of America (1.1.2017), Guyana (7.3.2020), Honduras (16.10.2017), Montenegro (1.1.2017), Nicaragua (18.4.2020), Norway (1.1.2013), Turkey (1.2.2017), Ukraine (1.11.2013)
Non-applicable internal norms	Applicable law: Article 57 of the Civil Code Recognition: Article 978 et seg. of the Code of Civil Procedure
Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations	
introducing international uniform laws to determine the law applicable to maintenance obligations (2007 Hague Protocol)	
Effective from	1 August 2013
Contracting parties	Member States of the European Union (except Denmark and the United Kingdom) Brazil (1.11.2018), Kazakhstan (1.4.2017), Serbia (1.8.2013)
Non-applicable internal norms	Applicable law: Article 57 of the Civil Code

General Aspects

Regulation 4/2009 shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity [Article 1(1)]. Maintenance obligations arising from a different source, such as those resulting from succession regimes or legal business, are not included in the scope of application of this Regulation, although they may not necessarily be subject to national law (cf. Regulation 650/2012 as to maintenance obligations arising from death, and Regulation 1215/2012 for other cases).

Regulation (EU) 2015/228 replaces Annexes I to VII to Regulation 4/2009.

The Regulation is articulated with the Lugano II Convention and with two other international instruments drawn up in the context of the Hague Conference on Private International Law (an intergovernmental organisation of which the European Union is a member: *vide* Council Decision 2006/719/EC) which overrides the scope of application of Regulation No 4/2009: the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; and the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

The cooperation operated by the EU Maintenance Regulation results in the following:

Lugano II Convention: Exclusive jurisdiction attributed to an Icelandic, Norwegian or Swiss Court by means of a choice-of-court agreement leads to application of the Lugano II Convention, except as regards disputes relating to a maintenance obligation towards children under the age of 18 [Article 4(3) and (4) of the EU Maintenance Regulation].

The 2007 Hague Convention: Where a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually resident in the State in which the decision was given [Article 8(1) of the EU Maintenance Regulation],

unless the competent authority in the State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or give a new decision [Article 8(2)(c) of the EU Maintenance Regulation]; or where the decision given cannot be recognised or declared enforceable in the Member State where proceedings to modify the decision or to have a new decision given are contemplated [Article 8(2)(d) of the EU Maintenance Regulation].

Hague Protocol of 23 November 2007: The rules governing the recognition and enforcement of decisions falling within the scope of the Maintenance Regulation differ depending on whether or not the State of origin is a party to the 2007 Hague Protocol (Article 16). If the State of origin is not bound by said Protocol and recognition of the decision has not been refused (Article 24), it shall only be enforceable in another Member State once it has been declared enforceable there (Article 26).

To sum up, it follows from Articles 68 and 75 of Regulation 4/2009 that:

- As a rule, Regulation 4/2009 applies to proceedings initiated, Court settlements approved and authentic documents issued, after 18 June 2011;
- Exceptionally, decisions handed down in Member States before that date but which are enforced after 18 June 2011 benefit only from the recognition and enforceability scheme provided for in sections 2 and 3 of Chapter IV of Regulation 4/2009 (this regime is extendable to Court settlements and authentic documents);
- Exceptionally, decisions handed down after 18 June 2018 in proceedings initiated before that date, which fall within the scope of Regulation 44/2001 with regard to recognition and enforcement, benefit only from the recognition and enforceability scheme provided for in the Sections 2 and 3 of Chapter IV of Regulation 4/2009 (this regime is applicable to Court settlements and authentic documents);
- Regulation 44/2001 continues to apply to procedures of recognition and enforcement of decisions regarding maintenance obligations in progress on 18 June 2011;

- Without prejudice to the aforementioned transitional regime, Regulation 4/2009 replaces the provisions of Regulation 44/2001 in matters of maintenance obligations;
- With regard to maintenance obligations, Regulation 4/2009 replaces Regulation 805/2004 (which creates the European Enforcement Order), except for the European Enforcement Orders relating to maintenance obligations issued in a Member State not bound by the 2007 Hague Protocol (in practical terms only the United Kingdom is covered by this exception as Denmark, which is also not bound by the 2007 Hague Protocol, is not bound by Regulation 805/2004).

The notion of Maintenance in Portuguese law

Maintenance obligations are regulated by Article 2003 et seq. of the Civil Code. Article 2003 of the Civil Code establishes that maintenance should be considered "everything needed for purposes of sustenance, housing and clothing". This legal formula is about food and comprises not only expenses relating to food, housing, clothing and footwear, but also the health and hygiene of the person in question.

In the case of maintenance due to a child under the age of 18, or to a child who has reached the age of majority or is emancipated, given the time normally required to complete his education, the provisions of Articles 1878 to 1880 and 1905 of the Civil Code must be taken into account. In accordance with said legal provisions maintenance includes expenses related with the instruction and education of a child.

While children are still minors (cf. Articles 1880 and 1905 of the Civil Code) parents have the duty to provide assistance, which means the duty to provide sustenance for the children and to shoulder expenses regarding safety, health and education (Article 1879 of the Civil Code). When the parent does not live with the child the fulfilment of this obligation takes the form of a maintenance obligation.

In case of divorce, Article 1905(2) of the Civil Code establishes that the child support determined for the child while still a minor shall remain in place until after he comes of age and reaches the age of 25, unless his education or his professional training are completed before that date, if it has been interrupted of his own free will or even, in any case, if the person having to provide maintenance can prove it is unreasonable.

In the case of maintenance due to ex-spouses, Article 2016-A(3) of the Civil Code establishes that the creditor has no right to demand a standard of living comparable to the one enjoyed during the marriage.

As a rule, the fulfilment of maintenance obligations is made by payment of a monthly sum in cash which is determined as the amount necessary to cover said expenses. However, maintenance obligations may be fulfilled in another manner, in particular in the case where an agreement is signed between debtor and creditor establishing a different way to fulfil the maintenance obligations, should there be a different legal provision or if there are sufficient reasons to justify an exceptional method of fulfilment (situations provided for in the last portion of Article 2005(1) of the Civil Code).

The maintenance obligation may be constituted by force of a deed (Article 2014 of the Civil Code) or result from the law, whenever there are a number of people with the obligation to provide maintenance pursuant to the law.

Pursuant to Article 2009 of the Civil Code, there are a number of people with the obligation to provide maintenance to others, when the latter are in a situation of need as they are incapable of supporting themselves (as a rule there is principle of self-sufficiency in force, [see Article 2004(2) of the Civil Code], whenever and to the extent that the former are in a position to provide that assistance [Article 2004(1) of the Civil Code].

The Civil Code (Article 2019) lists the categories of persons who are bound successively (in that the order in the listing corresponds to the binding order) by force of the law to provide maintenance. These are:

- ***i)*** The spouse or ex-spouse;
- ***ii)*** The children, by the order established for the legitimate succession (Article 2009(3) and Article 2133);
- ***iii)*** The parents by the order established for the legitimate succession (Article 2009(3) and Article 2133);
- ***iv)*** The siblings;
- ***v)*** Uncles and aunts, while the beneficiary of the child support is under age;
- ***vi)*** The stepfather and the stepmother, in respect of under-age stepchildren who at the time of the spouse's death were under the latter's responsibility.

Pursuant to Article 2009(3) of the Civil Code, "if any of the persons bound cannot provide maintenance or cannot fulfil his responsibility in full, the burden falls on the subsequent persons".

The autonomous concept of Maintenance in Regulation 4/2009

It follows from Recital (11) of the Regulation that the concept of maintenance must be interpreted autonomously by all national Courts of the Member States in order to ensure the uniform application of Union law. This means that the concept of maintenance for the purposes of the Regulation does not necessarily correspond to that enshrined in the national law, but must be adequate to pursue the objectives of the Regulation.

As an example, the CJEU ruled on the autonomous concept of maintenance in the following two cases.

In case **C-120/79** (paragraph 5) the CJEU found that the concept of maintenance includes the compensatory payments provided for in French law, which result from financial obligations between ex-spouses, fixed based on their respective needs and resources.

In case **C-220/95** (paragraph 22) the CJEU considered that in order to distinguish aspects of a decision relating to matrimonial property regimes from those relating to maintenance, the reasoning for that decision must be taken into account, in particular *[i]f this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance.*

1. In what cases can a Civil Registry in Portugal determine maintenance?

In Portugal, Civil Registries have jurisdiction to determine maintenance in the following cases:

- Registry officers have exclusive jurisdiction to determine maintenance between spouses in the context of divorce or separation proceedings by mutual consent, as per the procedure provided for in Articles 12 to 14 and Article 17 of Decree-Law No 272/2001 of 13 October;
- Registry officers have exclusive jurisdiction to determine maintenance for minors in the context of divorce or separation proceedings by mutual consent, as per the procedure provided for in Articles 12 to 14 and Article 17 of Decree-Law No 272/2001 of 13 October;
- Registry officers have exclusive jurisdiction to determine maintenance for adult or emancipated children in the case of agreement or lack of opposition of the requested party, as per the procedure provided for in Articles 5 to 10 and Article 17 of Decree-Law No 272/2001 of 13 October;
- Registry officers have exclusive jurisdiction to determine maintenance for minors, regardless of the marital status of

the parents, in the context of a lawsuit to regulate parental responsibilities brought by agreement before the Civil Registry, as per the procedure provided for in Articles 274-A to 274-C of the Civil Registry Code.

2. Are the rules of international jurisdiction provided for in Regulation 4/2009 applicable to Civil Registries in Portugal?

Yes, Civil Registries must apply the rules of international jurisdiction pursuant to Regulation 4/2009 in the cases indicated in the answer to the preceding question, in which they are competent to determine maintenance.

The rules of international jurisdiction regarding maintenance proceedings are set out in Chapter II of Regulation 4/2009. These rules bind the Courts and the Civil Registries when acting as courts, as is the case in the above-mentioned circumstances.

To find out when Civil Registries act as a Court and so are subject to the rules of international jurisdiction provided for in Regulation 4/2009, one must consider the definition of the term Court, as per Article 2(2) of this Regulation.

Under Article 2(2) of Regulation 4/2009, the term Court includes administrative authorities with jurisdiction to determine maintenance:

- Offering guarantees with regard to impartiality;
- Ensuring the right of all parties to be heard;
- Issuing decisions that have the same force and effects as a decision by a Court on the same matter;
- Issuing decisions that may be appealed or reviewed before a judicial authority.

These requirements appear to exist in all the above-referred cases, in which Civil Registries determine maintenance, as registry officers

offer guarantees with regard to impartiality in the exercise of their public authority, listen to the parties who participate in making the agreement, their decisions have the same force and effects as a Court decision and can be appealed.

As regards the possibility of appeal, in particular, Articles 14 and 17 of Decree-Law No 272/2001 of 13 October and Articles 274 to 274-B of the Civil Registry Code establish that in the case of maintenance determined for minors, the registry officers's decision may be appealed. This is also the case regarding the registry officers's decision to determine maintenance between spouses in proceedings of divorce by mutual consent. As regards maintenance for adult children, an appeal can be lodged against the registry officers's decision with the Court of first instance, which has jurisdiction on the matter within the scope of the legal circumscription on the Civil Registry – Article 10 of Decree-Law 272/2001 of 13 October.

Thus, when determining maintenance in the cases referred to above, Civil Registries act as Courts for they fulfil all the requirements under Article 2(2) of Regulation 4/2009 and must apply the rules of international jurisdiction established in Chapter II of this Regulation.

That also appears to be the opinion of the Advisory Board of IRN No CC 4/2012 SJC of 30.10.2012[15].

Furthermore, when acting as Courts Civil Registries must be included in the list of administrative authorities contained in Annex X to Regulation 4/2009.

In this regard, in the context of the Succession Regulation, in case number C-658/17 the CJEU decided that the communication made by Member States to the European Commission listing the administrative authorities equated to Courts, although presuming that function, is not constitutive and still requires verification of the requirements set forth in the Regulation for an administrative authority to be equated to a Court. Failure to make the communication does not prevent the decisions of the authorities fulfilling said requirements from using the recognition

[15] The opinions of the IRN Advisory Board can be consulted online at: https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

and enforcement set forth for judicial decisions, nor the inclusion of said decisions in the forms provided for recognition and enforcement of judicial decisions.

3. In that case, when do Civil Registries have international jurisdiction to determine the maintenance payments to children or spouses?

As mentioned above, in cases determining the maintenance of minors and adult children or spousal maintenance, Portuguese Civil Registries must apply the rules of international jurisdiction established in Chapter II of Regulation 4/2009.

Article 3 of Regulation 4/2009 sets forth alternative connecting factors. In particular, as regards Civil Registries, the following are relevant: the residence of the defendant; the residence of the creditor, or the jurisdiction of the Civil Registry according to the law of the forum, in proceedings to regulate parental responsibilities when determining the maintenance of minors is ancillary to those proceedings. This legal provision grants the party the possibility of bringing proceedings in the Member State where one of the connecting factors of his choice can be applied.

Article 4 of Regulation 4/2009 allows the parties to make a choice-of-court agreement provided certain restrictions as therein foreseen are observed. However, choice-of-court agreements are not permitted when Civil Registries are determining a maintenance obligation towards a child under the age of 18.

Article 5 of Regulation 4/2009 establishes a tacit prorogation of jurisdiction under the following terms: although in breach of the rules of jurisdiction under Regulation 4/2009, a Portuguese Civil Registry has international jurisdiction to determine maintenance if the requested party makes an appearance without contesting the international jurisdiction.

Under Articles 3, 4 and 5 of Regulation 4/2009, where no Court or

authority equated to a Court of a Member State has jurisdiction, and no Court of a State Party to the Lugano Convention which is not a Member State has jurisdiction, Article 6 of Regulation 4/2009 provides additionally for the possibility of a Portuguese Civil Registry to have international jurisdiction to determine maintenance, provided all the parties have Portuguese nationality.

In this context, the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done at Lugano on 30.10.2007 is published in the Official Journal of the European Union series L of 29.12.2010. Switzerland, a third State with a considerable number of Portuguese emigrants, and Portugal, are parties to this Convention, and therefore it applies to international jurisdiction and the recognition and enforcement of judgments on maintenance involving the two countries.

Lastly, Article 7 of Regulation 4/2009 provides for a *forum necessitatis*. Where no Court or administrative authority equated as a Court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6 of Regulation 4/2009, a Portuguese Civil Registry may, on an exceptional basis, have jurisdiction to determine maintenance if the following requirements are cumulatively and additionally verified: if proceedings cannot reasonably be brought or conducted or would be impossible in a third State; and if there is a connection with Portugal.

Example
A student, aged 20, of Russian nationality and habitual residence in Portugal, brings proceedings in a Portuguese Civil Registry pursuant to Articles 5 to 10 and Article 17 of Decree-Law No 272/2001 of 13 October, to obtain maintenance. The proceedings are brought against her father, resident in Germany. As the creditor's habitual residence is in Portugal, pursuant to Article 3(b) of Regulation 4/2009 the Portuguese Civil Registry has international jurisdiction. As in this case the debtor lives in another Member State, at a known address, and has not granted a power of attorney with special powers to an attorney for service of the documents in Portugal, in order to serve him in Germany, the registry officer must apply Regulation 1393/2007 (Service of Documents) and choose one of the forms therein. In the same example, let us now consider that her father refused to pay maintenance once his daughter came of age, but the proceedings regulating parental responsibilities and maintenance had been decided by a Portuguese Court (Portuguese Juvenile and Family Court) when the girl was still a minor. It is now her intention to continue to receive maintenance until she is 25 and still studying, which is admissible in the light of Article 1905(2) of the Civil Code and Article 989 of the Code of Civil Procedure. In this case, and pursuant to Article 5(2) of Decree-Law No 272/2001 of 13 October, and Article 123(1)(a) of the Law of the Judicial System Organisation [Law 62/2013 of 26 August, last amended (at the date on which this manual is being drafted) by Law 55/19 of 5 August] the Portuguese Juvenile and Family Court where the proceedings were held has internal jurisdiction to deal with this claim (enforcing the maintenance obligation) and not the Civil Registry – as provided for in Article 123(1)(e) of the Law of the Judicial System Organisation (Law 62/2013 of 26 August).

4. Can there be exceptions to the rule according to which the connecting factor is the habitual residence of the maintenance creditor who is a minor?

Yes, there are exceptions in which the residence of the maintenance creditor who is a minor may not be the connecting factor. Examples include the following:

If the determination of a child's maintenance is requested in the context of proceedings to regulate parental responsibilities brought by

agreement between the parents before a Portuguese Civil Registry, but Portugal is not the Member State of the child's habitual residence, the Civil Registry shall exercise international jurisdiction under the prorogation of jurisdiction pursuant to Article 12(3) of the Brussels IIa Regulation, whenever the determination of maintenance is a ancillary question which can be decided in the proceedings to regulate parental responsibilities, even though Portugal is not the country of the child's habitual residence.

If the determination of a child's maintenance is requested in the context of proceedings of divorce by mutual consent brought by both spouses before a Portuguese Civil Registry and Portugal is the country of habitual residence of one of the spouses, under the fourth subparagraph of Article 3(1)(a) of the Brussels IIa Regulation, although the child habitually resides with the other spouse in another Member State, the determination of maintenance being a ancillary question which can be decided in the divorce proceedings, the Civil Registry with international jurisdiction for the divorce proceedings also has jurisdiction to determine the child's maintenance, even if this is not the child's habitual residence.

However, when, having applied the rules of international jurisdiction of the Brussels IIa Regulation, divorce proceedings and proceedings to regulate parental responsibilities are pending before the authorities of two different Member States, the Court (*e.g.*, the Court or the Civil Registry) where the proceedings to regulate parental responsibilities are pending has jurisdiction to decide the ancillary question of determining the child's maintenance.

In that regard, CJEU jurisprudence in case C-184/14, in particular paragraphs 47 and 48 of that judgment, transcribed below, interpret Article 3(c) and (d) of the Maintenance Regulation:

47 – It follows, therefore, from the wording, the objectives pursued and the context of Article 3(c) and (d) of Regulation No 4/2009, that, where two courts are seised of proceedings, one involving proceedings concerning the separation or dissolution of the marital link between married parents of minor children and the other involving proceedings involving parental responsibility for those children, an application for

maintenance in respect those children cannot be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation, and to the proceedings concerning the status of a person, within the meaning of Article 3(c) of that regulation. They may be regarded as ancillary only to the proceedings in matters of parental responsibility.

48 – Consequently, the answer to the question asked is that Article 3(c) and (d) of Regulation No 4/2009 must be interpreted as meaning that, where a court of a Member State is seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving the same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation.

5. If the maintenance debtor, residing in another Member State, is served and does not enter an appearance, how should the registry officer proceed?

Where the requested party is served in another Member State, as the defendant in maintenance proceedings, and does not enter an appearance (i.e. does not present a defence or attach a power of attorney), before continuing with the proceedings the registry officer shall verify their admissibility under Article 11 of the Maintenance Regulation, on his own motion.

Where the requested party resides within the European Union, the registry officer shall verify:

- If the documents were served by one of the methods provided for in Article 19(1) of Regulation 1393/2007 (Service of Documents);

– If the requested party was given a time limit of 15 days to present a defence, as provided for in Article 7(2) of Decree-Law No 272/2001 of 13 October, to which was added the applicable extension (*e.g.*, Article 19 of Decree-Law No 272/2001 of 13 October and Article 245 of the Code of Civil Procedure).

The above formalities having been fulfilled, the registry officer considers that the facts indicated by the requesting party have been confessed and has legal grounds to determine the maintenance claimed.

In this case, and by force of the referral made in Article 11(2) of Regulation 4/2009 to Article 19 of Regulation 1393/2007, the requested party may appeal against the merits of the registry officer's decision after the expiry of time for appeal as provided for in Article 10(2) of Decree-Law No 272/2001 of 13 October and Article 638 of the Code of Civil Procedure.

An appeal by the defendant, following expiry of the time for appeal under Portuguese law, is admissible pursuant to Article 19(4) of Regulation 1393/2007, if:

– the defendant has filed an application for relief from the effects of the expiry of the time for appeal;
– the defendant has proved the cumulative existence of the two conditions provided for in Article 19(4)(a) and (b) of Regulation 1393/2007;
– the defendant makes that request within the time of one year from the date of the decision.

As provided for in the last paragraph of Article 19(4) of Regulation 1393/2007, each Member State will inform the European Commission of the reasonable time to submit that request, which can never be less than one year. Portugal has communicated that the time, counted from the date of the decision, to file an application for relief from the effects of

the expiry of the time for appeal, is one year. At the end of that one-year period, the request will not be allowed. This communication is published in the European e-Justice Portal on the European Judicial Atlas page on serving documents[16].

However, Article 19(4) of Regulation 1393/2007 does not apply to proceedings as to status (*e.g.*, divorce) or concerning the capacity of persons. It remains to be seen whether or not it is possible in divorce proceedings where a decision is made as to maintenance, to file an application for relief from the effects of the expiry of the time for appeal based on Article 19(4) of Regulation 1393/2007 when the appeal is limited to challenging the decision as regards maintenance.

If the requested party lives outside the European Union and must be served in a third State that is a party to HC65 (The 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters), the Civil Registry will proceed to serve the party under the terms of said Convention, to which Portugal is also a party.

In that case, in addition to Article 15 HC65 to which Article 11(3) of Regulation 4/2009 expressly refers, it is important to take into account the provisions of Articles 15 and 16 HC65. By and large, the wording of Articles 15 and 16 HC65 is identical to that of Article 19 of Regulation 1393/2007. In particular, Article 16 HC65, with identical wording to that of Article 19(4) of Regulation 1393/2007, is not applicable to judgments concerning the status or capacity of persons. Accordingly, in divorce proceedings where the defendant is served outside the European Union in a State that is a party to HC65, the doubt mentioned above remains, as to the possibility of filing an application for relief from the effects of the expiry of the time for appeal when this is limited to that portion of the decision that determines maintenance.

For purposes of applying the second paragraph of Article 16 HC65, Portugal has communicated that the time, counted from the date of the

[16] https://e-justice.europa.eu/content_serving_documents-373-pt-en.do?init=true&member=1

decision, to submit a request to file an application for relief from the effects of the expiry of the time for appeal is one year. This communication is published on the Hague Conference website[17].

6. Can the parties make choice of court agreements and with what limits?

Yes, Article 4(1)(3) and (4) of Regulation 4/2009 allows the parties to agree to a choice of Court, provided that:

- They choose the Courts or, in Portugal's case, the Civil Registries mentioned in Article 4(1)(a)(b) and (c) of the Maintenance Regulation;
- The conditions referred to in said subparagraphs are met at the time the choice-of-court agreement is concluded or at the time the court is seised;
- The choice-of-court does not relate to a maintenance obligation towards a child under the age of 18.

Under Article 4(2) of Regulation 4/2009, a choice-of-court agreement shall be in writing; any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing.

[17] https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=416&disp=resdn

7. Can the determination of a maintenance obligation arising out of family relationships made by a Civil Registry in Portugal be equated to a judicial decision, a court settlement or an authentic instrument?

In Portugal, Article 17(4) of Decree-Law No 272/2001 of 13 October equates the effects of the registry officer's decisions with judicial decisions on the same matter. Article 274-A(6) of the Civil Registry Code expressly mentions the ratification decisions by the registry officer, establishing that they have the same effects as judicial decisions on the same matter. In the context of European Union law, the definitions of decision, Court settlement and authentic instrument for purposes of applying this Regulation can be found in Article 2(1)(i)(ii) and (iii) of Regulation 4/2009.

In this context and depending on the cases, it is possible to include Civil Registry decisions on maintenance obligations in the definition of judicial decisions or court settlements, pursuant to Article 2 of Regulation 4/2009.

Thus:

- When the registry officer determines maintenance obligations between spouses and/or children under the age of 18, in the context of proceedings of divorce or separation by mutual consent, in accordance with the procedure provided for in Articles 12 to 14 and Article 17 of Decree-Law No 272/2001 of 13 October, this decision not only recognises the agreements established in substantive law but also enacts the divorce or separation. This decision is included preferentially in the definition pursuant to Article 2(1)(i) of Regulation 4/2009;
- When the registry officer determines maintenance obligations towards children over the age of 18, in the case of an agreement obtained during the conciliation attempt pursuant to Article 7(4) of Decree-Law No 272/2001 of 13 October, or of an agreement reached during the procedure, he is recognising a court settlement that is given preferential inclusion in the definition pursuant to Article 2(1)(ii) of Regulation 4/2009;

- When the registry officer determines maintenance obligations towards children over the age of 18, in the absence of opposition from the requested party but where he must admit the facts invoked, verify the fulfilment of legal requirements and only then declare the claim proven, according to the procedure provided for in Article 7(3) of Decree-Law No 272/2001 of 13 October, he is issuing a judicial decision that is included preferentially in the definition pursuant to Article 2(1)(i) of Regulation 4/2009;
- When the registry officer determines maintenance obligations towards children under the age of 18, whether or not the parents are married, in the context of a procedure on regulation of parental responsibilities brought before the Civil Registry, pursuant to Articles 274-A to 274-C of the Civil Registry Code, he is recognising a court settlement that is included preferentially in the definition pursuant to Article 2(1)(2) of Regulation 4/2009;

Pursuant to Article 48(1) of Regulation 4/2009, court settlements and authentic instruments which are enforceable in the Member State of origin shall be recognised in another Member State and be enforceable there in the same way as decisions, in accordance with Chapter IV of said Regulation.

8. What documents must the registry officer issue and supply to the party concerned to enable him to obtain recognition and/or enforcement of a maintenance obligation in another Member State?

The forms issued to obtain recognition and enforcement of decisions in another Member State differ depending on whether it is a judicial decision or a court settlement, on the one hand (the forms set out in Annexes I or II) or an authentic instrument, on the other (the forms set out in Annexes III or IV), as results from Articles 20, 28 and 48 of the Maintenance Regulation.

The forms the registry officer must issue and supply to the party concerned to enable him to obtain recognition and/or enforcement of a maintenance obligation in another Member State do not vary depending on whether it is a decision or a court settlement. They vary because the judicial decision or the court settlement are issued by a Court of a Member State that is a party to the 2007 Hague Protocol on the law applicable to maintenance obligations and will circulate in those Member States (form set out in Annex I) or of a Member State that is not a party to the 2007 Hague Protocol on the law applicable to maintenance obligations or will circulate in these Member States (form set out in Annex II).

As Portugal is a Member State that is a party to the 2007 Hague Protocol on the law applicable to maintenance obligations, when issuing decisions or approving settlements on maintenance, registry officers must issue the Form set out in Annex I, without prejudice to what will be mentioned bellow when the Member State of destiny is not a party to the 2007 Hague Protocol in which case they must issue form II.

In short, the party will have to obtain the documents listed in Article 20 of Regulation 4/2009, in particular:

- The extract from the decision or the settlement issued using the form set out in Annex I, issued by the registry officer;
- A copy of the decision or the settlement which satisfies the conditions necessary to establish authenticity, issued by the registry officer;
- A document showing the amount of any arrears and the date such amount was calculated. For this purpose it is possible to use the voluntary form drafted by the European Judicial Network, available in all official languages, which can be downloaded from the European e-Justice Portal on the page of the European Judicial Atlas on Maintenance Obligations[18];

[18] https://e-justice.europa.eu/content_maintenance_obligations-355-en.do

– Translation of the content of the form set out in Annex I into the official language accepted by the Member State where it is intended to obtain recognition or enforcement of the decision.

Recognition, enforceability and enforcement of decisions on maintenance obligations in another Member State as provided for in Chapter IV of Regulation 4/2009 is the same as that provided for in Chapter VI for court settlements and authentic instruments, as results from the referral made in Article 48 of this Regulation.

The main difference in the recognition, enforceability and enforcement can be found in all three categories and is linked to the fact that Regulation 4/2009 provides for:

– The abolition of *exequatur* (abolition of the declaration of enforceability) of decisions, settlements and authentic instruments given in Member States bound by the 2007 Hague Protocol on the law applicable to maintenance obligations and that will circulate in those Member States – Article 17 of Regulation 4/2009;
– The need for *exequatur* (in a preliminary proceeding of declaration of enforceability) of decisions, settlements and authentic instruments given in Member States not bound by the 2007 Hague Protocol on the law applicable to maintenance obligations or that will circulate in these Member-States– Article 26 of Regulation 4/2009.

Thus, Chapter IV has three sections on the forms of recognition, enforceability and enforcement applicable to decisions which, by referral to Article 48, also apply to court settlements and authentic instruments. Section 1 applies to the circulation of decisions given in the Member States that are parties to the 2007 Hague Protocol on the law applicable to maintenance obligations, which are all Member States except Denmark and the United Kingdom. Section 2 applies to decisions given in Denmark and the United Kingdom (the later while being a Member-State and during the trasnsitional period after its departure from the Union), as these are the

only two Member States that are not parties to the 2007 Hague Protocol on the law applicable to maintenance obligations. Section 3 contains common provisions applicable to all decisions, whether given in Member States that are parties to or Member States that are not parties to the 2007 Hague Protocol on the law applicable to maintenance obligations.

It is important to add that the European Union acceded to the 2007 Hague Protocol on the law applicable to maintenance obligations, which binds all Member States except Denmark and the United Kingdom. This declaration of the European Union can be consulted on the Hague Conference website[19].

Following the United Kingdom's departure from the European Union it will become a third State that is not bound by Regulation 4/2009 without prejudice of the transitional period. However, by force of the provisions of Article 2(1)(i), Chapters VII and VIII of Regulation 4/2009 are applicable to decisions on maintenance obligations given in a third State.

Lastly, as Civil Registries are equated to Courts whenever their activity complies with the requirements under Article 2(2) of Regulation 4/2009, **CJEU jurisprudence in case C-658/17** appears to indicate that the Civil Registries can and should issue the form set out in Annex I when requested by the parties concerned, regardless of whether Portuguese Civil Registries are listed or not in Annex X of the Regulation.

EJN Civil published guidance on the use of the Annexs on the European E-Justice Portal.

9. Can a Civil Registry in Portugal be asked to modify a decision determining maintenance obligations given in another Member State or in a third State?

Yes, it appears that both creditor and debtor can within certain limits make applications to a Civil Registry in Portugal for modification of a

[19] https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1065&disp=resdn

decision on maintenance obligations given in another Member State or in a third State, provided that the case comes under one of the situations encompassed in the rules of jurisdiction of the Civil Registries, pursuant to national rules and in accordance with Article 56(4) of Regulation 4/2009.

In certain cases the creditor may even make applications for a new decision, without requesting modification of the previous one.

These circumstances are provided for in Article 56 of Regulation 4/2009, as follows:

- The maintenance creditor may make applications for modification of a decision given in a State other than the requested Member State pursuant to Article 56(1)(f). In accordance with the provisions of Article 2(1)(1), this also covers modifications to decisions given in a third State;
- The maintenance creditor may make applications for a new decision to be given determining maintenance, even if he already has a decision given in another Member State, whenever the recognition and declaration of enforceability in Portugal of the decision given in another Member State is not possible – Article 56(1)(d);
- The maintenance debtor against whom there is a maintenance decision may make application for modification of a decision given in a State other than the requested Member State, under Article 56(2)(c). In accordance with the provisions of Article 2(1)(1), this also covers modifications to decisions given in a third State.

However, pursuant to Article 8(1) of Regulation 4/2009, the debtor cannot make applications for modification of a decision or for a new decision from the Civil Registry in Portugal in the following cases:

- Where a decision is given in a Member State or a Contracting Party State to the 2007 Hague Convention on the International

Recovery of Child Support and Other Forms of Family Maintenance; and

– As long as the creditor remains habitually resident in the State in which the decision to be modified or substituted was given.

This limit is aimed at protecting the creditor, and is applicable only to requests made by the debtor, not to requests by the creditor or to the situations provided for in Article 8(2) of Regulation 4/2009.

10. Is a decision, settlement or authentic instrument determining maintenance subject to registration in Portugal?

No. As already mentioned, Article 1(a) to (q) of the Civil Registry Code lists the facts for which registration is mandatory. To the extent that only facts considered by law to be registrable can be recorded in a register, as they arise from the Code itself or from another legal diploma, and there is no legal provision establishing its registration, a decision, settlement or authentic instrument determining maintenance obligations is not subject to registration in Portugal.

Both Article 1 mentioned above, and Article 69 of the Civil Registry Code, concerning annotations on birth entries, demand only registration of the decision or settlement regarding regulation and cessation of the exercise of parental responsibilities and its modification as regards guardianship of the minor, but establish nothing regarding the related issue of the maintenance due to the minor.

11. What is the law applicable to the determination of maintenance requested before the registry officer in Portugal?

Under Article 15 of Regulation 4/2009, the substantive law applicable to the determination of maintenance obligations shall be determined

in accordance with the 2007 Hague Protocol on the law applicable to maintenance obligations.

As a rule, the need to determine the applicable law only arises when the registry officer must examine the legal presuppositions – that is, when the registry officer determines maintenance for children over the age of 18 with no opposition from the requested party but when he must deem that the facts invoked have been confessed, examine fulfilment of all legal requirements and only then consider the validity of the application, following the procedure provided for in Article 7(3) of Decree-Law No 272/2001 of 13 October.

Where there is an agreement between the parties, it is not in principle necessary to determine the substantive law applicable as there is no decision as to merit, but only as to ratification of the agreement.

In this context, it is important to distinguish between jurisdiction and applicable law, and to consider the following:

- Regulation 4/2009, binding Portugal and all Member States of the European Union, including Denmark and the United Kingdom (whilst it is still part of the European Union) is applicable to determine the international jurisdiction, and obtain the recognition, enforceability and enforcement applicable to maintenance decisions given in the Member States of the European Union;
- The 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, to which Portugal is a party, should be applied by the Courts and by the Portuguese Civil Registries regarding the recognition, enforceability and enforcement applicable to maintenance decisions given in the contracting States party to the Convention that are not Member States of the European Union;
- The 2007 Hague Protocol on the law applicable to maintenance obligations, to which Portugal is a party as well all Member States of the European Union, (with the exception of Denmark

and the United Kingdom), is binding upon and should be applied by the Portuguese Courts and by Portuguese Civil Registries to determine the substantive law applicable to the determination of maintenance.

In general terms, and as regards Portuguese Courts and Portuguese Civil Registries whenever the applicable law has to be determined, certain regulations of the 2007 Hague Protocol on the law applicable to maintenance obligations should be considered:

- Under Article 1, this Protocol shall only determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents;
- Under Articles 2 to 6, as a rule the applicable law is that of the habitual residence of the creditor, even if in a State that is not party to this protocol (universal application); there are special provisions concerning the applicable law to protect certain creditors – *e.g.*, children under the age of 18, creditors under the age of 21, parents, spouses and ex-spouses – to be considered;
- Under Articles 7 and 8, and having observed the requirements as to form provided for in these provisions, the parties may enter into an agreement as to the applicable law; nevertheless, that agreement is not admissible if the creditor is under 18, or if he is a vulnerable adult;
- Under Article 12, renvoi is excluded.

12. Are there any limits to the content of the applicable law to be observed in determining maintenance?

Yes, there is the limit set pursuant to Article 14 of the 2007 Hague Protocol on the law applicable to maintenance obligations, according to which even if the applicable law provides otherwise, the needs of the creditor, the resources of the debtor as well as any compensation which the creditor was awarded in place of periodical maintenance payments shall be taken into account in determining the amount of maintenance.

Information on the national legislation of each Member State on calculation of maintenance can be consulted in the European e-Justice Portal, on the European Judicial Atlas page on civil and commercial matters – Information on national law (factsheets), Maintenance, information of each Member State[20].

13. Can the parties have access to legal aid when maintenance is determined in Civil Registries in Portugal?

Yes, the parties may have access to legal aid (legal protection) when the determination of maintenance takes place in proceedings under the jurisdiction of Civil Registries.

This possibility is governed by national legislation (in effect, Decree-Law No 322-A/2001 of 14 December, Decree-Law No 272/2001 of 13 October and Law No 34/2004 of 29 July), and also by the provisions of Chapter V of Regulation 4/2009.

In general terms, Portuguese legislation has the following rules for legal aid in proceedings under the jurisdiction of Civil Registries for determination of maintenance:

[20] https://e-justice.europa.eu/content_maintenance_claims-47-en.do?init=true

– The joint provisions of Article 20 of the Decree-Law No 272/2001 of 13 October and Article 10(3) and (4) of Regulation on Registry and Notarial Emoluments approved by Decree--Law No 322-A/2001 of 14 December, establish the persons who benefit from gratuitousness (*i.e.* exemption from paying emoluments due in the proceedings and exemption of the cost of certificates needed for preparation). These are persons presenting proof of insufficient financial means in the following proceedings before Civil Registries: maintenance obligations in the context of proceedings of divorce or separation by mutual consent; maintenance obligations for children over the age of 18; and maintenance obligations for children under the age of 18 in the context of proceedings to regulate parental responsibilities by agreement;
– Insufficient financial means can be proved in the following manners: (i) a document issued by the competent administrative authority; a declaration issued by a social welfare institution where the party concerned is resident;
– If the proceedings are requested by one or more persons, but only one of those parties is entitled to gratuitousness, the non-beneficiary party must pay half the emolument determined for the deed or proceedings. The table of emoluments is as provided for in Article 18 of Decree-Law No 322-A/2001 of 14 December;
– In cases where no emoluments are considered, no payment is due. Article 5(1) of the Regulation on Registry and Notarial Emoluments approved by Decree-Law No 322-A/2001 of 14 December expressly determines that extensive interpretation and analogous integration of the provisions of the table are impossible. Thus, as at the date on which this manual is being drafted there is no legal provision in the current Regulation on Registry and Notarial Emoluments (see Article 18) for

the proceedings to regulate parental responsibilities before a Registry, then it is not subject to emolument;

- Article 20 of Decree-Law No 272/2001 of 13 October establishes that legal aid applies to maintenance obligations in the context of divorce proceedings and of maintenance proceedings for the benefit of children over the age of 18, under the jurisdiction of the Civil Registries, in the form of appointment of a lawyer and payment of the respective compensation, and the appointment of a lawyer and the phased payment of the respective compensation, pursuant to Article 16(1)(b) and (e) of Law No 34/2004 of 29 July, concerning access to the law and to the Courts;
- In the proceedings dealt with here, under the jurisdiction of the Civil Registries, as provided for in Decree-Law No 272/2001 of 13 October, and Articles 271 and 274-A of the Civil Registry Code, the appointment of a lawyer is not mandatory, and the parties may write their own applications and present them to the Registry.

Chapter V of Regulation 4/2009 contains legal provisions regarding legal aid. Among them are the following, establishing broader protection than that afforded by Portuguese law, and which are directly applicable in Portugal:

- In proceedings with determination of maintenance obligations, as a rule no preliminary payment of emoluments is exigible, whether the proceedings under the jurisdiction of the Civil Registries regard minors, or adults, whatever the form of the proceedings, and whether or not the claim for maintenance is presented with another claim, in particular with a claim on the status of a person, as arises from Article 44(5) of Regulation 4/2009. In this regard, Article 3(c) and (d) and Article 56(1)(c) of Regulation 4/2009 provide that the claim for maintenance

can be joined with the divorce, the regulation of parental responsibilities or the establishment of parentage:

– In such proceedings, if the applicant does not benefit from legal aid or a cost-free process, emoluments must only be demanded at the end for purposes of respecting the provisions of Regulation 4/2009;
– The procedures pursuant to Article 56 of Regulation 4/2009 must be totally cost-free, in cases where there is the obligation of parents paying maintenance to a child under 21, by force of the direct application of Article 46 of the Maintenance Regulation. This will only not be the case where the exception provided for in paragraph 2 thereof applies;
– By force of Article 47(1) of Regulation 4/2009, the requirements established in Portuguese legislation to assess insufficient financial means are not applicable to legal aid enjoyed by children under the age of 21 as for them this benefit arises automatically from this Regulation. The national requirements to assess economic needs are only applicable in the remaining cases, but having regard to Articles 44 and 45 of Regulation 4/2009, to the extent that these contain a broader range of protection;
– For the party who benefits from legal aid the cost-free proceedings before the registry officer include, whenever necessary, all deeds provided for in Article 45 of Regulation 4/2009 (*e.g.*, translation of necessary documents).

The above rules of Regulation 4/2009 are directly applicable by the Civil Registries and by national Courts, and internally extend the scope of legal aid granted by Portuguese legislation. Its application does not require transposition to internal law and it prevails over ordinary Portuguese legislation.

According to CJEU jurisprudence in judgment C-283/16, which interprets certain provisions of Regulation 4/2009 compared with national legal provisions that are incompatible with that Regulation: the national judge who is responsible in the scope of his jurisdiction for applying the legal provisions of the European Union has the duty to guarantee the full effectiveness of such norms, removing if necessary, in the exercise of his authority, the application of any contradictory national legal provision, even if subsequent, without having to request or expect its revocation through legislation or any other constitutional procedure.

Civil Registries should take into account this jurisprudence when equated to Courts in application of the provisions of Regulation 4/2009.

Jurisprudence

Judgement of the Court of Justice of 6 March 1980
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Judgement of the Court of Justice of 27 February 1997
C-220/95, ECLI:EU:C:1997:91 135

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Useful Links	
European Judicial Atlas: service of documents	https://e-justice.europa.eu/content_serving_documents-373-pt-en.do?init=true&member=1
European Judicial Atlas: maintenance obligations	https://e-justice.europa.eu/content_maintenance_obligations-355-en.do?init=true
2007 Hague Protocol	https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1065&disp=resdn
European Justice Network in civil and commercial matters: information on national law	https://e-justice.europa.eu/content_maintenance_claims-47-en.do?init=true

Section III

Divorce and Parental Responsibility

Regulation 2201/2003

Regulation 1259/2010

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Introduction

Relevant instruments of civil law of the European Union in matters of divorce and parental responsibility

- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (in this Section, referred to simply as the "Regulation", "Regulation 2201/2003" or "Brussels IIa Regulation")[21].

- Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation[22].

[21] http://data.europa.eu/eli/reg/2003/2201/oj
[22] http://data.europa.eu/eli/reg/2010/1259/oj

Regulation (EC) No 2201/2003 of 27 November 2003	
concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIa)	
Informal designation	Brussels IIa Regulation
Material scope	Divorce, legal separation or marriage annulment and the attribution, exercise, delegation, restriction or termination of parental responsibility
Effective from:	1 August 2004 (Articles 67 to 70) 1 March 2005
Non-binding on these Member States	Denmark
Preceded by	Regulation (EC) No 1347/2000
Non-applicable internal norms	International jurisdiction: Articles 62 and 63 of the Code of Civil Procedure Recognition: Article 978 et seq. of the Code of Civil Procedure
Repealed from 1 August 2022 by	Regulation (EU) 2019/1111 Applicable from 1 August 2022 with the exeception of Articles 92, 93 and 103 which shall apply from 22 July 2019 (Articles 104 and 105)

Regulation (EU) No 1259/2010 of 20 December 2010	
implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation)	
Informal designation	Rome III Regulation
Material scope	In situations involving a conflict of laws in cases of divorce and legal separation
Effective from:	21 June 2011 (Article 17) 21 June 2012 without prejudice to the different initiation of application to Member States which participation takes place subsequently
Participating Member States	Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia - Decision 2010/405/EU Lithuania - Decision 2012/714/EU Greece - Decision 2014/39/EU Estonia - Decision (EU) No 2016/1366
Preceded by	-
Non-applicable internal norms	Applicable law: Articles 52 and 55 of the Civil Code

Divorce under the Portuguese Legal System

The legal system concerning divorce currently in force in Portugal results from the reform introduced by Law No 61/2008 of 31 October which accompanied the trends noted in this matter, in particular, those concerning simplification, expedition, elimination of penalties, elimination of spouses' statement of fault and facilitation of access to justice.

In the light of Article 1776 of the Portuguese Civil Code, the national legal system has two principal models of divorce: divorce by mutual consent and divorce without the consent of the spouse (Article 1773 of the

Civil Code). In divorce by mutual consent, it is assumed that the spouses are in agreement as to the dissolution of their marriage through divorce, filing a joint application for the purpose. This application is filed in the Civil Registry if it is documented by the spouses with the agreements provided for in Article 1775 of the Civil Code: an agreement as to parental responsibility when there are children under the age of 18 and this has not already been regulated; an agreement as to maintenance due to the spouse in need; an agreement as to the fate of the family home; and an agreement as to pets, if any. In this case, the procedure under Article 14 of Decree--Law No 272/2001 shall apply.

If the spouses do not reach agreement on all points set out in Article 1775 of the Civil Code, an application for divorce without mutual consent must be filed in the Court [Article 1773(2) of the Civil Code]. The Court will decide on the divorce in two additional situations: when divorce by mutual consent results from the conversion of an application initially filed by one spouse against the other [Article 1779(2) of the Civil Code], and when the Public Prosecutor rules that the agreement on parental responsibility submitted with the application filed in the Civil Registry does not safeguard the interests of the child and the applicants do not agree with the alterations made by the Public Prosecutor. In this case, if the spouses are still intent on divorce, the proceeding is referred to the Court (Article 14 of Decree-Law No 272/2001).

Thus, in addition to divorce by mutual consent, the law provides for divorce without the consent of a spouse. In this case, the divorce application is filed in the Court by one spouse against the other, and must be based on the irretrievable breakdown of the marriage by reason of one of the causes listed in Article 1781 of the Civil Code. These are (i) *de facto* separation for one consecutive year [Article 1782(b) of the Civil Code]; (ii) alteration of one spouse's mental faculties, lasting for over one year, whose gravity compromises the possibility of a life in common; (iii) the absence without news of one spouse for at least a year; (iv) any other facts that regardless of the fault of the spouses shows that the marriage has irretrievably broken down.

Once this has been demonstrated through one of the circumstances referred in Article 1781 of the Civil Code, the Court will decree a no-fault divorce.

Parental Responsibility in the Portuguese Legal System

Children are subject to parental responsibility until they reach adulthood (at the age of 18) or on being emancipated (*e.g.*, through marriage which can take place from the age of 16)) – Articles 1601(a) and 1877 of the Civil Code.

Parental responsibility is regulated in Title III, Chapter II, Section II of the Civil Code – Articles 1877 to 1920-C.

Under Article 1878 of the Civil Code, parental responsibility comprises the following:

1. *It is the responsibility of the parents, in their children's interest, to ensure their safety and health, provide for their upkeep, oversee their education, represent them even whilst still unborn, and administer their property.*
2. *Children must obey their parents; however, in accordance with their children's maturity, parents must take into account their opinion on important family matters and allow them autonomy to organise their own lives.*

As a rule, during the marriage both parents exercise parental responsibility (Article 1901 of the Civil Code).

In case of divorce or legal separation, parental responsibility with regard to particularly important acts is exercised jointly by both parents unless contrary to the child's best interests; parental responsibility with regard to the child's day-to-day actions is exercised by the parent with whom the child habitually resides or with whom the child is at the time in question (Article 1906 of the Civil Code).

The joint exercise of parental responsibility may not be in the child's best interests in cases of crimes of domestic abuse or other forms of abuse in a family context (Article 1906-A of the Civil Code).

When the child is entrusted to a third party, the powers and duties of the parents required for adequate performance of their functions becomes the responsibility of said third party.

1. Can Civil Registries in Portugal handle proceedings of divorce, legal separation or regulation of parental responsibility?

Proceedings of divorce and legal separation by mutual consent are special proceedings which, under Portuguese legislation, must be brought before Civil Registries, provided the spouses are in agreement as to the following: the list of community property; provision (or waiver) of maintenance to the spouse in need thereof; parental responsibility where there are minors, if this has not already been regulated; agreement as to the fate of the family home; and agreement as to pets, if any (Article 1773 and 1775 of the Civil Code and Article 271 et seq. of the Civil Registry Code).

Where there are children under the age of 18 on behalf of whom the agreement as to parental responsibility must be ratified, the proceedings are sent to the Public Prosecutor at the Court of first instance with jurisdiction within the scope of the Registry circuit, for a response within a period of 30 days. If the Public Prosecutor considers that the agreement does not safeguard the interests of the minor children, the applicants may alter the agreement accordingly or submit a new agreement, which, that being the case, would also be examined by the Public Prosecutor. Where the applicants do not agree with the alterations indicated and are still intent on divorce, the proceedings are referred under Articles 1776-A and 1778 of the Civil Code and Article 14 of Decree-Law No 272/2001 of 13 October to the Court of the district to which the Civil Registry belongs.

Decree-Law No 272/2001 of 13 October transferred the decision-making competence in voluntary jurisdiction proceedings from the Courts to the Public Prosecutor and to the Registries.

A proceeding for divorce by mutual consent may be filed in any Civil Registry. As far as Registries are concerned, there is no internal rule of territorial jurisdiction on this matter. Proceedings may be filed electronically [at https://justica.gov.pt/Registos/Civil/Divorcio].

Under the provisions of Articles 12 and 17 of Decree-Law No 272/2001 and Article 272(6) of the Civil Registry Code, the registry officer has exclusive jurisdiction over these proceedings, and his decision shall have the same effects, in particular regarding taxes, as Court judgments on the same matter.

Spouses may divide their community property within the same proceedings, in which case they should attach to the proceedings the agreement as to division. In terms of division of the matrimonial property, the Registry draws up a titling document, ensures settlement and payment of all taxes due and immediately records the conveyance of immovable and movable property or shareholdings subject to registration, which have been divided (cf. Articles 272-A to 272-C of the Civil Registry Code).

Community property may also be divided at a later date at the Civil Registry, provided the ex-spouses agree as to the division, regardless of whether or not the divorce or legal separation was by mutual consent. As opposed to a simplified division procedure in an inheritance, it should be noted as that the condition imposed by Article 210-A(3) of the Civil Registry Code, does not apply, a division due to divorce or legal separation is possible even if the matrimonial property consists of no immovable or movable assets or shareholdings subject to registration.

Parental responsibility may be regulated at a Civil Registry in two cases: in divorce or legal separation proceedings by mutual consent as described above; or autonomously in proceedings to regulate parental responsibility.

Regulating or altering a ratified agreement as to parental responsibility

is provided for pursuant to Articles 274-A, 274-B and 274-C of the Civil Registry Code, amended by Law No 5/2017 of 2 March.

Under such provisions parents wishing to regulate parental responsibility by mutual consent for their minor children, or modify an agreement already ratified (by this or another Registry or by the Court), should apply for this proceeding at any time before any Civil Registry.

This is also a special proceeding (included in Chapter II, Section III of the Civil Registry Code) under the exclusive jurisdiction of the registry officer, and his decision shall have the same effects as Court judgments on the same matter, pursuant to the provisions of Article 274-A(6) and Article 17(3) of Decree-Law No 272/2001.

In this regard, see the opinion of the Consultative Board of the Institute of Registries and Notary, IRN, I.P. No 18/CC/2018, delivered in proceedings 56/2017 SJC-CT[23].

2. When do Civil Registries in Portugal have international jurisdiction in proceedings of divorce or legal separation by mutual consent?

Articles 3 to 7 of the Brussels IIa Regulation state rules of international jurisdiction applicable to Courts. When handling divorce and/or legal separation proceedings, Portuguese Civil Registries are equated to Courts pursuant to Article 2(1) of this Regulation and are therefore subject to the rules of international jurisdiction set out in the Brussels IIa Regulation.

Article 3 of the Brussels IIa Regulation establishes alternative connecting factors for international jurisdiction. The following have jurisdiction to decide on issues relating to divorce and legal separation:

[23] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

a) the Courts of the Member State in whose territory the spouses are habitually resident; or were last habitually resident insofar as one of them still resides there; or the respondent is habitually resident; or in the event of a joint application, either of the spouses is habitually resident or the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made; or the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there; b) the Courts of the Member State of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

Without prejudice to the provisions of Article 3 of the Brussels IIa Regulation, the Court of the Member State that issued a decision on legal separation shall also have jurisdiction to convert the separation into divorce, if so provided by the law of that Member State (cf. Article 5 of the Brussels IIa Regulation). Jurisdiction for examining a counterclaim is determined by Article 4 of the Brussels IIa Regulation.

Pursuant to Article 6 of the Brussels IIa Regulation, either spouse who a) is habitually resident in the territory of a Member State; or b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States, may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Where no Court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 of the Brussels IIa Regulation, jurisdiction shall be determined, in each Member State, by the laws of that State (Article 7 of the Brussels IIa Regulation).

Example
Two persons of the same sex, of Italian nationality, both with habitual residence in Italy, got married in Portugal in December 2014. They now wish to file for divorce by mutual consent at a Registry in Portugal. Pursuant to Article 3(1)(a) and (b) of the Brussels IIa Regulation, the Italian Courts have jurisdiction. Under the provisions of Article 6 of the Brussels IIa Regulation, if any of the spouses has habitual residence in a Member State or is a national of a Member State he or she may be sued in the Courts of another Member State only in accordance with Articles 3, 4 and 5 of said Regulation. In this case, Italian Courts shall have jurisdiction. Article 7 (Residual jurisdiction) does not apply, as the criteria of Article 3 attributed jurisdiction exclusively to the Italian Courts, by force of Article 6 of the Brussels IIa Regulation.

3. Is it possible to make a choice of law regarding divorce, legal separation and marriage annulment?

The Brussels IIa Regulation does not establish the spouses' wishes as grounds for attributing international jurisdiction in case of divorce or legal separation. It does not appear, therefore, as if the Brussels IIa Regulation allows for choice of law in this regard.

4. Does a Civil Registry in Portugal have jurisdiction in a proceeding of divorce by mutual consent filed by two nationals of a third State who got married in said third State but on the date they filed the proceeding one of them has habitual residence in Portugal and the other in France?

Yes, by force of the alternative connecting factors provided for in Article 3 of the Brussels IIa Regulation. In accordance with this rule, the Courts of the Member State in whose territory either of the spouses is

habitually resident in the event of a joint application, have jurisdiction to decide on issues regarding divorce.

Indeed, this proceeding of divorce by mutual consent could be filed in Portugal. If the divorce proceedings were filed between the same parties in Courts of different Member States (in this case, Portugal and France), the Court where the proceeding was filed in second place would of its own motion suspend the instance until the jurisdiction of the Court where the proceeding was filed first was established (Article 19 of the Brussels IIa Regulation).

Example
A and B, both foreigners (she is Algerian and he is Moroccan), currently residing in Portugal, married in a third state and intend to divorce through a Portuguese Civil Registry. This Registry has jurisdiction under Article 3(1)(a) of the Brussels IIa Regulation. The applicable law to the divorce is defined by the Rome III Regulation and covers the grounds for divorce and its requirements. The applicants may designate Portuguese law as being applicable [Article 5(1)(a) of Regulation 1259/2010 - Rome III]. In this case, under Portuguese law, the applicants must attach the agreements established in Articles 1773 and 1775 of the Civil Code and 271 et eq. of the Civil Registry Code, together with a marriage certificate issued by the third State where the marriage took place. In the light of national law, applicable by force of the choice of law made by the applicants, the agreements in question establish the mutual consent of the spouses.

5. Does a marriage celebrated in and before the authorities of a third State have to be registered in the Civil Portuguese Registries for the spouses to file for divorce or legal separation by mutual consent in a Civil Registry in Portugal?

Not necessarily. Pursuant to Article 1(2) of the Civil Registry Code, it is only mandatory to record facts regarding foreigners in the Registry when these facts take place on Portuguese territory. A marriage certificate issued

in a third State could be accepted to document the divorce proceeding, in accordance with the legal system mentioned below.

Article 1(1)(d) of the Civil Registry Code is applicable to facts occurring in Portugal, and pursuant to said article, marriage is a fact subject to mandatory registration. Article 2 of the same Code states that facts subject to registration may only be invoked after being registered.

However, Article 1(2) of the Civil Registry Code, mentioned above, is applicable to marriages taking place abroad.

Thus, a marriage celebrated in another State is not subject to mandatory registration in Portugal but may be recorded in the Portuguese Registry in the light of substantiating documents, in accordance with the respective law and on presentation of proof that it does not run counter to the fundamental principles of international public policy of the Portuguese State [Article 6(1) of the Civil Registry Code].

To file a divorce proceeding in the Civil Registry the spouses have to submit proof of the marriage celebrated in a third State, in the form of a certificate issued by the authorities of said State [Article 211(1) of the Civil Registry Code]. As a rule, and pursuant to Article 49(8) of the Civil Registry Code, the marriage certificate should be presented with a translation.

As regards verification of the authenticity of the foreign document, Article 365(2) of the Portuguese Civil Code establishes that if the document is not certified under the terms of the procedural law, and there are grounds for doubting its authenticity or the authenticity of the certification, its legalisation may be required. Thus, as a rule, legalisation is not required. This will only be required if the registry officer has serious grounds for doubting the authenticity of the certificate or the authenticity of the certification.

If that is the case, pursuant to the provisions of Article 440(1) of the Code of Civil Procedure, without prejudice to what is provided for in European Regulations and other international instruments, authentic documents issued in and in accordance with the law of a third State are considered legalised provided the signature of the public official is

certified by a Portuguese diplomatic or consular agent in said State, and the signature of said agent is authenticated with the embossed consular seal.

Whenever a case comes under the respective scope of application, Registries must take into account the provisions of the following international instruments and European Regulations binding Portugal (cf. Article 8 of the Constitution of the Portuguese Republic):

- States that ratified or acceded to The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (HC61) do not have to legalise public documents bearing the apostille;
- Foreign documents complying with the formalities under Convention No 17 ICCS – International Commission on Civil Status (on the Exemption from Legalisation of Certain Records and Documents), done at Athens on 15 September 1977, are exempt from legalisation when issued by a State that ratified said Convention;
- Documents issued by a Member State are governed by Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1424/2012**.** This Regulation, effective from 16 February 2019, simplifies administrative formalities for the circulation of certain public documents and their certified copies where those public documents and the certified copies thereof are issued by a Member State authority for presentation in another Member State [Recital (3) of Regulation 2016/1191]. This Regulation also provides exemption from legalisation or similar formality, and creates a multilingual standard form for use as a translation aid, which has no probative effect *per se* but is attached to public documents.

6. What are the connecting factors used to determine the international jurisdiction of a Portuguese Civil Registry when handling an application for divorce or legal separation?

The connecting factors are the habitual residence of either spouse or the nationality of both spouses under Article 3 of the Brussels IIa Regulation.

7. Does the Portuguese Civil Registry have international jurisdiction to decide on an application for divorce by mutual consent filed by two French citizens who got married in France but habitually reside in Portugal?

Yes. There is no hierarchy in the connecting factors provided for in Article 3 of the Brussels IIa Regulation, only alternatives. Accordingly, this proceeding can be filed in a Portuguese Registry.

CJEU issued a judgment in respect of the connecting factors provided for in Article 3 of the Brussels IIa Regulation being alternatives – see **Case C-168/08.**

8. If on the date the application is filed at the Registry one of the spouses has returned to live in France, whilst the other continues living in Portugal, does the Portuguese Civil Registry still have jurisdiction to decide on a divorce by mutual consent?

Yes, under Article 3 of the Brussels IIa Regulation, provided the residence of one of the spouses is located on Portuguese territory, we are in the presence of a connecting factor according to which a Portuguese Registry has jurisdiction.

9. Can two citizens of the same sex, of Italian nationality, who got married in a third State and came to live in Portugal file for divorce by mutual consent in a Civil Registry in Portugal even though same-sex marriage was not at the time recognised in the Member State of their nationality?

To resolve this issue it is necessary to apply the rules of international jurisdiction provided for in the Brussels IIa Regulation and the rules for determining the applicable law provided for in the Rome III Regulation.

Therefore, as regards international jurisdiction under the provisions of the first point of Article 3(1)(a) of the Brussels IIa Regulation, the Portuguese Registry has international jurisdiction for this divorce proceeding as the applicants both live in Portugal.

As regards the law applicable to the merits of the application, in the absence of a choice of law agreement between the parties, Portuguese substantive law is applicable, based on the provisions of Article 8(a) of the Rome III Regulation. The Portuguese Civil Code allows for same-sex marriage and divorce (Articles 1577 and 1773 of the Civil Code).

However, in accordance with Portuguese substantive law, for the divorce to be granted, the marriage must be proved. Considering that the marriage in question is not recorded in a Portuguese registry and is not recognised in Italy, for the divorce proceeding to be granted the applicants must attach a marriage certificate issued in the third State where the marriage was celebrated, with the accompanying translation if necessary, under Article 49(8) of the Civil Registry Code, to document the proceeding of divorce by mutual consent.

If the registry officer has doubts as to the authenticity of this document he may ask the parties to attach an apostille or legalised certificate or, as the case may be, apply Convention No 17 ICCS or HC61, if the State that issued the certificate is bound by any of these instruments.

At the time this manual was drafted ICCS forms needed to be adapted to issue marriage certificates of same sex spouses.

10. How does the registry officer know which is the applicable law for divorce by mutual consent?

By applying the rules of the Rome III Regulation.

When a proceeding of divorce by mutual consent is brought in Portugal, the registry officer must verify if he has international jurisdiction in the light of the rules of jurisdiction provided for in the Brussels IIa Regulation. If he decides that he has international jurisdiction the registry officer shall determine which law is applicable to the divorce in the light of the Rome III Regulation.

Article 4 of the Rome III Regulation rules that the Regulation has universal application, that is, the law designated by this Regulation shall apply whether or not it is the law of a Member State. Renvoi is excluded under Article 11 of this Regulation.

Where a determined legal provision in the applicable foreign law violates public policy the registry officer may exclude solely the application of that legal provision, and maintain all the remaining foreign legal provisions.

If Portuguese law is the applicable law to the divorce by mutual consent under the rules of the Rome III Regulation, the agreements provided for in Article 1775 of the Civil Code are required. However, it appears that such agreements are not required if the applicable law is another law and provides for different requirements. In that case, the requirements of the applicable law must be fulfilled to document the proceeding of divorce by mutual consent.

11. May the spouses agree to designate the applicable law? When?

Yes, Article 5 of the Rome III Regulation states that the spouses may agree to designate the law applicable to divorce and legal separation

within certain limits, that is, the choice must comply with one of the laws indicated in Article 5(1) subparagraphs (a) to (d).

This agreement as to the choice of applicable law should not be confused with a choice-of-court agreement. Under a choice-of-court agreement the parties determine the jurisdiction (in matters of divorce and legal separation the Brussels IIa Regulation does not allow the parties to enter into choice-of-court agreement). In an agreement to designate the law, the parties designate the substantive law applicable to the merits of the cause, pursuant to the Rome III Regulation.

As to when the agreement on the applicable law can be made, Article 5(2) and (3) of the Rome III Regulation provides that this can be made or modified:

- Before the divorce;
- Until the time that the application for divorce enters the Civil Registry.

Furthermore, the spouses may designate the applicable law even during the divorce proceedings if the law of the forum (Portuguese law, in this case) provides for that possibility. As the applicable Portuguese procedural laws do not provide for this possibility, it appears that the applicable law of the divorce must be designated by the spouses up to the moment when the application for divorce enters the Civil Registry, and it appears that it can be made within the application itself.

Member States' communications concerning this possibility in national legislation are provided for in Article 17 of the Rome III Regulation and may be consulted at the European e-Justice Portal on the page of the European Judicial Atlas on civil matters, on the law applicable to divorce and legal separation[24].

[24] https://e-justice.europa.eu/content_law_applicable_to_divorce_and_legal_separation-356-pt-en.do?member=1

At the date on which this manual is being drafted Portugal has declared that it has no communication to make in this regard.

12. In the light of which law should the registry officer examine the formal and material validity of the agreement to designate the applicable law?

Formal validity to designate the applicable law is examined in the light of Article 7 of the Rome III Regulation.

Material validity, regarding the existence of an agreement, is examined in the light of the law that would be applicable pursuant to the rules of the Rome III Regulation if the agreement were valid [Article 6(1) of the Rome III Regulation].

Additionally, in the case provided for in Article 6(2) of the Rome III Regulation, the spouse who wishes to demonstrate that he or she has not given their consent may invoke the law of the country of habitual residence on the date the proceeding is brought, if the other circumstances provided for in that provision are in place.

13. If the applicable law does not provide for divorce, which law should the registry officer apply?

If, pursuant to the rules of Articles 5 to 8 of the Rome III Regulation, the registry officer concludes that the law applicable is that of a country that:

- does not provide for divorce; or
- does not grant one of the spouses equal access to the divorce or separation by reason of gender

the registry officer must apply the law of the forum (in this case Portuguese substantive law).

14. Can the certificate of a marriage celebrated in France between two French citizens be accepted to document the application for divorce by mutual consent brought before a Civil Registry in Portugal?

Yes, to bring this proceeding it is merely necessary to attach proof of the fact by means of a certificate issued by the authorities of the Member State [Article 211(1) of the Civil Registry Code].

As to requirements regarding authenticity and translation, see the answer to question 5 above.

15. And in the case of the dual Portuguese and French nationality of the spouses?

The answer in this case is different, because in the case of a Portuguese citizen, the marriage must be registered in Portugal and there must be a national marriage entry regarding this Portuguese citizen.

So, if one of the spouses also has Portuguese nationality, the marriage is subject to mandatory registration under the provisions of Article 1(1)(d) of the Civil Registry Code (cf. also Article 27 of the Nationality Law: "If someone has two or more nationalities and one of them is Portuguese, only the Portuguese nationality will be relevant in the light of Portuguese law").

For the above-referred purposes, the exact moment when Portuguese nationality was acquired appears to be irrelevant, that is, even if it took place before or after the fact subject to mandatory registration [cf.

Articles 1651(1)(c) of the Civil Code and Article 50(3) of the Portuguese Nationality Regulation[25]].

Article 1669 of the Civil Code states that a marriage whose registration is mandatory cannot be invoked by the spouses or their heirs or a third party, until the respective entry has been recorded in the registry, without prejudice to the rights of a third party that are compatible with the rights and duties of a personal nature of the spouses and the children. Consequently, the divorce proceeding would have to be preceded by the transcription of the marriage, by means of an entry, before the Portuguese authorities – Articles 2, 6(2), 10, 11 and 12 of the Civil Registry Code.

The process of transcribing a Catholic marriage celebrated in a third State between two Portuguese citizens or between a Portuguese and a foreign national, is regulated in Article 178 et seq. of Subsection II of the Civil Registry Code.

A civil marriage celebrated in a third State between two Portuguese citizens or between a Portuguese and a foreign national, is registered by recording, under Article 180 et seq. of the Civil Registry Code, if the marriage was celebrated before a Portuguese diplomatic or consular agent and, in other cases, by transcribing the document substantiating the marriage, issued pursuant to the law of the place of celebration – cf. Article 184 et seq. of Subsection IV of the Civil Registry Code. The transcript may be requested at any time by any interested party and shall be provided by the competent diplomatic or consular agent as soon as he or she becomes aware of the celebration of the marriage.

If the marriage is not preceded by the respective process (*e.g.* the preliminary marriage process provided for in Articles 134 to 145 of the Civil Registry Code), the transcription is subordinated to prior organisation of said process, to which are applicable Article 134 et seq. of the Civil

[25] Decree-Law No 237-A/2006 of 14 December.

Registry Code with the exception of the provisions of Article 137(1)(a) and (4)(b).

The civil marriage of two Portuguese citizens in a third State, whose entry has not been made by the competent diplomatic or consular agent, may be transcribed directly at any Civil Registry pursuant to Article 187 of the Civil Registry Code.

Legal and technical opinion No 20 DGATJSR/2015, given in Proceeding CC 23/2014 STJSR (in 20/DGATJSR/2015) questioned the possibility of a transcription being made of the second marriage (which ended in divorce) of a citizen who acquired Portuguese nationality, through naturalisation under Article 6(1) of the Nationality Act[26], where the transcription of the first marriage (which also ended in divorce, decreed before the local jurisdiction in a third State) had not been requested. The conclusion was that it was mandatory to record in Portuguese registries all acts concerning civil status issued abroad, and that it was not enough to transcribe the last marriage and the review and confirmation of the last divorce sentence to prove the divorced status. On the contrary, the two marriages would have to be transcribed and the two divorce sentences reviewed, before organising the preliminary publication process of said citizen with dual nationality, even if such facts occurred abroad, prior to his/her naturalisation.

[26] Law No 37/81 of 3 October.

Example
A, Portuguese, divorced, and B, French, divorced, wish to get married in Portugal. A's birth certificate entry contains no annotation of the previous marriage or of the divorce that dissolved it. B's birth certificate entry also contains nothing as to alteration of her civil status. As the marriage and subsequent divorce are not mentioned in the birth entry of the Portuguese national that fact will prevent the favourable decision regarding the marriage proceeding which should not as a rule begin until such facts subject to registration have been recorded in the respective entry. If the proceeding has already started, it should remain pending until the missing annotations have been recorded. As for the birth certificate of the French woman B, with similar omissions, it must first be ascertained if said omissions should be mandatorily registered under French law. The fact that B's certificate contains a registered partnership is not a legal impediment to the celebration of the marriage.

Example
A, Portuguese, married to B, a Frenchman, bought land in Portugal for building. At the time, as her marriage was not transcribed, she stated that she was single. Some time later, she went to the Registry with a certificate of her marriage to B, in international form 724, issued by the French Registry. She then requested rectification of the property registration made, declaring that she had married under the French matrimonial regime of community property (Articles 1400 – 1491 of the French Civil Code). The Registry should refuse said registration as the marriage is subject to mandatory registration under Article 1(1)(d) of the Civil Registry Code and facts subject to mandatory registration may only be invoked after registration (Article 2 of the same Code). So, A will only be able to rectify the property registration in question based on the birth certificate recorded at the Portuguese Registry (which should contain the annotation of the marriage transcribed into national law). In addition, the marriage entry on which said annotation is based should also be consulted. In the meantime, A had conveyed said property to C, who was unaware of the existence of the marriage and took out a bank loan, with the property as guarantee. B's non-intervention in the sale (in particular its repercussions as to the validity of the transaction with a third party acting in good faith) should be examined in the light of the law applicable to the matrimonial property regime of A and B.

16. What must a Portuguese national, whose divorce was decreed in France, do to annotate his divorce on his birth certificate entry in Portugal?

Pursuant to Article 21(2) of the Brussels IIa Regulation, the registry officer shall automatically recognise the French sentence decreeing the divorce for purposes of annotating said divorce on the birth certificate entry as provided for in Article 69(1)(a) of the Civil Registry Code.

The party concerned must document the application with the following documents pursuant to Article 37 of the Brussels IIa Regulation:

- The standard form set out in Annex I as provided for in Article 39 of the Brussels IIa Regulation, issued by the French Court;
- A certified copy of the French decision;
- In addition, and only in the case of a judgment given in default, a certified copy of the document which establishes that the defaulting party was served with the document instituting the divorce proceedings or with an equivalent document evidencing that the respondent accepted the judgment unequivocally.

If the registry officer so requires, a translation of such documents shall be furnished – Article 38(2) of the Brussels IIa Regulation.

If the documents are not produced, the provisions of Article 38(1) of the Brussels IIa Regulation shall apply, according to which the registry officer may:

- specify a period within which they must be produced; or
- accept equivalent documents; or
- if he considers that he has sufficient information for the registration, dispense with their production.

17. If in addition to decreeing the divorce a French judgment also rules on the division of the couple's property, and sentences one spouse to pay the other compensation and maintenance, which recognition procedure should the registry officer apply to accept the decision?

In this case, Article 36 of the Brussels IIa Regulation provides for partial recognition of the judgment, but only concerning the part that decrees the divorce.

The part of the judgment concerning maintenance obligations is subject to recognition under Regulation 4/2009 (Maintenance Obligations).

The part of the judgment concerning the division of the couple's property is subject to recognition under Regulation 2016/1103 (Matrimonial Property Regimes).

It now remains to be seen what recognition is applicable to that part of the judgment ruling that one part shall pay compensation to the other party (*e.g.* for moral damages). Where it is a case of extra-contractual responsibility for an unlawful fact which does not appear to come under the exclusion provided for in Article 1(2)(a) and (e) of Regulation 1215/2012 (Brussels IIa), that part of the judgment is subject to recognition and enforcement as provided for in the Brussels IIa Regulation.

In practical terms, therefore, this could mean that the applicant must request partial recognition of various parts of one single judgment given in another Member State. For that purpose, he should present each of the forms attached to the above-mentioned Regulations, to the extent that each one may be needed to certify different requirements, depending on the recognition scheme applicable.

18. Can the registry officer refuse to register a divorce judgement based on an earlier judgment?

Yes, the registry officer not only can but should refuse to register a

divorce judgement in the cases mentioned in Article 22(c) and (d) of the Brussels IIa Regulation:

- if it is irreconcilable with a judgment given in Portugal (whether prior to or after the date of the judgment in which recognition is sought); or
- if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State, provided that the earlier judgment fulfils the conditions necessary for its recognition in Portugal.

19. As a rule, when does a Civil Registry in Portugal have international jurisdiction to handle a proceeding to regulate parental responsibility brought by agreement between the child's parents?

When the child is habitually resident in Portugal – Article 8(1) of the Brussels IIa Regulation. However, the concept of habitual residence is not defined in this article.

The CJEU in Judgment C-523/07 interpreted the concept of the child's habitual residence as corresponding to *the place which reflects some degree of integration by the child in a social and family environment*. To that end, the CJEU considers that the following factors should be taken into account:

- The duration of the child's stay on the territory of a Member State;
- The regularity of that stay;
- The conditions of the child's stay;
- The reasons for that stay;

– The reasons for the family's move to that Member State;
– The child's nationality;
– The place and conditions of attendance at school;
– The child's linguistic knowledge;
– The family and social relationships of the child in that State.

Registries must take this jurisprudence into consideration to ascertain their international jurisdiction based on the connecting factor of the habitual residence of the child in matters concerning regulation of parental responsibility over which they have jurisdiction.

20. May the parents of a child bring a proceeding to regulate parental responsibility in a Civil Registry in Portugal even though the child does not habitually reside in Portugal?

Yes, in the two cases of prorogation of jurisdiction provided for in Article 12(1) and (3) of the Brussels IIa Regulation respectively: paragraph (1) is applicable when the parents are married and have applied for divorce, legal separation or annulment of the marriage; paragraph (3) applies whether or not the parents are married. This was the interpretation of **the CJEU in the Judgment given in C-656/13** concerning these two cases of prorogation of jurisdiction as provided for in Article 12 of the Brussels IIa Regulation.

The prorogation of jurisdiction pursuant to Article 12(1) of the Brussels IIa Regulation can only occur when:

– the Portuguese Civil Registry has international jurisdiction to decide on an application for divorce or legal separation by mutual consent pursuant to Article 3 of the same Regulation (in this case, the matter of parental responsibility ancillary to the divorce can be decided by the same Registry);

- at least one of the spouses has parental responsibility in relation to the child;
- the jurisdiction of the Registry has been expressly and unequivocally accepted by both parties at the time the application is made;
- prorogation of jurisdiction is in the best interests of the child.

The prorogation of jurisdiction shall cease in cases pursuant to Article 12(2) of the Brussels IIa Regulation.

The prorogation of jurisdiction pursuant to Article 12(3) of the Brussels IIa Regulation can be applied without it being necessary for the matter of parental responsibility to be ancillary to any divorce or separation proceedings pending before the Civil Registry. However, the following requirements must be met for prorogation of jurisdiction to occur:

- the child has a substantial connection with Portugal;
- the jurisdiction of the Registry has been expressly and unequivocally accepted by both parties at the time the application is made;
- prorogation of jurisdiction is in the best interests of the child.

21. Does a Portuguese Civil Registry have international jurisdiction in matters concerning parental responsibility where a child's habitual residence cannot be established or where the child is a refugee?

Yes, in such cases, Article 13 of the Brussels IIa Regulation establishes international jurisdiction based on the presence of the child on national territory.

Where the child is in Portugal and the requirements under national law are in place to bring the proceeding of parental responsibility before the Civil Registry, the latter has international jurisdiction.

22. In proceedings of divorce and parental responsibility for which they have jurisdiction, which documents should Civil Registries provide to the parties to enable them to obtain recognition or enforcement of the respective judgments in another Member State?

In proceedings of divorce and parental responsibility for which they have jurisdiction, Portuguese Registries shall issue at the request of the parties under Article 39 of the Brussels IIa Regulation, in addition to a certified copy of the decision:

- The certificate set out in Annex I for judgments in matrimonial matters;
- The certificate set out in Annex II on judgments on parental responsibility.

Ex officio, under Article 41(3) of the Brussels IIa Regulation, they shall issue:

- The certificate set out in Annex III for decisions on rights of access when the judgment becomes enforceable in Portugal, if at the time the agreement as to parental responsibility is ratified, the rights of access involve a cross-border situation.

The certificates are issued in Portuguese, by means of the forms annexed to the Brussels IIa Regulation.

The parties must ensure the necessary translations into an official language accepted by the Member State of destination. To do this the parties may use the respective form available in all official languages and merely ensure translation of the text required into the language accepted by the Member State of destination.

The forms in all official languages of the EU attached to the Brussels IIa Regulation may be downloaded from the European e-Justice Portal on the European Judicial Atlas page, on matrimonial matters and matters of parental responsibility[27].

Lastly, the same proceeding can comprise applications for divorce, parental responsibility, maintenance obligations and division of the couple's property.

In this case, the same decision of the registry officer will enjoy different forms of the recognition and enforcement depending on the applicable Regulation.

Accordingly, based on the decision given in the same proceeding, the registry officer may have to issue:

- the forms set out in Annexes I, II and III provided for in the Brussels IIa Regulation for the part of the decision concerning the divorce or legal separation, parental responsibility or rights of access;
- the form set out in Annex I provided for in Regulation 4/2009 (Maintenance Obligations) for the part of the decision or Court settlement concerning maintenance;
- the forms set out in Annexes I or III provided for in Regulation 2016/1103 (Matrimonial Property Regimes).

When in doubt, a national Court may bring before the CJEU the question of the need to issue various forms for partial enforcement of one and the same decision under the various regulations establishing different types of recognition and enforcement.

[27] https://e-justice.europa.eu/dynform_intro_form_action.do?idTaxonomy=271&plang=en&init=true&refresh=1

23. Can a Portuguese Civil Registry annotate on the birth entry of a child of Portuguese nationality, and on presentation of which documents, a decision given in another Member State:

– ***Determining rights of access?***
– ***Under Article 11(8) of the Brussels IIa Regulation determining the return of the child to the country of last habitual residence where this had previously been denied by a Portuguese Court?***

No, because such facts are not subject to registration under the Portuguese Civil Registry Code.

These decisions may be relevant in terms of acceptance or refusal to issue a passport to the Portuguese child. For that purpose, it should be emphasised that under Article 40(a) and (b) and Articles 41 and 42 of the Brussels IIa Regulation, these decisions are the only ones that do not require *exequatur,* in other words, the parties do not need a process of recognition or a declaration of enforceability as provided for in Articles 21 to 39 of the Brussels IIa Regulation to obtain recognition and enforcement in another Member State.

This is the interpretation given by the CJEU judgment in C-92/12 PPU, which reaffirms that these are the only two exceptions to the rule requiring a declaration of enforceability of a judgment on parental responsibility when it has to be enforced in another Member State.

A decision on rights of access given in another Member State which may be enforced in that Member State must be recognised and enforced in Portugal without having to be declared as being recognised and enforceable.

It is also not possible in Portugal to file an opposition to said recognition and enforcement if it has been certified by the Member State of origin by means of the form set out in Annex III of the Brussels IIa Regulation.

The recognition of this decision by the national authorities is mandatory on presentation of the following documents listed in Article 45 of the Brussels IIa Regulation:

- The certificate of Annex III referred to in Article 41(2) of the Brussels IIa Regulation, issued by the Court of origin;
- A translation into Portuguese of point 12 of Annex III, certified by a person qualified for the purpose in one of the Member States.

A judgment ordering the return of a child given by the Court of the Member State of the child's habitual residence (Holland, for example), with jurisdiction for the merit of the cause, after the Court of the Member State to which the child was taken (Portugal, for example) decided against the return in proceedings under the Hague Convention of 1980 on the Civil Aspects of Internacional Child Abduction:

- shall not require a declaration of recognition and enforceability to be recognised and enforceable in Portugal; and
- shall not permit its recognition and enforceability being opposed if the judgment has been certified in the Member State of origin by means of the form set out in Annex IV of the Brussels IIa Regulation.

The recognition of this decision by the national authorities is mandatory on presentation of the following documents listed in Article 45 of the Brussels IIa Regulation:

- The certificate of Annex IV referred to in Article 42(1) and (2) of the Brussels IIa Regulation, issued by the Court of origin;
- Accompanied by a translation into Portuguese of point 14 of Annex IV, certified by a person qualified for the purpose in one of the Member States.

– ***Regulating the parental responsibility towards the child?***
– ***Limiting the exercise of parental responsibility (e.g. the child placed in institutional care, into the care of the extended family or with a foster family)?***
– ***Inhibiting the exercise of parental responsibility?***
– ***Appointing a guardian for the child?***

Yes, in these cases the registry officer may not only recognise the judgment given in another Member State pursuant to the provisions of Article 21(1) of the Brussels IIa Regulation but also accept it for annotation in the child's birth certificate entry as provided for in Article 69(1)(e), (f) and (g) of the Civil Registry Code, as the case may be.

The judgment may be recognised for registration purposes on presentation by the party of the following documents listed in Article 37 of the Brussels IIa Regulation:

– The form set out in Annex II provided for in Article 39 of the Brussels IIa Regulation, issued by the Court of origin;
– A certified copy of the foreign judgment;
– Additionally, and only if the judgment was given in default, a certified copy of a document establishing that the defaulting party was served with the document instituting the proceedings of parental responsibility or with an equivalent document that indicates the defaulting party unequivocally accepted the judgment;
– a translation of such documents shall be furnished if the registry officer so requires – Article 38(2) of the Brussels IIa Regulation.

If the documents are not produced, the provisions of Article 38(1) of the Brussels IIa Regulation shall apply, according to which the registry officer may:

- specify a time for their production; or
- accept equivalent documents; or
- if it considers that it has sufficient information for the registration, dispense with their production.

The registry officer may not automatically recognise any of these decisions on production of the documents referred to above if he considers that there are grounds for refusing recognition under Article 23 of the Brussels IIa Regulation, which he must state in support of his refusal to carry out the act of registration requested of him.

In such a case, the party may introduce an appeal of the registry oficcer's refusal to perform the act of registration (Articles 286 to 293 of the Civil Registration Code). Alternatively the party may initiate proceedings in Portugal for recognition of the decision under Article 21(3) of the Brussels IIa Regulation before the competent national Court. Portugal has informed the European Commission that Family and Juvenile Courts, or, where they do not exist, Local Civil Courts, or, where they do not exist, Local Courts of Generic Jurisdiction, are competent for the procedure of recognition or declaration of enforceability. This information, as well as the information provided by the other Member States may be consulted on the European e-Justice Portal on the European Judicial Atlas page dealing with matrimonial matters and matters of parental responsibility[28].

[28] https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-pt-en.do?init=true&member=1

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Judgment of the Court of Justice of the European Union of 12 November 2014
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Judgment of the Court of Justice of the European Union of 26 April 2012
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Useful Links	
European Judicial Atlas: matrimonial matters and matters of parental responsibility	https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-en.do
European Judicial Atlas: law applicable to divorce and legal separation	https://e-justice.europa.eu/content_law_applicable_to_divorce_and_legal_separation-356-en.do

Section IV

Matrimonial Property Regimes and the Property Consequences on Registered Partnerships

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Introduction

Regulation 2016/1103 (hereinafter also called the Regulation on Matrimonial Property Regimes) on the matrimonial property regimes of international marriages, was adopted under a process of enhanced cooperation by 18 EU countries: Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, Czech Republic, Netherlands, Austria, Bulgaria, Finland and Cyprus.

These Member States simultaneously adopted Regulation 2016/1104 (hereinafter also called the Registered Partnership Regulation) on the property consequences of registered partnerships.

Other Member States of the European Union are free to accede to Regulation 2016/1103 at any time but to do so, they must also accede to Regulation 2016/1104.

The Commission's Implementing Regulation 2018/1935 establishes the forms referred to in Regulation 2016/1103.

The Commission's Implementing Regulation 2018/1990 establishes the forms referred to in Regulation 2016/1104.

Enhanced cooperation in the area of matrimonial property regimes	
Participating Member States	Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Germany, Greece, Italy, Malta, Luxembourg, Netherlands, Portugal, Czech Republic, Slovenia, Spain, Sweden

Council Regulation (EU) 2016/1103 of 24 June 2016	
implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes	
Informal Designation	Regulation on matrimonial property regimes
Material scope	Matrimonial property regimes (excluding in particular: the legal capacity of the spouses, the existence, validity or recognition of a marriage; maintenance obligations; succession on the death of the spouse)
Effective from	29 January 2019, except as regards Articles 63 and 64, which are effective from 29 April 2018, and Articles 65, 66 and 67, effective from 29 July 2016
Non-binding on these Member States	Denmark, Finland, Hungary, Ireland, Latvia, Lithuania, Poland, Romania, Slovakia, United Kingdom
Preceded by	-
Non-applicable internal norms	International jurisdiction: Articles 62 and 63 of the Code of Civil Procedure Applicable law: Articles 52, 53, 54 of the Civil Code Recognition: Article 978 et seq. of the Code of Civil Procedure

Council Regulation (EU) 2016/1104 of 24 June 2016	
implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships	
Informal Designation	Registered Partnership Regulation
Material scope	Property consequences on registered partnerships (excluding, in particular, the legal capacity of the partners, the existence, validity or recognition of the registered partnership; maintenance obligations; succession on death of the partner)
Effective from	29 January 2019, except as regards Articles 63 and 64, which are effective from 29 April 2018, and Articles 65, 66 and 67, effective from 29 July 2016
Non-binding on these Member States	Denmark, Finland, Hungary, Ireland, Latvia, Lithuania, Poland, Romania, Slovakia, United Kingdom
Preceded by	-
Non-applicable internal norms	International jurisdiction: Articles 62 and 63 of the Code of Civil Procedure Recognition: Article 978 et seq. of the Code of Civil Procedure

1. What matrimonial property regimes are provided for under Portuguese national law?

Portuguese law provides for three standard matrimonial property regimes: acquired community of property; community of property; and separation of property.

The acquired community of property regime is regulated in Article 1721 et seq. of the Civil Code and is the default matrimonial property

regime, applicable in the absence of a prenuptial agreement (with the exceptions provided for under Article 1720 of the Civil Code) or in the case of expiry, invalidity or ineffectiveness of the agreement. The regime established by law is based on the idea that assets resulting from the common efforts of the spouses should be considered community property. In this regard, assets purchased during the marriage shall in principle be included in the community property.

The community property regime is regulated by Articles 1732 et seq. of the Civil Code. Community property is all present and future property of the spouses, with the exceptions provided under the law (see Article 1733 of the Civil Code).

The separation of property regime is regulated by Articles 1735 et seq. of the Civil Code and contains no community property, each spouse maintaining ownership and enjoyment of all his or her assets, both present and future, which may be disposed of quite freely. Exceptions to that broad power of disposition include, for instance, restrictions with the aim of protecting the family home [Articles 1682-A(2) and 1682-B of the Civil Code]. This regime is mandatory in all cases provided for under Article 1720 of the Civil Code.

Portuguese law grants great latitude to the principle of freedom of the spouses to stipulate their property regime (Article 1698 of the Civil Code). In a prenuptial agreement (article 1710 of the Civil Code) spouses can in principle choose the property regime they wish to have applied during the marriage. They can choose one of the regimes provided for and regulated by law (standard regimes). They can combine these regimes (mixed regimes) and even create a regime that is different to the standard regimes (non-standard regime). They cannot, however, exceed the limits provided for in the law. For instance, they cannot turn the assets provided for under Article 1733 of the Civil Code into community property (*e.g.*, assets donated with an incommunicability clause, insurance policies payable to each one of the spouses, clothing and personal objects for the exclusive use of each spouse) which belong to each, even under a community property regime.

2. According to Portuguese national law, when can an agreement be made regarding the matrimonial property regime applicable to the marriage?

Under Portuguese law, the principle of immutability of prenuptial agreements and of the matrimonial property regime, enshrined in Article 1714 of the Civil Code, applies. Should the future spouses wish to decide on the matrimonial property regime and exclude the default regime (i.e., the acquired community of property regime), the matrimonial property regime must be set out in a prenuptial agreement (Article 1710 of the Civil Code), and must be signed before the spouses are married. During the marriage, the spouses may not enter into an agreement modifying or extinguishing the matrimonial property regime. Exceptions to this rule of the principle of immutability are the circumstances under Article 1715 of the Civil Code (*e.g.*, in case of legal separation of property or legal separation of persons and assets).

3. According to Portuguese national law, which matters may be the object of an agreement regarding the matrimonial property regime?

As the property regime is understood to be a set of legal or conventional norms regulating the classification of the present and future assets of the spouses, a broad principle of freedom of stipulation applies (Article 1698 of the Civil Code). This will only not be the case with application of the restriction under Article 1720 of the Civil Code, which imposes the regime of separation of property, or the restriction under Article 1699(2) of the Civil Code, preventing the choice of the community property regime or the communicability of the assets established under Article 1722 of the Civil Code.

As regards rules on property administration, lack of spousal consent in asset transactions, and marital debt (matters to be included in the so-called primary matrimonial regime), there is less freedom to stipulate. For a start, certain restrictions result from the principle of immutability provided for under Article 1714 of the Civil Code. Furthermore, such matters cannot be included in a prenuptial agreement (Article 1699(1)(b) and (c) of the Civil Code). Lastly, the freedom to stipulate will always be restricted by mandatory norms. For instance, spouses may not conclude an agreement to change the rules regarding spousal consent or liability regarding debt. But the spouses may through a (revocable) power of attorney grant powers of administration, deviating from the rule under Article 1678 of the Civil Code.

4. What formal requirements are needed to make a valid disposition as to the matrimonial property regime under Portuguese national law?

The stipulations concerning the property regime must be set out in a prenuptial agreement (Article 1698 of the Civil Code). Requirements as to form and disclosure apply regarding prenuptial agreements. Under Article 1710 of the Civil Code, formal requirements demand that to be valid, prenuptial agreements must be made by means of a declaration before a civil registry officer or by public deed. As to disclosure, in order to take effect in relation to third parties, prenuptial agreements must be registered under Article 1711(1) of the Civil Code. To that end, the heirs of the spouses and other parties to the deed are not considered to be third parties. It should be noted that registration of the agreement does not dispense with the need for land registration regarding facts that are subject to registration.

It should also be noted that there is a time limit to be observed: the prenuptial agreement must be signed not more than one year before the marriage, otherwise it expires as provided for under Article 1716 of the Civil Code.

5. In accordance with Portuguese national law what matrimonial property regime is applied if the spouses do not express a preference?

In the absence of a valid prenuptial agreement or if it expires, the default regime of acquired community of property is applied under Article 1717 of the Civil Code. There are two exceptions provided for under Article 1720 of the Civil Code: when the marriage is concluded with no preliminary marriage proceeding; and when the marriage is concluded by someone who has completed their 60th year of age. It is mandatory for the separation of property regime to be applied to these two cases, and the spouses may not express any wish to the contrary.

6. Is a matrimonial property regime applicable in Portugal subject to disclosure at the Registry? What effect does it have?

At the Civil Registries, under the provisions of Article 167(1)(f) and Article 181(e) of the Civil Registry Code, the marriage entry must indicate if the marriage was concluded with or without a prenuptial agreement. It must mention the respective document or deed, indicating the matrimonial property regime stipulated, whether it was a standard regime and whether it was mandatory. The matrimonial property regime must be included in the marriage entry if Portuguese law is applicable and, that being the case, express mention must be made of the regime adopted in accordance with said law.

The absence of a prenuptial agreement must be mentioned, whenever the applicable matrimonial property regime is determined by Portuguese national law.

Prenuptial agreements and amendments, if permitted, to the property regime agreed or fixed by law, are subject to mandatory registration, and may only be invoked after registration pursuant to Article 1(1)(e) and Article 2 of the Civil Registry Code.

Where a fact is subject to mandatory registration, proof thereof can only be made under the terms provided for under Articles 4 and 211 of the Civil Registry Code.

Where the prenuptial agreement is presented following conclusion of the marriage, the change to the property regime agreed or fixed by law is recorded in an annotation to the marriage entry (Article 190(1) and (2) of the Civil Registry Code). A prenuptial agreement whose object is to establish or amend the matrimonial property regime will only take effect in relation to third parties from the date of its registration. In the case of a Catholic marriage, the effects of the registration entered simultaneously with the transcription are backdated to the date the marriage was concluded, provided said marriage has been transcribed within seven days of its conclusion (Article 191(1) and (2) of the Civil Registry Code).

If the registry officer decides that a foreign law is applicable to the property regime, he should delete from the legal marriage entry form the mention regarding the property regime that would be applicable under national law. The existence, if any, of a prenuptial agreement is mentioned without making reference to the specific property regime adopted. Therefore, where there is a prenuptial agreement and foreign law is applicable, the mention on the legal marriage entry form is identical to the mention recorded in the case of a marriage to which national law is applicable, which was concluded with an atypical prenuptial agreement, in accordance with Portuguese national law – compare subparagraph (c) in the table below – Property Status of a Marriage Governed by National Law – with subparagraph (b) in the table below – Property Status of a Marriage Governed by Foreign Law (cf. Opinion in Case C.C. No 43/97 – DSJ, published in BRN 5/98, I Caderno[29]).

At the Registry, disclosure of the matrimonial property regime in the marriage entry can be summarised in the following tables.

[29] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

DISCLOSURE OF THE MATRIMONIAL PROPERTY REGIME PRIOR TO REGULATION NO 2016/1103

PROPERTY STATUS OF THE MARRIAGE GOVERNED BY INTERNAL LAW	Without a prenuptial agreement (*)	With a prenuptial agreement under a standard regime	With a prenuptial agreement under a non-standard regime	With an amendment to the property regime – Article 1715 of the Civil Code
	(a)	(b)	(c)	(d)

a) "Catholic/civil/non-Catholic religious marriage with no prenuptial agreement".

b) "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement under the terms of the deed drawn up at … Notary Office on …/…/…, stipulating the … property regime"; or "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement drawn up by deed at the … Registry on …/…/…, stipulating the … property regime".

If the prenuptial agreement is only attached following recording of the entry, the following annotation should be made to the marriage entry: "A prenuptial agreement was signed on …/…/…, at … Notary Office, stipulating the … property regime".

c) "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement under the terms of the deed drawn up at … Notary Office on …/…/…"; or "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement drawn up by deed at the … Registry on …/…/…" (**).

Where the prenuptial agreement is only attached following recording of the entry – an annotation should be made to the marriage entry: "A prenuptial agreement was signed on …/…/…, at … Notary Office".

d) Annotation in the marriage entry:

1. Article 1715(1)(a) and (d) (absence, insolvency,) – “Matrimonial property regime changed”;
2. Article 1715(1)(b) and (c) – “Separation of persons and assets (or only assets) decreed/declared…” (***).

PROPERTY STATUS OF THE MARRIAGE GOVERNED BY FOREIGN LAW ARTICLE 53 OF THE CIVIL CODE	Without a prenuptial agreement	With a prenuptial agreement	Change in the property regime under the regulatory material right
	(a)	(b)	(c)

a) “Catholic/civil/non-Catholic religious marriage” – no mention of the absence of a prenuptial agreement.

b) “Catholic/civil/non-Catholic religious marriage with prenuptial agreement under the terms of the deed drawn up at … Notary Office on …/…/…”.

c) If the prenuptial agreement is only attached following recording of the entry – an annotation should be made to the marriage entry: “A prenuptial agreement was signed on …/…/…, at … Notary Office”. Annotation in the marriage entry: “Property regime changed”.

NOTES:

(*) No direct mention is made here of the matrimonial property regime applicable to the marriage. It is understood that the property regime is the acquired community of property regime for, under Portuguese family law, or in the case of expiry, invalidity or ineffectiveness of the agreement, the marriage is considered to have been concluded under the acquired community of property regime (Article 1717 of the Civil Code).

(**) Where the mandatory separation of property regime is applicable, there may be a prenuptial agreement merely to agree on reciprocal waiver

of the condition of legitimate heir – in that case, the following mention should be made: "Catholic/civil/non-Catholic religious marriage under a prenuptial agreement made under the mandatory separation of property regime with a prenuptial agreement under the terms of the deed drawn up at … Notary Office on …/…/…"; or "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement drawn up by deed at the … Registry on …/…/…" – see Opinion of the Advisory Board No 42/CC/2018, given in Case C.C. 84/2018 STJSR-CC[30].

(***) Where a marriage is being transcribed – the absence of any mention to the matrimonial property regime is not an impediment to the transcription – Articles 185(3) and 187(3) of the Civil Registry Code, and it should be completed with the annotation.

DISCLOSURE OF THE MATRIMONIAL PROPERTY REGIME UNDER REGULATION NO 2016/1103

PROPERTY STATUS OF THE MARRIAGE GOVERNED BY INTERNAL LAW	Without a prenuptial agreement	With a prenuptial agreement stipulated in one of the standard regimes	With a prenuptial agreement under a non-standard regime	With an amendment to the property regime – Article 1715 of the Civil Code	With a valid amendment to the applicable law per Article 22 of the Regulation
	(a)	(b)	(c)	(d)	(d)

a) "Catholic/civil/non-Catholic religious marriage with no mention regarding the non-existence of prenuptial agreement"

b) "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement under the terms of the deed drawn up at … Notary Office on …/…/…, stipulating the … property regime"; or

[30] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

"Catholic/civil/non-Catholic religious marriage with a prenuptial agreement drawn up by deed at the … Registry on …/…/…, stipulating the … property regime".

If the prenuptial agreement is only attached following recording of the entry, the following annotation should be made to the marriage entry: "A prenuptial agreement was signed on …/…/…, at … Notary Office, stipulating the … property regime"

c) "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement under the terms of the deed drawn up on …/…/…, at … Notary Office"; or "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement drawn up by deed on …/…/…, at the … Registry"

If the prenuptial agreement is only attached following recording of the entry, the following annotation should be made to the marriage entry: "A prenuptial agreement was signed on …/…/…, at … Notary Office".

d) Annotation in the marriage entry:

1. Article 1715(1)(a) and (d) (absence, insolvency, separation of half-shares in the execution) – "Matrimonial property regime changed";
2. Article 1715(1)(b) and (c) – "Separation of persons and property (or only property) decreed/declared…"
3. Valid change of the law – Matrimonial property regime changed (*)

PROPERTY STATUS OF THE MARRIAGE GOVERNED BY FOREIGN LAW	Without a prenuptial agreement	With a prenuptial agreement (note: only the applicable law can be agreed)	Amendment to the property regime under the substantive law governing it	Valid amendment to the law applicable to the matrimonial property regime – Article 22 of the Regulation
	(a)	(b)	(c)	(c)

a) "Catholic/civil/non-Catholic religious marriage" - no mention is made of the non-existence of a prenuptial agreement.

b) "Catholic/civil/non-Catholic religious marriage with prenuptial agreement drawn up by deed at … Notary Office on …/…/…"; or "Catholic/civil/non-Catholic religious marriage with a prenuptial agreement drawn up by deed on …/…/…, at the … Registry"

If the prenuptial agreement is only attached following recording of the entry, the following annotation should be made to the marriage entry: "A prenuptial agreement was signed on …/…/…, at … Notary Office".

c) Annotation in the marriage entry: "Matrimonial property regime amended".

NOTE:

(*) Example: two Portuguese nationals resident in Portugal conclude a marriage with no prenuptial agreement and establish their first common habitual residence in France – Article 26(1)(a) of the Regulation on Matrimonial Property Regimes – declaration by the two spouses drawn up in a deed, followed by the annotation in the marriage entry.

Concerning Land Registry, pursuant to the provisions of Article 93(1)(e) of the Land Registry Code, the persons subject to the recording of facts shall be identified with the mention of their full name, taxpayer number, status and residence, in the case of natural persons, together with the name of the spouse and the matrimonial property regime of the marriage, if the persons are married.

If the law regulating the matrimonial property regimes is a foreign law, said law should be mentioned in the register. For example: "*Acquisition in favour of A, married to ..., under the ... property regime, regulated by ... law*". In the presence of a plurilegislative legal system (*e.g.*, Spain), not only must reference be made to the regulatory law of the country but also to the territorial unit whose legal norms are applicable. Even though the matrimonial property regimes have the same literal designation, the

property regimes provided for in the respective legal systems are not materially identical or confusable. It is therefore recommended, in the legal translation of said regimes made in the title and the registration, that the specific designation of the language of origin should be added to the term or expression written in Portuguese, together with reference to the law regulating the property status of the marriage. In this regard, cf. Opinion No 15/CC/2014, in Case R.P. 2/2015 STJ-C[31].

Concerning Vehicle Registry, there is no direct disclosure of the matrimonial property regime applicable to the marriage of the owner of the vehicle (Article 27-B of the Vehicle Ownership Registration Code). However, under the provisions of Article 43(4) of the Vehicle Registry Regulation, the contents of the registry in particular as regards the owners and the right or fact registered are determined by the note of presentation and by the application and documents that substantiated it.

Concerning Companies Registry, Portuguese legislation [Article 9(1)(d), Article 9(2), and Article 10(b)(j)(n)(o) and (p) of the Companies Registry Regulation] requires that registries pertaining to the articles of association of a limited company and all alterations to the share capital and its distribution, should also mention the shares into which the share capital is divided and the identification of the shareholders; the inscription must also mention the civil status of the shareholders and, when married, the name of the spouse and the matrimonial property regime.

The inscription of the start of activity of an individual trader should contain, among others, the nationality, civil status, and when married, the name of the spouse and the matrimonial property regime – Article 10(a) of the Companies Registry Regulation.

The registration of a fact pertaining to a shareholding or its holder, to be recorded by deposit [simple filing of the documents titling facts subject to registration – Article 53-A(3) of the Companies Registry Code] is not presented in the log, and is merely a mention in the registry, based on the elements contained in the printed form/application for registration

[31] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

completed by the applicant (Form 3). This mention should, among other things, contain: a) the shareholding that is the object of the registration of the fact registered; b) the civil status of the person and when married, the name of the spouse and the matrimonial property regime - Article 15(2) of the Companies Registry Regulation.

Example
A, a Portuguese woman, resident in France and B, a Frenchman, resident in New York (United States), married in Belgium on 30.01.2019, before the Belgian authorities. A, did not organize the procedure to verify her matrimonial capacity before the Portuguese authorities. They made a formal and materially valid choice-of-law agreement under Articles 23 and 24 of the Regulation, according to which the applicable law is the law of the State of New York. They now wish to transcribe their marriage in Portugal. As the marriage was concluded after the starting date of application of Regulation 2016/1103, the law applicable to the matrimonial property regime shall be defined through the norms of the Regulation. Accordingly, if the choice of applicable law is valid it shall define the applicable matrimonial property regime. The fact that the Portuguese bride did not organise the procedure to verify her matrimonial capacity has no bearing on the marriage being mandatorily subject to the separation of property regime [Article 1720(1)(a) of the Civil Code] as the application of Portuguese national law is not at issue here. This, as long as the aforementioned rule of the Civil Code is not considered an overriding mandatory provision, in line with the Opinion of the Advisory Board of IRN 1/CC/2019 [available at https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal].

7. As regards Portuguese internal law, how does the applicable matrimonial property regime affect the capacity to dispose of or to encumber the spouse's property?

Strictly speaking, the matrimonial property regime does not affect the capacity to dispose of or to encumber the spouse's property. The limitations result from other norms making up what is known as the primary matrimonial regime. Some of these norms are applicable regardless of the property regime, while others presuppose the prior application of the rules of the acquired community regime to be applicable.

As regards the norms applicable regardless of the matrimonial property regime, note those under Articles 1682-A(2), 1682-B and 1682-B(3) of the Civil Code. Therefore, whatever the applicable property regime, alienation, encumbrance, rental or constitution of other real rights of enjoyment over the family home requires the consent of both spouses (Articles 1682-A(2) of the Civil Code). The acts provided for in the subparagraphs of Article 1682-B of the Civil Code relating to the lease agreement of the property in which the family home is located (resolution, opposition to renewal or termination of the agreement by the tenant; sub-lease or partial or total loan) always require the consent of both spouses, even the one who is not the tenant, and even under the regime of separation of property. The limitations under Article 1682(3) of the Civil Code are applicable to any matrimonial property regime: the consent of both spouses is required for the alienation or encumbrance of movable assets used jointly by both spouses in their home life or as a common work instrument, and of the movable assets owned exclusively by one spouse who does not administer them, except in the case of ordinary administrative acts.

There are other limitations in addition to these that are applicable only when the rules of acquired community property are applied. So, unless a separation of property regime is in force, the alienation, encumbrance, rental or constitution of other personal rights of enjoyment over the spouse's own immovable properties or those that are common to both spouses, as well as the alienation, encumbrance, or lease of an individual or common business establishment require the consent of both spouses (Article 1682-A(1) of the Civil Code).

8. What are the effects of these limitations, in particular as regards the Land Registry?

Where there is no consent as required by substantive law, and sanctioned with annullability (Articles 1682-A and 1687 of the Civil

Code), Article 92(1)(e) of the Land Registry Code determines that the registration in question shall be made provisionally. Said rule says: "The following inscriptions shall be requested with a provisional nature: a deed annullable owing to lack of consent by a third party or lack of legal authorisation, before the annullability is remedied or the right to argue it has expired".

If the inscription in question is not provisional due to another cause, it shall remain in force for a period of five years, renewable for equal periods, at the request of the parties concerned, on presentation of documents substantiating the existence of a reason for the provisional nature, and issued no more than six months prior to the term of said period [Article 95(3) of the Land Registry Code].

9. What authorities in Portugal can be included in the definition of judicial authorities for the purposes of applying Regulation 2016/1103?

Judicial Courts in particular, in terms of matter and hierarchy, juvenile and family Courts, local civil Courts, local Courts with generic competence, Courts of appeal and the Supreme Court of Justice.

In proceedings of division of marital assets under their jurisdiction, as provided for in Articles 271 to 274 of the Civil Registry Code and in Decree-Law No 272/2001 of 13 October, Registries are competent:

– as regards legal separation or divorce by mutual consent;
– during or following a legal separation or divorce, if the spouses are in agreement as to the division.

Notary Offices, in inventory proceedings as a consequence of legal separation, divorce, declaration of nullity or annulment of a marriage – for which they are competent under the terms of the division of jurisdiction,

enshrined in Article 1083 of the Code of Civil Procedure and of the Notarial Inventory Regime approved by Law No 117/2019 of 13 September, which came into force on 1 January 2020 – when the spouses do not agree as to the division.

Where they act in the context of the above-referred proceedings, Civil Registries and Notary Offices are equated to Courts as provided for in Article 3(2) of Regulation 2016/1103, to the extent that:

- They exercise judicial functions;
- Furthermore, Notary Offices in inventory proceedings act under the control of the Courts, to which they send the inventory proceeding for certain decisions to be given;
- They guarantee impartiality;
- They guarantee the right of all parties to be heard;
- Their decisions may be made the subject of an appeal;
- Their decisions have a similar force and effect as a decision of any other judicial authority.

All this is in accordance with the applicable legal framework, already specifically mentioned above, pursuant to the Civil Registry Code, Decree--Law No 272/2001 of 13 October, the Code of Civil Procedure and Law No 117/2019.

Accordingly, in the above-referred proceedings, Registries and Notary Offices are equated to Courts and must comply with the rules of international jurisdiction established in Chapter II of the Regulation on Matrimonial Property Regimes. Their decisions enjoy the recognition, enforceability and enforcement under Chapter IV of this Regulation for legal decisions and, as the case may be, as provided for in Chapter V, for court settlements.

Outside the cases mentioned above, Registries and Notary Offices are not equated to Courts and the rules of international jurisdiction

established in the Regulation on Matrimonial Property Regimes are not applicable to them, under the terms of Article 2 of said Regulation. The authentic instruments they issue enjoy the recognition, enforceability and enforcement under Chapter V of the Regulation on Matrimonial Property Regimes and said issue is not subject to the rules of international jurisdiction provided for in this Regulation.

In any case, whether or not equated to Courts, Registries and Notary Offices are bound by the rules governing the applicable law under Chapter III of the Regulation on Matrimonial Property Regimes. As Regulation 2016/1103 has universal application, they must apply the law arising from the rules of said Regulation, whether it is the law of a Member State bound by the Regulation, the law of a Member State not bound by the Regulation, or the law of a third State.

In summary, in their actions the Courts are always bound by the rules of international jurisdiction and by the rules of the applicable law under Chapters II and III, respectively. Their decisions enjoy the recognition, enforceability and enforcement under Chapter IV, and any court settlements they ratify enjoy the recognition, enforceability and enforcement under Chapter V of the Regulation on Matrimonial Property Regimes.

Information concerning Member States and the administrative authorities equated to Courts may be consulted at the European e-Justice Portal, on the European Judicial Atlas page under Matters of Matrimonial Property Regimes[32].

As mentioned above, in Case C-658/17, the CJEU decided that the communication made by the Member States to the European Commission containing the list of administrative authorities equated to Courts, although assuming that quality, is not constitutive. Failure to make this notification does not prevent the decisions of administrative

[32] https://e-justice.europa.eu/content_matters_of_matrimonial_property_regimes-559-en.do

authorities or of professionals fulfilling those requirements from enjoying the recognition, enforceability and enforcement provided for judicial decisions. Neither does it prevent the judicial control that verifies said requirements.

10. In the case of divorce by mutual consent applied for by an international couple before a Portuguese Registry, can this authority give a decision on matters regarding the matrimonial property regime in connection with that application?

Yes, pursuant to the provisions of Article 5 of the Regulation on Matrimonial Property Regimes, where a Court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201/2003 (Brussels IIa), the Courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application. However, jurisdiction in matters of matrimonial property regimes shall be subject to the spouses' agreement in all issues provided for in the subparagraphs of Article 5(2) of Regulation 2016/1103.

The applicability of Article 5 of Regulation 2016/1103 (and Article 4 of the same Regulation, in matters of succession) shall always depend on the circumstance of the matter brought before the Courts of a Member State participating in enhanced cooperation pursuant to the Regulation on Matrimonial Property Regimes. As Portugal is a participating State, if a Portuguese Registry is asked to decide on a proceeding of divorce or legal separation by mutual consent, under the provisions of Regulation 2201/2003, said Registry has jurisdiction to decide on matters relating to the matrimonial property regime in connection with that application.

11. If so, can the Registry decide that the matrimonial property regime be governed by the law of a State other than the State whose law would in principle apply?

Article 26(3) of the Regulation on Matrimonial Property Regimes provides for the possibility of the judicial authority having jurisdiction to rule on matters of the matrimonial property regime to decide that the matrimonial property regime shall be governed by the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1, upon application by either spouse, if the applicant demonstrates that the requirements provided for in Article 26(3)(a) and (b) have been met.

This exception appears to be restricted to cases where the spouses have not made a valid choice-of-law agreement or completed a prenuptial agreement before the establishment of their last common habitual residence.

Thus, when equated with a Court, the registry officer may apply Article 26(3) of Regulation 2016/1103 on Matrimonial Property Regimes that is, whenever his activity meets all the requirements of Article 3(2) of Regulation 2016/1103, which appears to be the case when dealing with a proceeding of divorce or legal separation by mutual consent.

Lastly, although the law applicable to divorce or legal separation is determined in accordance with the Rome III Regulation, the latter excludes from its scope of application the property consequences of the marriage [Article 1(1)(e) of the Rome III Regulation].

Where Regulation 2016/1103 is applicable *ratione temporis* to the marriage, the registry officer must examine the matrimonial property regime of the marriage given the applicable law, in accordance with the Regulation on Matrimonial Property Regimes.

12. What is the notion of a matrimonial property agreement adopted by Regulation 2016/1103?

For purposes of the Regulation on Matrimonial Property Regimes a "matrimonial property agreement" means any agreement between spouses or future spouses by which they organise their matrimonial property regime [Article 3(1)(b)].

13. In a marriage proceeding brought before a Portuguese Registry, can the future spouses agree to designate the law applicable to their matrimonial property regime? In which cases?

In a marriage proceeding brought before a Portuguese Registry it must be ascertained (and, if so, mentioned in the marriage register) if there is a foreign element (nationality, habitual residence or dispersal of property) at the time of the marriage which may cause a conflict of laws, requiring for its performance the realisation of an agreement as to the choice of law applicable to the matrimonial property regime, pursuant to Article 22 of Regulation 2016/1103.

In the case of a marriage with cross-border implications [cf. Recital (14) of the Regulation on Matrimonial Property Regimes], under Article 22(1) of Regulation 2016/1103, the future spouses (before the marriage) or the spouses (during the marriage) may agree to designate or to change the law applicable to their matrimonial property regime to the law of the State of habitual residence of one or both the future spouses, at the time the agreement is concluded, or to the law of a State of nationality of either spouse at the time the agreement is concluded.

The cases that only concern the choice of applicable law must be distinguished from those that in addition to said choice of applicable law include the choice of the applicable matrimonial property regime.

Where it is only a matter of the choice of applicable law (whether

foreign or Portuguese), that choice cannot be made before the registry officer for he has not material jurisdiction to set down in writing any statements the parties concerned may wish to make in their presence. A public deed must be concluded before a notary.

Where, in addition to making a choice of applicable law, they determine the matrimonial property regime, the future spouses may conclude a prenuptial agreement before the registry officer or the registry official, provided that the applicable law is Portuguese law.

It appears that a prenuptial agreement made before a Registry is possible, even if the parties choose as the applicable law acquired community of property provided for in Portuguese law. In that sense, see the wording of the law: Article 1721 of the Civil Code according to which “If the property regime adopted by the spouses or applied is that of acquired community of property (…)”

On this matter, consult the opinion of the Advisory Board No 1/CC/2019, given in Case C.C. 114/2018 STJSR-CC[33].

Example
A, with dual Brazilian and Portuguese nationality, resident in Portugal, and B, of Brazilian nationality, resident in Brazil, wish to choose Portuguese law to regulate their matrimonial property regime, which is to be the default regime. They may make this choice before a Registry, by means of a prenuptial agreement defining Portuguese law as the applicable law, and agreeing on the acquired community property regime.

[33] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

Example
A and B, nationals of Malta, he resident in France and she resident in Brazil, wish to start marriage proceedings in Portugal where they wish to designate Portuguese law as being applicable to their matrimonial property regime. Article 22(1) of Regulation 2016/1103 allows the future spouses to agree to designate the law applicable to their matrimonial property regime, which can be the law of the State of habitual residence of the parties concerned, or of one of them (France or Brazil) when they conclude the agreement, or the law of the State of nationality of either spouse at the time the agreement is concluded (Malta). Thus, they cannot designate Portuguese law.

14. What law is applicable to the formal requirements regarding the choice of applicable law? A tacit choice-of-law agreement would be admissible?

Article 23 of Regulation 2016/1103 states the formal requirements concerning the agreement:

- It shall be expressed in writing (the written form revealing the spouses' wishes);
- It shall be dated (essential to determine the connection mentioned in Article 22 and Article 23 of Regulation 2016/1103);
- It shall be signed by both spouses (consubstantiating both parties' consent).

Under Article 23 of Regulation 2016/1103 any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing, and a written version on paper is not required. Electronic signatures will be accepted if they satisfy the legal requirements (cf. Regulation 910/2014).

Furthermore, there are additional formal requirements established for matrimonial property agreements by the law of the Member State where the spouses are habitually resident at the time the agreement is concluded.

If only one of the spouses is habitually resident in a Member State and the law of that State lays down additional formal requirements for matrimonial property agreements, the agreement will be valid if it satisfies said requirements. If the spouses are habitually resident in different Member States and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

The connecting factor of the habitual residence of the spouses is not relevant to the formal validity of the agreement where the habitual residence is in a third State or in a Member State that is not a participating in enhanced cooperation.

Example
A, a Portuguese man, and B, a Spanish woman, resident in Portugal, married in a Portuguese Registry on 30.01.2019 and documented the proceeding with a prenuptial agreement made at the Registry, stipulating the *regimen de gananciales*, but not expressly choosing the law applicable to their matrimonial property regime. The marriage entry contains no mention of the property regime. They establish their first marital home in Portugal. The question here is whether Article 23 of Regulation 2016/1103 requires an express statement or, rather, whether a tacit agreement on the choice of applicable law is admissible. The Advisory Board of IRN, I.P. stated the following on this question (cf. Opinion 1/CC/2019): "(…) until such a time as the CJEU makes an interpretation, it seems from the objectives of legal safety governing the Regulation that Article 22(1) should apply to the spouses' desire being taken from an express reference, rather than being inferred from a number of circumstances or conclusive facts" [https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal].

Thus, without prejudice of a different interpretation by national Courts in cooperation with the CJEU, through the referral mechanism, the IRN at this moment does not consider admissible a tacit choice-of-law agreement regarding the law applicable to the matrimonial property regime.

In the absence of a valid choice-of-law agreement by the spouses, the connecting factors under Article 26 of Regulation 2016/1103 shall apply.

The property regime applicable to the marriage must be disclosed in the marriage entry.

15. In the case of an international couple, can the spouses agree to change the applicable matrimonial property regime? If so, how and where?

The spouses may agree to change the law applicable to the matrimonial property regime of a marriage concluded before 29 January 2019, which situation will allow material application of the Regulation, provided that this change occurs on or after 29 January 2019 (cf. the combined provisions of Article 22 and Article 69(3) of Regulation 2016/1103).

Article 22 of Regulation 2016/1103 provides for an agreement on the law applicable to the matrimonial property regime during the marriage to lead to a succession of statutes, which reflects on the matrimonial property regime of the marriage, the legal situation of the persons and their property.

Before the Regulation became effective, this succession of statutes was not possible through a change to the applicable law, but only on the basis of what was permitted under the material right of the law designated in Article 53 of the Civil Code in this regard, and provided that the law designated under Article 52 of the Civil Code did not contradict this.

At present, the succession of statutes may occur, not automatically or through the mobility of the connecting factors, but based on the change to the law applicable to the matrimonial property regime agreed by the spouses under Article 22, within the time frame provided for in Article 69(3) and in accordance with the formal and material parameters defined in Articles 23 and 24, all of Regulation 2016/1103.

Therefore, at any time during their married life, a succession to the matrimonial property regime may occur, when the spouses change the applicable law they had chosen in respect of its substantive, formal and temporal conditions, as provided for in Regulation 2016/1103.

Example
A and B, both Portuguese, resident in Brazil, married in Portugal in 1997, with no prenuptial agreement. They now wish to change the applicable law of the matrimonial property regime of their marriage to Brazilian law and agree to the Brazilian separation of property regime. For the purpose they attach the e-mails exchanged, with digital signatures that have been authenticated and duly dated, for said change to be disclosed at the Registry. Article 22(1) of Regulation 2016/1103 allows the spouses to agree to change the law applicable to their matrimonial property regime. In this case, they may choose the law of the State of the habitual residence of the parties concerned (Brazilian law) at the time the agreement is concluded. Under Article 23 of Regulation 2016/1103, the exchange of e-mails satisfies the minimum requirements of formal validity, and European rules regarding digital signatures have also been met (Regulation 910/2014). Additional formal requirements established for matrimonial property agreements under Brazilian law (the law of the habitual residence of the spouses when they concluded the agreement) have no bearing on the formal validity of the agreement, as Brazil is a third State. The substantive validity of the agreement, under Article 24 of Regulation 2016/1103, is verified by the law that was putatively chosen by the parties. Therefore, the existence and substantive validity of the agreement on the applicable law must be verified in the light of Brazilian law. In cases where the applicable law is validly changed (and also in cases where the autonomy of the parties extends to the choice of applicable regime) said succession of statutes must be disclosed in the (civil, land or companies) registry. A condition protecting third parties consists in the suitable disclosure of the valid exercising of the parties' autonomy. Once this change is made, should A wish to sell a house (which is not the family home) which he owns in Portugal and had bought in 1998, without B's intervention, it is important to ascertain the current matrimonial property regime of the couple, as this will have a bearing on each spouse's ability to dispose of property. The law governing the matrimonial property regime shall determine the conditions of protection of third parties [cf. Article 27(f) of Regulation 2016/1103]. However, Article 28(1) of Regulation 2016/1103 establishes a limit to the effects of that law on third parties: the law applicable to the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law. The fact that the third party is deemed to possess the knowledge pursuant to Article 28(2) of Regulation 2016/1103 is a rebuttable presumption.

16. How is the existence and substantive validity of the agreement as to the applicable law verified?

Under Article 24 of Regulation 2016/1103, the law putatively chosen by the parties is applied. The existence and substantive validity of the agreement as to the choice of applicable law or of any of its provisions are determined by the law chosen by the parties, pursuant to Article 22 of Regulation 2016/1103. It is in the light of this rule that decisions can be made on issues that are related, for instance, to the real wish of the parties, the declarative behaviour or any divergence between wish and declaration.

17. How can the registry officer or the notary obtain information on additional formal requirements provided for in the law of another Member State that are applicable to the choice-of-law agreement, and know whether this agreement is valid in the light of the applicable law?

This information is available on the following websites:

- European e-Justice Portal, Going to Court, Family Matters, Property Consequences of Marriage and Registered Partnerships, in the factsheets, of the Contact Points of the EJN Civil available there[34].
- On the website of the ELRA (European Land Register Association), in the factsheets on States that are parties to the Association, which can be consulted under *Contact Points, Factsheets, Registering Property Rights of Married Persons and Registered Partners*[35].

[34] https://e-justice.europa.eu/content_property_consequences_of_registered_partnerships-36687-en.do

[35] https://www.elra.eu/european-land-registry-network/contact-points/

– On the website of CNUE (Council of the Notaries of the European Union), regarding States that belong to this council, in the factsheets which can be consulted under *Practical Tools, The law for couples, Couples in Europe*[36].

Additionally, the States Party to the 1968 European Convention on Information on Foreign Law of the Council of Europe (also known as the London Convention) and to the 1978 Additional Protocol to the European Convention on Information on Foreign Law – which includes Member States of the European Union and third States – may submit a request for information on foreign law under that Convention. The 1968 London Convention, the 1978 Additional Protocol, the list of States Party and the respective statements can be consulted on the Council of Europe website[37]. The request must be made through the central authorities designated by each State Party. Portugal designated the Documentation and Comparative Law Office of the Prosecutor General's office as the central authority[38].

Lastly, the Contact Points of EJN Civil (European Judicial Network in civil and commercial matters) can also provide the Courts, the central authorities and the administrative authorities equated to Courts with information on national law, pursuant to Article 5(2)(c) of Council Decision No 2001/470/EC amended by Decision 568/2009/EC of the European Parliament and of the Council, which established a European Judicial Network in civil and commercial matters. In this case, the information is limited to the national legislation of Member States of the European Union. Under the aforementioned Article 5 of the Decision that established the EJN Civil, said information is not binding on those requesting consultation, the contact points or the authorities consulted.

[36] http://www.coupleseurope.eu

[37] https://www.coe.int/en/web/conventions/full-list

[38] http://gddc.ministeriopublico.pt/instrumento/convencao-europeia-no-campo-da-informacao-sobre-o-direito-estrangeiro-0

18. Is an agreement to change the applicable law of the matrimonial property regime, with formal validity, acceptable and substantively valid if the new law chosen is Portuguese law?

When the applicable law of the matrimonial property regime is changed to Portuguese law this law shall determine if the matrimonial property regime can be changed. In Portugal, the principle of immutability of prenuptial agreements and property agreements arising from the law is in force, as provided for in Article 1714 of the Civil Code. Accordingly, the spouses cannot validly change the matrimonial property regime as the result of an agreement changing the applicable law in case they chose the Portuguese law.

Another matter would be if the change to the matrimonial property regime resulted from a change from Portuguese to French law. The change to the matrimonial property regime resulting from that choice-of-law agreement is admissible.

Example
A, with dual Brazilian and Portuguese nationality, resident in Portugal, and B, with Brazilian nationality, resident in Brazil, married in Portugal, prior to 29.01.2019. They currently live in Spain. Pursuant to Article 53 of the Civil Code, the matrimonial property regime of this marriage was defined by Brazilian law (considering their common Brazilian nationality). They now wish to choose Portuguese law to regulate their matrimonial property regime, and wish the applicable property regime to be the default regime, as it is the law of the first marital residence. Under Article 22 of Regulation 2016/1103, the spouses may agree to change the law applicable to the matrimonial property regime, provided that it is the law of the State of the habitual residence of the spouses or of one of them, at the time the agreement is concluded, or it is the law of a State of nationality of either spouse at the time the agreement is concluded. The relevant connection in this case would be A's nationality (Portuguese) and the fact that the first marital residence was in Portugal is irrelevant. The formal validity of said choice would depend on verification of additional formal requirements provided in Spanish law for matrimonial property agreements. As to the substantial validity of said change, leading to a change in the matrimonial property regime, this would have to be verified by the law that would be applicable if the agreement were valid. Now, under Article 1714 of the Civil Code, legally concluded prenuptial agreements and property agreements cannot be altered after conclusion of the marriage.

Example
A and B, both Moroccan, married in Morocco. Meanwhile, A came to live in Portugal and acquired Portuguese nationality through naturalisation. He now wishes to transcribe the marriage concluded in Morocco. A alone may request transcription of his marriage to B before any Registry, documenting the application with B's birth certificate and a marriage certificate, and possibly also proof of civil status of the foreign spouse and his or her nationality. A's declarations must also be recorded to establish the time frame of the marriage and proper observance of the rules of private international law (Article 53 of the Civil Code for marriages concluded before 29.01.2019 and the rules of Regulation 2016/1103, in particular Articles 22 to 26, for cases included in the temporal scope of application) to verify the law applicable to the matrimonial property regime. The possibility of applying Regulation 2016/1103 to the marriage concluded before 29.01.2019 is provided for in Article 22 of said Regulation. Thus, where there is an agreement as to choice of Portuguese law applicable to the marriage to be registered under Portuguese law for transcription of the marriage (concluded under Moroccan law), the formal validity of the agreement of the law chosen must be verified in accordance with Article 23 and the substantial validity of the agreement in accordance with the law putatively applied (Portuguese law), as provided for in Article 24, both in Regulation 2016/1103. As a result of applying Portuguese law to the substantial validity of the agreement on the choice of applicable law, the agreement will not have substantial validity to the extent that it results in a change to the matrimonial property regime, as Article 1714 of the Civil Code does not allow legally concluded prenuptial agreements and property agreements to be changed after conclusion of the marriage.

19. What disclosure do Portuguese Registries make of the change to the law applicable to the matrimonial property regime?

A succession of statutes may occur:

- With the change in the applicable law, by agreement between the spouses, under the terms provided for in Article 22, within the framework of effectiveness established in Article 69(3), and

in accordance with the formal and material parameters defined in Articles 23 and 24 of Regulation 2016/1103;
- Based on what is authorised in that respect by the material law of the law designated by the spouses.

Article 1(1)(e) of the Civil Registry Code provides that registration is mandatory for legally concluded matrimonial property agreements and changes to the property regime agreements.

The same rule should be applied to the change of the applicable law arising in the light of Regulation 2016/1103.

Thus, in any of the cases mentioned above, the succession of statutes is subject to disclosure and an annotation made in the marriage entry "matrimonial property regime changed", based on a document to be filed in the respective annual record at the Registry.

20. Does a valid change of the law applicable to the matrimonial property regime concluded during the marriage have prospective effects only?

Under Article 22(2) of Regulation 2016/1103, unless otherwise agreed by the spouses, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effects only.

Thus, in order to have a retroactive effect, the spouses' agreement to this effect is necessary. In any case, the rights of third parties cannot be adversely affected by the retroactive effects of a change on the applicable law – Article 22 (3).

21. As regards application of Article 23 of Regulation 2016/1103, does the concept of Member State refer to all Member States of the European Union or only to those Member States that are party to this instrument of enhanced cooperation?

National Courts must refer any doubt as to the interpretation of Article 23 of the Regulation on Matrimonial Property Regimes to the CJEU for a preliminary ruling. The CJEU is exclusively competent for interpreting EU law and its rulings are binding on national Courts and on other authorities applying this Regulation.

Having said that, until such a time as the CJEU has provided clarification, the following serves as a contribution reflecting on the matter. The question has practical implications not only for professionals but also for the parties concerned.

In the first place, Chapter III (Applicable Law) of the Regulation on Matrimonial Property Regimes distinguishes between the agreement on the applicable law established in Articles 22 to 24 and the matrimonial property agreement pursuant to Article 25; the requirements of validity applicable to each of these legal transactions are listed separately.

As regards the agreement on the choice of applicable law, Article 23 of the Regulation on Matrimonial Property Regimes stipulates that the agreement on the choice of applicable law concluded by the spouses or future spouses must meet the formal requirements established in this Regulation and additional formal requirements established for the matrimonial property agreements under the law of another Member State, whenever one or both spouses or future spouses have habitual residence in one Member State or, respectively, each of them have residence in different Member States. In the latter case, only the formal requirements of one of the Member States must be satisfied.

Recital (47) of the Regulation on Matrimonial Property Regimes sets out that where an agreement on the choice of applicable law is concluded, the principal objective of such a formal requirement is to facilitate the informed choice of the spouses and respect their consent with a view to

ensuring legal certainty as well as better access to justice. In particular Recital (47) says: “As far as formal validity is concerned, certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice”.

Among other factors that may be determined by the CJEU, it appears that it is in the light of the above objective that the concept of the Member State of habitual residence of the spouses or future spouses or of one spouse, pursuant to Article 23 of the Regulation on Matrimonial Property Regimes can be analysed forthwith. The purpose is to decide if in order to attain the objectives of the Regulation this concept should be viewed as encompassing all Member States of the European Union, including those not bound by the Regulation on Matrimonial Property Regimes, or only participating Member States.

22. In the absence of a choice-of-law agreement, what law is applicable to the matrimonial property regime?

Where the spouses have not concluded a valid choice-of-law agreement, the successive connections provided for in Article 26(1) and (2) of Regulation 2016/1103 shall apply: a) the spouses’ first common habitual residence after the conclusion of the marriage (principal default connection); b) the spouses’ common nationality at the time of the conclusion of the marriage; c) the spouses’ closest connection or proximity to a specific Member State. If the spouses have more than one common nationality at the time of the conclusion of the marriage, the connecting factor under point (b) of Article 26(2) of Regulation 2016/1103 shall be disregarded.

Article 26(3) of Regulation 2016/1103 provides for an exception, in that at the request of either spouse, the matrimonial property regime may be governed by the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1, if so decided by the competent judicial authority.

Article 26 must be interpreted in the light of Recitals (49) to (51) of Regulation 2016/1103.

At any time during their marriage the spouses may decide to change the applicable law, in the exercising of private autonomy provided for under Article 22, if they meet the formal and substantive requirements contained in Articles 23 and 24 of Regulation 2016/1103.

23. How is the "first common habitual residence" determined?

For purposes of applying Article 26(1)(a) of Regulation 2016/1103, the Regulation does not define what should be understood to be the "first common habitual residence".

Insofar as there is no reference to the rules of national law, the idea of "first common habitual residence" appears to be an autonomous concept that must be interpreted consistently in all participating Member States, in accordance with the objectives and purposes of Regulation 2016/1103.

The examples below take several factors into account to strengthen this concept.

What should be taken into account is the spouses' first common habitual residence rather than the first merely random residence, as stability is also a criterion to be considered. The place where the spouses accidentally set up residence for a short period of time after their marriage, where they have no intention of remaining, is irrelevant. The concept implies crystallisation of the common habitual residence "shortly after marriage" (cf. Recital (49) of Regulation 2016/1103). The application of this connecting factor cannot be postponed for an indefinite period. The admissible time frame should be relatively short.

The spouses' intention in this matter is relevant as it is they who determine where they will live. If their residence is fixed in accordance with their wishes, it shall correspond to the place where they have established their centre of interests of a fixed and lasting (or permanent) nature.

Lastly, the habitual residence is a *de facto* situation, not to be confused with the right to residence.

The establishment of the first common habitual residence can and should be declared by the spouses (even if additional proof may be required). The question of whether the declaration can be furnished by one of the spouses only, or any other party concerned, needs to be established. When transcribing the marriage between a Portuguese citizen and a foreign citizen, it has always been the case that said declaration could be made by any one of the parties concerned [Article 184(3) of the Civil Registry Code]. As a rule, no documentary substantiation was required and the declaration would also reflect on the determination of the law applicable to the matrimonial property regime through the connecting factor: "the law of the first common habitual residence", provided for in the internal norms of private international law, should other connections (common nationality and common residence at the time of the marriage) have previously been excluded – Article 53(2) of the Civil Code, also applicable to cross-border situations excluded from the temporal scope of application of Regulation 2016/1103.

If Portuguese law is applicable by force of this connecting factor, adequate disclosure concerning the matrimonial property regime applicable to the marriage must be made by mentioning in the marriage entry that there is no prenuptial agreement.

The principal default connection provided for in Article 26(1)(a) of Regulation 2016/1103 may also give rise to the need to complete/rectify the connections available at the time the marriage is concluded. If the marriage was concluded before 29 January 2019, the connecting factors of the spouses' common nationality at the time of the conclusion of the marriage or, failing that, the closest connection to a particular Member State, may have led to the marriage entry being drawn up considering that national law was applicable, with the mention that the marriage was concluded without a prenuptial agreement. However, at a later date, the spouses may have fixed their first common habitual residence in a third State, and disclosure should be made of the change of matrimonial

property regime (by annotation, for instance, based on a declaration by the spouses – of the change of the property regime, by force of the change of the applicable law).

Example
A and B, both Ukrainians, resident in Portugal, organised their marriage proceeding and married in Portugal at a Registry in February 2019. They made no agreement as to the applicable law. Under Article 26(1)(b) of Regulation 2016/1103 the registry officer considered that the applicable law was that of the common nationality and made no mention of the matrimonial property regime. The spouses established their first common habitual residence in Portugal, where they already lived. They have come before the Registry to rectify their marriage entry by applying the principal default connection under Article 26(1)(a) of Regulation 2016/1103: the first common habitual residence of the spouses after conclusion of marriage (with renvoi to Portuguese national law). The registry officer must make a record after hearing the parties concerned. If necessary, he must request documentary evidence to determine the first marital residence in Portugal. As Portuguese national law is applicable, suitable disclosure of the matrimonial property regime applicable to the marriage must be made, completing the marriage entry and annotating the absence of a prenuptial agreement. Similarly, if they have purchased a house, it is advisable to disclose in the Land Registry, by annotating the inscription of the property acquisition [Article 100(1) of the Land Registry Code], the matrimonial property regime governing the marriage after consulting the respective marriage certificate.

Example
A and B, both Brazilians, resident in Portugal, marry on 01.02.2019, at a Portuguese Civil Registry. They attach a deed made before a notary designating Brazilian law as the applicable law to their matrimonial property regime. They make no mention of their specific matrimonial property regime. The marriage entry must be completed without mentioning the property regime, as the matrimonial property regime will be defined by Brazilian national law. If a prenuptial agreement was concluded this must be mentioned.

24. Can the spouses designate the law applicable of the "first common habitual residence", for example, in divorce proceedings brought before a Portuguese Registry? Where the divorce is by mutual consent, might that designation not be consensual? Is proof required?

In matters of divorce, Regulation 1259/2010 (Rome III Regulation) allows the parties to enter a choice-of-law agreement applicable to divorce and legal separation, provided it is:

- the law of the Member State of the habitual residence of the spouses at the time the choice-of-law agreement is concluded; or
- the law of the Member State of the last habitual residence of the spouses provided one of them is still living there at the time the agreement is concluded; or
- the law of the State of the nationality of one of the spouses at the time the agreement is concluded; or
- the law of the forum.

The law applicable to the divorce (by force of the spouses' valid choice — Article 5 of the Rome III Regulation — or in the absence of choice, Article 8 of the Rome III Regulation) will apply to the grounds and requirements for the divorce. However, the matter of the property consequences of the marriage and thus of the division of the marital assets is excluded from said application (Article 1(2)(e) of the Rome III Regulation).

In this regard (although in the context of application of Regulation 1215/2012) **in the judgment given in Case C-67/17, the CJEU** decided that once the divorce was decreed the division of a movable asset acquired during the marriage by spouses who were nationals of a Member State but resident in another Member State, was covered by the rule of matrimonial property regimes.

As regards jurisdiction on the property consequences of the marriage, as Courts of a Member State seised to rule on an application for divorce or legal separation, pursuant to the provisions of Regulation 2201/2003, Portuguese Civil Registries have jurisdiction on matters of the matrimonial property regime (division) connected with the divorce application, under the terms of Article 5(1) of Regulation 2016/1103. In the case provided for in said Article 5(1), the Regulation on Matrimonial Property Regimes does not require the spouses' agreement for the jurisdiction to be effective.

However, in the cases provided for in Article 5(2) of Regulation 2016/1103, for the registry officer's jurisdiction to also cover the matter of division, the agreement of the spouses, given at that or an earlier moment, is required. But it cannot be a unilateral declaration by one of the spouses. If the agreement precedes the divorce application, it must observe the formal requirements under Article 5(3) of Regulation 2016/1103.

25. At the time the marriage proceeding is initiated, documented and decided at a Civil Registry, what are the connecting factors available to determine the applicable law in the absence of a choice-of-law?

In this case the principal default connection — the first common habitual residence of the spouses after conclusion of the marriage — is obviously not available, given that the marriage has not yet been concluded. In this case, there is no recourse to a declaration by the parties regarding their hypothetical common habitual residence as this is nothing more than a proposed place of residence.

As a national authority applying private international law the registry officer is bound to comply with the rules of Regulation 2016/1103 in the marriage documentation and decision proceeding, when he is confronted with a legal situation within the material and temporal scope of its application.

In the exercise of such jurisdiction and in the absence of a (valid) choice-of-law, one possible solution would be to rule on the property consequences of the planned marriage, expressly referring to the determination of the law applicable to said marriage, for the purpose of resorting to the default connecting factors established in Article 26(b) and (c) of Regulation 2016/1103.

26. In case of a change to the applicable law with the consequent change to the matrimonial property regime, how are the legal expectations of the spouses and third parties protected?

It appears that Article 1(1)(e) of the Civil Registry Code should be applied. Any change to the law applicable to the matrimonial property regime is subject to mandatory registration by annotation – *e.g.* "matrimonial property regime changed by force of a change of the law applicable to the spouses' property".

Prior to the entry into force of the Regulation, questions were already being raised regarding the protection of third parties, when a law other than Portuguese law was applicable to the matrimonial property regime (by applying the rules of conflict under Article 53 of the Civil Code), and the spouses could, in the exercising of their private autonomy and as substantively permitted by the applicable law, change their matrimonial property regime and with it the ownership status of their property.

It should be said that the very absence of any reference to the matrimonial property regime in a consular entry (based on a title issued by a foreign authority which did not contain that information) did not constitute a reason for rejecting the inclusion; indeed, later, this should be completed by annotation (cf. Process CC 49/97-DSJ-CT, in BRN 6/98, II Caderno).

This is not, therefore, a new situation. It merely raises the problem of the protection of third parties with greater acuity, given this possibility –

both in marriages concluded after 29.01.2019 and in marriages concluded prior to that date – that the spouses can change the law applicable to their matrimonial property regime (conflictual autonomy), and also do so retroactively, provided this change does not adversely affect the rights of third parties deriving from the law initially applicable – Article 22 of Regulation 2016/1103.

In this context, Regulation 2016/1103 provides for protective measures both of the legal expectations in Article 26(3), and of third parties in Article 22(2) and (3) and Article 28 of the same Regulation.

To be effective, all such protective measures shall depend on the actions regarding conveyancing and registration of this matter, and on the consequent quality of disclosure, bearing in mind the fundamental scope of registration, which is to disclose legal situations that are true and exact.

In the scope of Civil Registry, international spouses should be made aware of and encouraged to make use of their private autonomy as to the choice-of-law applicable to their matrimonial property regime. The registry officer must also take particular care in mobilising the conflicts of rules available, defining their substantive and temporal scope.

In the scope of the Land Registry and Companies Registry, the notary, the lawyer or the solicitor arranging the deeds transfer (prior to registration), as well as the registry officer, who not only conveyances but also examines the viability of the application for registration, should mobilise the conflicts of laws available.

To summarise, "the registration is embodied (must be embodied) in a technical and legal text drafted by a specialised jurist (as a rule), whose words contain (must contain) a precise and exact legal meaning and scope (the name of the fact, the law applicable to the fact, the name of the matrimonial property regime), such words to be carefully selected in accordance with the legal framework established during the classification. And what is said for a registration can also be applied, for instance, to a public deed or to a deed of authentication – those, too, are texts with a technical content, drafted by experts, in which each

word or constitutive legal phrase has a well-defined technical meaning" (explanation of vote cast in the above referred opinion – Judgment R.P. 31/2018 STJSR-CC)[39].

Example
A, Cypriot, and B, English, marry in Cyprus under Cypriot law. A bought an apartment in Portugal. On the title deed she declared she was married under the acquired community property regime. The registration was made with the mention of the matrimonial property regime. They then divorce and wish later to sell the apartment. B is now living in Ukraine and A wishes before the Registry to sell through the "Casa Pronta" conveyancing procedure. The Registry must require proof of the matrimonial property regime applicable to the dissolved marriage as well as rectification of the Land Registry, which wrongly refers the issue to Portuguese national law. As regards the legitimacy to proceed with the sale, Cypriot law, applicable to the matrimonial property regime, shall rule the classification of the property of either or both spouses in different categories, during and after the marriage, in addition to the transfer of property from one category to another, the powers, rights and obligations of either one or both the spouses regarding the property, dissolution of the matrimonial regime and division, distribution or liquidation of the property. Pursuant to Article 43-A of the Land Registry Code, the registry officer may require proof of the wording of the foreign law by means of an authentic instrument, on which the assessment of the viability of the conveyancing and subsequent registration will depend.

27. What matters are regulated by the law applicable to the matrimonial property regime?

Pursuant to the provisions of Article 27 of Regulation 2016/1103, the law applicable to the matrimonial property regime regulates in particular the following (the list appears to be merely indicative):

[39] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

- the classification of property of either or both spouses into different categories during and after marriage;
- the transfer of property from one category to the other one;
- the responsibility of one spouse for liabilities and debts of the other spouse;
- the powers, rights and obligations of either or both spouses with regard to property;
- the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property;
- the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and
- the substantive validity of a matrimonial property agreement.

28. How does Regulation 2016/1103 regulate the protection of the spouses as regards the law applicable to their matrimonial property regime?

Regulation 2016/1103 allows the spouses to choose the law applicable to their matrimonial property regime [Article 22 and Recital (45)]. The same results from Recital (46) of the Regulation: "To ensure the legal certainty of transactions and to prevent any change of the law applicable to the matrimonial property regime being made without the spouses being notified, no change of law applicable to the matrimonial property regime should be made except at the express request of the parties. Such a change by the spouses should not be retroactive unless they expressly so stipulate. Whatever the case, it may not infringe the rights of third parties." This is also enshrined in Article 22(1) and (2) of Regulation 2016/1103.

The legal expectations of either one of the spouses as regards the law applicable to their matrimonial property regime are also safeguarded in

the exception clause under Article 26(3) of Regulation 2016/1103. Either spouse may apply to the judicial authority having jurisdiction to rule on matters of the matrimonial property regime to decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 thereunder shall govern the matrimonial property regime if the applicant demonstrates that the spouses had their last common habitual residence in that other Member State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1, and if both spouses had observed the law of that other State in arranging or planning their property relations.

If the application is approved, the law of that other State is applicable as from conclusion of the marriage unless one of the spouses disagrees. In that case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State. The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to Article 26(1)(a) of Regulation 2016/1103.

This exceptions clause will only function in the absence of a choice-of-law applicable to the matrimonial property regime and contains three requirements: a) it must be made upon application by either spouse; b) it may only be decided by a judicial authority; c) it only serves to determine the law of the last common habitual residence [Article 26(3)(a)] which simultaneously corresponds to the law both spouses observed when arranging or planning their property relations [Article 26(3)(b) of Regulation 2016/1103].

29. How does Regulation 2016/1103 regulate the protection of third parties as regards the law applicable to the matrimonial property regime invoked by the spouses?

In Regulation 2016/1103, the protection of third parties as regards the law applicable to the matrimonial property regime has two aspects: a) as regards the change of the applicable law; and b) as regards the change of the matrimonial property regime. In the former case, a combination of Article 22(2) and (3) provides that in principle the change of the matrimonial property regime shall be prospective only, but where the spouses change the applicable law retroactively, this shall not adversely affect the rights of third parties. In the latter case, regarding the change of the matrimonial property regime, the law governing the matrimonial property regime shall determine the conditions of protection of third parties (cf. Article 27(f) of Regulation 2016/1103). However, this Regulation establishes a limitation under Article 28(1) on the legal effects of that law on third parties, that is, the law applicable to the matrimonial property regime between spouses cannot be invoked by one of the spouses against a third party in a dispute between said third party and either spouse or both spouses unless the third party is aware of or with due diligence should have been aware of that law. The third party is deemed to possess the knowledge of the law applicable to the matrimonial property regime, if:

a) that law is the law of:
- *i)* the State whose law is applicable to the transaction between a spouse and the third party;
- *ii)* the State where the contracting spouse and the third party have their habitual residence; or,
- *iii)* in cases involving immovable property, the State in which the property is situated; or

b) either spouse had complied with the applicable requirements for disclosure or registration of the matrimonial property regime specified by the law of:

i) the State whose law is applicable to the transaction between a spouse and the third party;

ii) the State where the contracting spouse and the third party have their habitual residence; or

iii) in cases involving immovable property, the State in which the property is situated.

30. What type of presumption is established in Article 28(2) of Regulation 2016/1103?

Article 28(2) of Regulation 2016/1103 establishes various possibilities in which there is a rebuttable presumption (*praesumptio iuris tantum*) that a third party is aware of the law applicable to the matrimonial property regime.

One possible issue is whether the applicable law presumes knowledge of the specific matrimonial property regime applicable. That knowledge will largely depend on the rules of disclosure in registrations in force in the respective Member State, which matter, however, is excluded from the scope of application of the Regulation.

31. Is renvoi a possibility?

No, Article 32 of Regulation 2016/1103 excludes renvoi. Renvoi to the law of a Member State as the law specified to regulate the matrimonial property regime refers exclusively to substantive law in force in that State and not to its rules of private international law.

32. For the purposes of registration how is the adaptation of rights *in rem* provided for in Regulation 2016/1103 performed?

Article 29 of Regulation 2016/1103 provides that rights *in rem* can be adapted as follows: "Where a person invokes a right *in rem* to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not recognise the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it".

Please consult Section I (Successions), which has already discussed how the registry officer should proceed in adapting a right *in rem* on presentation of a request for registration of a right *in rem* that is not recognised in Portuguese law.

33. In Portuguese internal law, what are the overriding mandatory provisions for purposes of applying Article 30 of Regulation 2016/1103?

Whilst aware that in the scope of matrimonial law, many rules in force in Portuguese internal law are mandatory in nature on private persons with no possibility of derogation, it appears that not all of them may be referred to the scope of provision of Article 30 of Regulation 2016/1103. It does appear, however, that the provisions of Article 30 of the Regulation on Matrimonial Property Regimes include rules protecting the family home. This is the case under Article 1682-A(2) of the Civil Code which always requires the consent of both spouses (even the one who does not own the property), whatever the matrimonial property regime (therefore, even separation of property), for acts of alienation, encumbrance, lease

or constitution of other personal rights_over the family home. Similarly, the regime of Article 1682-B of the Civil Code on the protection granted to the family home when it is located in a rented space also refers to the aforementioned Article 30.

As to the concept of overriding mandatory provisions see the answer to question 14 in section VI.

34. Can the registry officer, by his own motion, refuse application of a provision of the applicable law under Regulation 2016/1103?

Yes, by force of the provisions of Article 31 of Regulation 2016/1103, the application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy. The remaining rules of the designated law shall continue to apply.

35. When the applicable law specified by Regulation 2016/1103 is the law of a Member State which comprises several territorial units how is the conflict of law resolved? Does it fall to the registry officer to resolve the conflict by applying the rules contained in the Regulation?

When the applicable law as specified by Regulation 2016/1103 is the law of a Member State comprising different laws by reason of territory (territorial conflicts of laws) the registry officer must apply the provisions of Article 33 of the Regulation.

When the law applied as specified by Regulation 2016/1103 is the law of a Member State comprising different laws applicable to different

categories of persons (inter-personal conflicts of laws) the registry officer must apply the provisions of Article 34 of the Regulation.

Article 33(1) of Regulation 2016/1103 establishes that where the law specified by the Regulation is that of a Member State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply. Subsidiarily, in the absence of such internal rules governing conflicts of laws, the connection criteria under Article 33(2) of Regulation 2016/1103 shall apply. Accordingly, if the applicable law results from the connection of the "habitual residence", the law applicable shall be the law of the territorial unit in which the spouses have their habitual residence; if the applicable law is determined by nationality, it shall be construed as referring to the law of the territorial unit with which the spouses have the closest connection.

In relation to inter-personal conflicts of laws, Article 34 of Regulation 2016/1103 provides for a system of indirect renvoi. The conflict-of--law rules of the State whose law has been designated by the Regulation shall be applied, and these conflict-of-law shall determine the specific system of rules applicable. In the absence of such rules, the system of law or the set of rules with which the spouses have the closest connection shall apply.

The registry officer, bound by the Regulation, has the duty to apply said Regulation to resolving conflicts of laws placed before him.

Finally, in the case of inter-regional conflicts of laws (occurring when a Member State comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes), under Article 35 of Regulation 2016/1103 said Member State shall not be required to apply the Regulation to conflicts of laws arising exclusively between such territorial units. But it may do so.

36. Can a decision given at a Portuguese Civil Registry in a proceeding of divorce by mutual consent, which determines the law applicable to the matrimonial regime, be recognised in another Member State? Under what terms? May said Registry evaluate the validity of an agreement on the choice of law required to determine the applicable law?

A decision on a matter of divorce enjoys recognition and enforceability in another Member State pursuant to Regulation 2201/2003. Where there is a choice-of-law applicable to the divorce, said law shall be evaluated by the Registry in the light of the Rome III Regulation.

For purposes of Regulation 2016/1103, decisions in matters of matrimonial property regimes mean a decision pursuant to the provisions of Article 3(1)(d) of this Regulation.

Pursuant to Article 5 of Regulation 2016/1103, as a Court of a Member State, a Portuguese Civil Registry seised to rule on an application for divorce or legal separation pursuant to the provisions of Regulation 2201/2003, shall have jurisdiction on matters of the matrimonial property regime arising in connection with that application as mentioned above. Pursuant to Article 36 of Regulation 2016/1103, said decision shall be recognised in the other Member States without any special procedure being required. The Registry shall determine the validity of the agreement on the choice of law applicable to the matrimonial property regime, under the provisions of Articles 23 to 25 of Regulation 2016/1103.

37. What is the definition of an authentic instrument under Regulation 2016/1103?

Under Regulation 2016/1103 an authentic instrument means a document in a matter of a matrimonial property regime which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which: (i) relates to the signature and the

content of the authentic instrument; and (ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin – Article 3(1)(c).

This definition is reinforced in Recitals (58) and (59) of Regulation 2016/1103, as follows.

Recital (58): "Authentic instruments should have the same evidentiary effects in another Member State as they have in the Member State of origin, or the most closely comparable effects possible. When determining the evidentiary effects of a given authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin. The evidentiary effects which a given authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin".

Recital (59): "The 'authenticity' of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the named parties appeared before that authority on the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent Court in the Member State of origin of the authentic instrument under the law of that Member State".

38. Under what law is the evidentiary effect of an authentic instrument determined?

Pursuant to Article 58 of Regulation 2016/1103, the evidentiary effect of an authentic instrument is determined by the law of the Member State of origin (where the authentic instrument is issued). A person wishing to use

an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form (Annex II) established by Implementing Regulation 2018/1935, describing the evidentiary effects which the authentic instrument produces in the Member State of origin.

39. What Portuguese legal instruments may be qualified as authentic instruments in the light of Regulation 2016/1103?

Pursuant to Portuguese national law – see Article 363(2) of the Civil Code – authentic instruments are those instruments issued with all legal formalities by public authorities within the limits of their jurisdiction or within the sphere of activity attributed to them by the notary or by another public official with authority to attest documents; all other instruments are private instruments.

Portuguese legal instruments covered by the material application of Regulation 2016/1103 are, in particular, matrimonial property agreements concluded before a notary in a public deed, or before a registry officer in a document; public deeds concluded before a notary determining the choice of law applicable to the matrimonial property regime; marriage certificates from entries filed in Civil Registries; documents drawn up by the registry officer within the scope of proceedings of marriage/ transcription of marriage concluded abroad.

40. Can the registry officer accept a private document (an agreement on choice of law, for instance) to document a marriage proceeding?

The acceptance or otherwise of a private document containing an agreement on a choice of law for purposes of documenting a marriage proceeding will depend on the formal and substantive validity of said

document in the light of the criteria provided for in Articles 23 and 24 of Regulation 2016/1103.

41. Under what terms can the registry officer accept an authentic instrument issued in another Member State?

As a rule, under Portuguese law foreign authentic instruments are not required to be legalised or even bear the apostille, unless there are substantiated doubts as to their authenticity, as mentioned in previous Sections.

An authentic instrument within the material scope of application of Regulation 2016/1103, issued in another participating Member State must be accepted and has the same evidentiary effects that it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) (Article 58 of Regulation 2016/1103).

42. Can an authentic instrument issued by a Portuguese Registry be used in another Member State? And in a third State? Under what terms?

An authentic instrument issued by a Portuguese Registry can be used in another participating Member State and shall have the same evidentiary effects that it has in Portugal. For purposes of enforcement in another Member State it must be accompanied by the form under Annex II provided for in Implementing Regulation 2018/1935 – Article 67 of Regulation 2016/1103.

If the same instrument is presented in a non-participating Member State or in a third State, the issue of the Portuguese document's formal

reception and extrinsic evidentiary effects shall be determined by the State of destination. Said State will determine the procedural or administrative mechanism necessary to ascertain the veracity of the document and the status of the conveyancer. Requirements made by the State of destination shall depend on whether or not said State has acceded to, for instance, the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

43. What forms must be issued by the registry officer or the notary for a decision, authentic instrument or court settlement given by them to be recognised or enforced in a participating Member State?

Free circulation of decisions, authentic instruments or court settlements on matters of matrimonial property is restricted to the territory of the participating Member States, that is, at the date this manual is drafted, to 18 EU countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Italy, Luxembourg, Malta, Germany, the Netherlands, Portugal, Slovenia, Spain, and Sweden.

Other Member States of the European Union are free to accede to the Regulation at any time but for the purpose must also accede to the Regulation on the property consequences of registered partnerships (Regulation 2016/1104). Although the legal status of registered partnerships is not enshrined in Portuguese legislation, Portugal acceded to both Regulations, and is bound by application of their norms regarding jurisdiction, applicable law, recognition, enforcement and enforceability.

The forms to be issued allow free circulation – recognition, enforcement and enforceability – of a decision, authentic instrument or court settlement on matters of matrimonial property regimes in another Member State bound by Regulation 2016/1103, are established by Implementing Regulation 2018/1935, and are available in the official languages of the European Union.

In particular, the registry officer or notary should certify:

– Legal decisions given by them when equated to Courts, through Annex I;
– The authentic instruments they deliver, through Annex II;
– The court settlements they confirm when equated to Courts, through Annex III.

(Annexes provided for in Implementing Regulation 2018/1935).

The above-mentioned certificates may be issued on request for purposes of the recognition and enforceability of a decision in another Member State bound by the Regulation on Matrimonial Property Regimes:

– By any party concerned in the case of decisions and court settlements – Article 36(2) and Article 60(1) of the Regulation on Matrimonial Property Regimes;
– Any person wishing to use the authentic instrument or any party concerned in the case of authentic instruments – Article 58(1) and Article 59(1) of the Regulation on Matrimonial Property Regimes.

In general terms, below is the system of recognition, enforcement and enforceability enshrined in the Regulation on Matrimonial Property Regimes:

a) Regarding legal decisions (Articles 36 to 57 of Regulation 2016/1103):

– The recognition may be automatic on presentation of the form in Annex I issued by the authority of origin;
– Alternatively, the party concerned may request recognition of the legal decision in another Member State bound by the Regulation on Matrimonial Property Regimes, pursuant to the provisions of Articles 44 to 47 of this Regulation;

– The party concerned may invoke recognition of the legal decision, which is incidental to a legal proceeding pending in another Member State bound by the Regulation on Matrimonial Property Regimes;
– Execution of a judicial decision is not automatic; it depends on a preliminary proceeding declaring the enforceability brought in another Member State where the party concerned wishes to enforce it, which is only possible if said Member State is bound by the Regulation on Matrimonial Property Regimes;
– There are four instances of grounds of non-recognition or enforceability under Article 37, and these are not *ex officio*; they must be invoked by the parties, pursuant to Article 47 of Regulation 2016/1103.

b) Regarding authentic instruments (Articles 58 and 59 of Regulation 2016/1103):

– Recognition is automatic on presentation of Form II in the Member State bound by the Regulation on Matrimonial Property Regimes where the party concerned wishes to use the authentic instrument;
– In another Member State bound by Regulation 2016/1103 the authentic instrument has the same evidentiary effects it has in Portugal or the most closely comparable effects possible; to that end, the issuing authority shall describe the evidentiary effects of the authentic instrument in the form of Annex II;
– If it constitutes enforceability in Portugal the authentic instrument may be declared enforceable in another Member State bound by the Regulation on Matrimonial Property Regimes;
– Execution is not automatic; it depends on a preliminary proceeding, declaring the enforceability of the authentic instrument, brought by the party concerned pursuant to Articles

44 to 57 of the Regulation on Matrimonial Property Regimes, in the Member State bound by this regime, where the authentic instrument is to be enforced;

– The only reason to refuse to recognise or enforce an authentic instrument is if it is manifestly contrary to public policy (ordre public) in the Member State where it is to be recognised or enforced. However in case of declaration of enforceability it seems that it cannot be declared *ex officio* (Articles 37, 47 and 59).

c) Regarding court settlements (Article 60 of the Regulation on Matrimonial Property Regimes)

– If it is enforceable in Portugal the Court settlement can be declared enforceable in another Member State bound by the Regulation on Matrimonial Property Regimes;

– Enforcement is not automatic, it depends on a preliminary proceeding to declare the enforceability, brought by the party concerned under the terms of Articles 44 to 57 of Regulation 2016/1103, in the Member State bound by said Regulation where the court settlement is to be enforced;

– The only reason to refuse recognition or enforcement is if it is manifestly contrary to public policy (ordre public) in the Member State where the court settlement is to be recognised or enforced. However in case of declaration of enforceability it seems that such reason for refusal cannot be declared *ex officio* (Articles 37, 47 and 60).

44. Who can request a declaration of enforceability of an authentic instrument in another Member State, and from whom?

The declaration of enforceability of an authentic instrument may be requested by any party interested in the enforcement.

The party concerned must bring a proceeding of declaration of enforceability, under the terms of Articles 44 to 57 of the Regulation on Matrimonial Property Regimes, in the other Member State bound by said Regulation, where the authentic instrument is to be enforced.

Member States bound by the Regulation on Matrimonial Property Regimes must inform the European Commission which Courts or judicial authorities can bring proceedings for declarations of enforceability. This information may be consulted at the European e-Justice Portal, on the European Judicial Atlas page under Matters Relating to Matrimonial Property Regimes[40].

45. Who can challenge and before whom, the authenticity of an authentic instrument and the legal acts or legal relationships recoded in an authentic instrument?

Any challenge relating to the authenticity of an authentic instrument shall be made pursuant to the provisions of Article 58(2) of Regulation 2016/1103:

- Any challenge relating to the authenticity of an authentic instrument shall be made before the Courts of the Member State of origin where the authentic instrument was issued, and shall be decided upon under the law of that State;
- The authentic instrument challenged shall not produce any evidentiary effect in another Member State for as long as the challenge is pending before the competent Court.

[40] https://e-justice.europa.eu/content_matters_of_matrimonial_property_regimes-559-en.do

Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made pursuant to the provisions of Article 58(3) and (4) of Regulation 2016/1103:

- Any challenge relating to the legal acts or legal relationships shall be made before the Courts having international jurisdiction pursuant to the rules of Chapter II or of Article 58(4) of the Regulation on Matrimonial Property Regimes;
- The applicable law is determined pursuant to the rules of Chapter III of the Regulation on Matrimonial Property Regimes;
- The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged for as long as the challenge is pending before the competent Court.

46. Can the registry officer require a translation of the documents issued by a Member State, within the scope of Regulation 2016/1103?

If the Court or competent authority so requires, a translation or transliteration by a qualified person in one of the Member States must be submitted [Article 46 (2)]. Alternatively, the document may be submitted in the form of a multilingual attestation, in accordance with the Convention on the Issue of Multilingual Extracts from Civil Status Records of 30 July 1983[41], which defines a uniform format for extracts on civil status (marriage certificates, for instance), that does not require translation.

Additionally, Regulation 2016/1191 (Public Documents), applicable in all EU countries as from 16 February 2019, waives the need for legalisation or similar, and creates multilingual standard forms, with no autonomous

[41] https://dre.pt/application/file/a/450745

evidentiary value, which when attached to public documents dispense with the need for translation – Articles 6 to 9 of Regulation 2016/1191.

Thus, the multilingual standard forms to be used as translation aids are attached to the public documents concerning birth, proof of life, death, marriage (including capacity to marry and marital status), registered partnership (including capacity to enter into a registered partnership and registered partnership status), domicile and/or residence and absence of a criminal record.

These forms may be downloaded in the EU official languages from the European e-Justice Portal, under Dynamic Forms, Public Documents[42].

47. Are registered partnerships provided for under Portuguese law?

No, registered partnerships are not provided for under Portuguese law.

In Portugal, "partnerships" were institutionalised by Law No 135/99 of 28 August, repealed and replaced by Law No 7/2001 of 11 May, which adopted measures to partnerships regardless of gender. This Act was later amended by Law No 23/2010 of 30 August and republished. However, Portuguese law does not provide for the possibility of registering a partnership, either in the Civil Registry (cf. Article 1 of the Civil Registry Code) or in any administrative registry.

48. In the light of Regulation 2016/1104, can a partnership registered in another Member State or in a third State (Brazil, for instance) have effects in Portugal? Under what terms could it be accepted by the registry officer?

A partnership registered in another Member State or in a third State (Brazil, for instance) may have property consequences in Portugal as

[42] https://e-justice.europa.eu/content_public_documents-551-en.do

provided for in the legislation applicable to registered partnerships, and, given the effects of said property consequences, should allow the creation or transfer of a right *in rem* on movable or immovable property. It should not, however, affect the limited number (*numerus clausus*) of rights *in rem* known in the national law, and national authorities should not be required to recognise a right *in rem* relating to property located on its territory, if the right *in rem* in question is not known in its law (*cf.* Recital (24) of Regulation 2016/1104:"A Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law").

The Land Registry should unequivocally reflect the property consequences of the registered partnership, considering the presumption derived from the registration: as determined by Article 7 of the Land Registry Code, "the definitive registration constitutes the presumption that the right exists and belongs to the person inscribed, under the precise terms defined by the registration".

It is therefore important to identify the active subjects of the fact inscribed, in order to classify the property within the scope of their property relations. For example: "*acquisition on behalf of A, bachelor, of age, living in communion of property with B…, under a registered partnership with property consequences, regulated by … law*".

This question will influence the conveyancing. The registry officer may act as conveyancer under the terms of Decree-Law No 263-A/2007 of 23 July, in legal transactions involving the purchase and sale of immovable property, through a special procedure of conveyance of immovable property, encumbrance and immediate registration of immovable property, commonly known as "Casa Pronta", and in the scope of simplified procedures of entitlement and sharing-out. In this context, the registry officer must mobilise the appropriate instruments and sources (bearing in mind the time frame applicable to the specific issue) to verify the legitimacy of the parties involved.

Jurisprudence

Judgment of the Court of Justice of the European Union of 23 May 2019
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Section V

The Service of Judicial and Extrajudicial Documents

Regulation 1393/2007

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Introduction

Relevant instruments of civil law of the European Union in matters of service of documents

– Regulation (CE) No 1393/2007 of the European Parliament and of the Council of 13 November 2007, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), repealing Council Regulation (EC) No 1348/2000[43].

NOTE: Any articles in this section with no indication of origin refer to Regulation (EU) No 1393/2007; references to a code without mentioning the country refer to Portuguese legislation.

Regulation (CE) No 1393/2007 of 13 November 2007	
on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)	
Informal designation	Service Regulation
Material scope	Service of judicial and extrajudicial documents in civil or commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there.
Effective from	13 August 2008 (Article 23) 13 November 2008
Non-binding on these Member States	-
Preceded by	Regulation (EC) No 1348/2000
Non-applicable internal norms	Article 239(2) of the Code of Civil Procedure

[43] http://data.europa.eu/eli/reg/2007/1393/oj

The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	
Material scope	Judicial or extrajudicial documents for service abroad.
Effective from	28 February 1974
Contracting parties	All EU Member States (except Austria which signed in 22.11.2019 but at the time of writting this manual did not ratified), Albania (1.7.2007), Andorra (1.12.2017), Antigua and Barbuda (1.9.1981), Argentina (1.12.2012), Armenia (1.2.2013), Australia (1.11.2010), Bahamas (1.2.1998), Barbados (1.10.1969), Belarus (1.2.1988), Belize (1.5.2010), Bosnia-Herzegovina (1.2.2009), Botswana (1.9.1969), Brazil (1.6.2009), Canada (1.5.1989), China (1.1.1992), Colombia (1.11.2013), Costa Rica (1.10.2016), Egypt (10.2.1969), Iceland (1.7.2009), India (1.8.2007), Israel (13.10.1972), Japan (27.7.1970), Kazakhstan (1.6.2016), Kuwait (1.12.2002), Malawi (1.12.1972), Mexico (1.6.2000), Monaco (1.11.2007), Montenegro (1.9.2012), Morocco (1.11.2011), Nicaragua (1.2.2020), Norway (1.10.1969), Pakistan (1.8.1989), Republic of Korea (1.8.2000), Republic of Moldova (1.2.2013), Republic of North Macedonia (1.9.2009), Russian Federation (1.12.2001), Saint Vincent and the Grenadines (27.10.1979), San Marino (1.11.2002), Serbia (1.2.2011), Seychelles (1.7.1981), Sri Lanka (1.6.2001), Switzerland (1.1.1995), Tunisia (1.2.2018), Turkey (28.4.1972), Ukraine (1.12.2001), United States of America (10.2.1969), Venezuela (1.7.1994), Vietnam (1.10.2016).
Preceded by	-
Non-applicable internal norms	Article 239(2) of the Code of Civil Procedure

Framework:

The service of documents on Portuguese territory is done pursuant to Articles 225 to 246 of the Code of Civil Procedure. The service of documents abroad is governed by Regulation 1393/2007 (when done in another Member State), the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965, also called the Hague Service Convention (when done in a State Party that is not a Member State) and, in the absence of any other international convention, Article 239(2) of the Code of Civil Procedure.

Enacted with the aim of improving and expediting the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States, Regulation 1393/2007 serves to regulate the transmission of such documents without harmonising its substantive legal regime [cf. Recital (2)]. Consequently, there are several aspects that are not governed by the Regulation. These include the conditions regarding public notices, the formalities of the service not provided for therein, its faults and how to redress them, which shall continue to be governed by the internal law of each Member State.

The Regulation is applicable to the service of judicial and extrajudicial documents in civil or commercial matters [Article 1(1)], concepts that should be interpreted autonomously. The Regulation considers judicial documents to be those regarding a lawsuit, all others being deemed extrajudicial (whether or not such documents have been drawn up or certified by a notary or by another public official, or whether or not they are private documents that have not been drawn up or certified by a notary or by another public official provided that, in the latter case, certain requirements are observed, as mentioned below). In Portugal the transmission of extrajudicial documents may be ordered by a Court following a request by the interested party detached from a litigious judicial process.

Articulation with other instruments

Pursuant to Article 20 hereunder, this Regulation shall prevail over other provisions contained in bilateral or multilateral agreements or

arrangements concluded by the Member States, to the extent that the spheres of application overlap, and in particular Article IV of the Protocol to the Brussels Convention of 1968 and the Hague Service Convention. This Regulation shall not preclude individual Member States from maintaining or concluding agreements or arrangements to expedite further or simplify the transmission of documents, provided that they are compatible with this Regulation [Article 20(2)], as is the case with the "Agreement between the Republic of Portugal and the Kingdom of Spain concerning Judicial Cooperation in Criminal and Civil Matters" (approved by Decree-Law No 14/98 of 27 May).

1. Can Registries and Notary Offices serve documents under Regulation 1393/2007?

Yes, in Portugal all Registries and Notary Offices can serve documents under Regulation 1393/2007.

Portugal notified the European Commission that registry officers and notaries may be transmitting agencies for purposes of Regulation 1393/2007, but did not indicate them as receiving agencies, for practical reasons linked to the absence of territorial jurisdiction rules applicable to Civil Registries and Notary Offices.

Additionally Courts and private bailiffs can be both transmitting and receiving agencies for the purposes of the Regulation. Finally lawyers can serve documents under the Regulation but cannot be receiving agencies.

2. Which are the transmitting agencies and which the receiving agencies for purposes of applying Regulation 1393/2007 and where is this information contained?

Under Article 2 of the Service Regulation the transmitting agencies

are those competent to request a service, and receiving agencies are those competent to receive a service in each Member State, pursuant to the Service Regulation. Each Member State shall inform the European Commission of the transmitting and receiving agencies in that Member State.

Communications concerning transmitting and receiving agencies in each Member State, the respective addresses, means of communication and languages accepted, together with the forms annexed to the Service Regulation are available on the European e-Justice Portal, on the European Judicial Atlas page, under Serving Documents[44].

3. What are the functions of the central authorities and of the contact points of the European Judicial Network in civil and commercial matters?

Pursuant to Article 3 of the Service Regulation, as a rule the central authorities do not act as document transmitting or receiving agencies. Each Member State shall designate a central authority responsible, in particular, for supplying information (*e.g.* to the bailiffs) on the functioning of the Service Regulation or seeking solutions to difficulties which may arise during its application. In Portugal, the central authority of the Service Regulation is the Directorate General for the Administration of Justice (DGAJ)[45].

The central authorities designated by each Member State may be consulted on the European e-Justice Portal, on the European Judicial Atlas page, under Serving of Documents[46].

Additionally, the contact points of the European Judicial Network in civil and commercial matters (EJN Civil) are competent to assist Courts,

[44] https://e-justice.europa.eu/content_serving_documents-373-en.do?init=true
[45] https://www.dgaj.mj.pt
[46] https://e-justice.europa.eu/content_serving_documents-373-en.do?init=true

central authorities and other authorities exercising the attributions provided in the Regulations, pursuant to Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters. In particular, the Portuguese contact point of EJN Civil can inform Registries and Notary Offices when exercising their attributions as applied under the Service Regulation, establish the necessary direct contacts, and facilitate the transmission between transmitting and receiving agencies for purposes of applying this Regulation.

4. When is it mandatory for Registries and Notary Offices to apply Regulation 1393/2007?

The Service Regulation must be applied whenever the notification:

- has to be served on a natural or legal person with domicile in the European Union area; and
- the address of the person to be served is known; and
- the person to be served has not granted power of attorney with special powers to receive the notification to an attorney or representative in the country where the proceeding that gave rise to the service of the document is pending.

In Judgment C-325/11 the CJEU decided that the use of the Service Regulation is mandatory in the case of the three above requirements.

Under Article 1(2) of Regulation 1393/2007 this shall not apply where the address of the person to be served is not known.

In this regard, there have been cases where it was known that the person to be served resided in another Member State, although the exact address was not known. Some Member States, such as Portugal,

whose receiving agencies can access databases to search the address, have cooperated over and above what is required by this Regulation. Accordingly, when they receive a request for notification, Portuguese judges to whom the request is submitted generally authorise their secretariat to search the address, under Article 236 of the Code of Civil Procedure, to facilitate the service of the document and the effective exercising of the right of defence. The same has been the case when the person to be served has not been found at the address initially indicated. However, this solution depends on the interpretation given on a case by case basis by each judge, and the national legislation of Member States does not always provide for receiving agencies to have access to databases to search addresses.

If the service cannot be effected pursuant to Regulation 1393/2007, a public notice is ordered if provided in national law, as in this case it does not correspond to any of the methods of service provided in this Regulation.

In this regard, Judgement CJEU C-292/10, admits that a public notice may be used under national law if the requested party cannot be located, provided the Court to which the proceeding was given has ensured beforehand that every possible step was taken pursuant to the principles of diligence and good faith to find the requested party. The registry officer and the notary must take this jurisprudence into account when serving documents in another Member State.

5. What documents can be transmitted and what persons can be served under Regulation 1393/2007?

The Service Regulation is applied to serve judicial or extrajudicial documents to a natural or legal person domiciled in the European Union and is binding on all Member States.

Extrajudicial documents to be transmitted under this Regulation can be:

– Extrajudicial documents drawn up or certified by a public body or by a Registry or notary – see Judgment CJEU C-14/08;
– Private extrajudicial documents, neither drawn up nor certified by a public body – see Judgment CJEU C-223/14.

The CJEU in Judgment C-223/14 decided that in order to transmit a private extrajudicial document, neither drawn up nor certified by a public body, under the Service Regulation, the following requirements must be met: formal transmission to the addressee in another Member State must be necessary for the *exercising, proof or safeguard of a right or a legal claim in civil and commercial matters.*

6. What methods of service provided under Regulation 1393/2007 are available for the registry officer or notary to choose? Is there any hierarchy?

Regulation 1393/2007 establishes four methods of service:

– The registry officer or notary must send the standard form set out in Annex I (Form I) attached to the Service Regulation directly to the receiving agency indicated by the other Member State (which, depending on the Member State, may be a Court or a bailiff *(huissier de justice*) – Articles 4 to 11 of Regulation 1393/2007;
– By means of a registered letter with acknowledgement of receipt or equivalent – Article 14 of Regulation 1393/2007;
– By a letter of request addressed to the Portuguese consulate if the person to be served is Portuguese – Article 13 of Regulation 1393/2007;

– By direct service outside a judicial proceeding - Article 15 of Regulation 1393/2007.

Portugal informed the European Commission that it does not permit direct service as provided under Article 15 of Regulation 1393/2007.

For information about Portugal and the other Member States consult the European e-Justice Portal on its European Judicial Atlas page, under Serving Documents[47].

Annex I (Form I) of Regulation 1393/2007 may be downloaded from this site.

The CJEU in Judgment C-473/04 decided that there is no hierarchy between the methods of service mentioned above, provided in the Service Regulation. The national Court must decide which is the most convenient. Where in a particular case there are two methods of service, the method provided under Articles 4 to 11 (form under Annex I) and the method provided under Article 14 (by post), it shall be the date of the service first executed that must be taken into account.

Example
In a rectification of a registration, the non-requesting party is a company with registered offices in Belgium. The companies registry officer can decide to have him served by registered letter with acknowledgement of receipt or equivalent, if he believes this to be the most suitable method. Supposing the registry officer requested the documents to be served through the standard form set out in Annex I (Form I) to the Belgian *huissier de justice*, but that given the delay in the return of the certificate of completion or non-completion under Article 10 of Regulation 1393/2007, he also decided to serve the documents by registered letter with acknowledgement of receipt. Both services were made, although on different dates. The prevailing date shall be that of the first service of documents made.

[47] https://e-justice.europa.eu/content_serving_documents-373-en.do?init=true

7. To which body is the standard form set out in Annex I (Form I) of the Service Regulation transmitted?

When the registry officer or the notary decide to serve the documents by transmitting the standard form set out in Annex I (Form I), this request should not be transmitted to the central body. It should be transmitted directly by the Portuguese transmitting agency to the receiving agency in the other Member State that has territorial jurisdiction. This information is available on the European e-Justice Portal on the European Judicial Atlas page, under Serving Documents[48].

This site contains the information provided by each Member State designating the bodies that are competent to receive the requests; in some cases such bodies are Courts or merely certain categories of Courts, and in another cases it will be a bailiff, or *huissier de justice,* chosen by the transmitting agency, in which case there is a link to the page listing the *huissiers de justice* closest to the address of the person to be served.

Pursuant to Article 4(1) of the Service Regulation the standard form set out in Annex I (Form I) must be transmitted directly between the transmitting and receiving agencies.

8. Before serving the document must the applicant or a party concerned in the transmission of the document be advised beforehand?

Yes, Article 5 of Regulation 1393/2007 stipulates that before ordering the service of documents in another Member State, the registry officer or notary shall advise the applicant or the party benefiting from the proceeding that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8 of Regulation 1393/2007.

[48] https://e-justice.europa.eu/content_serving_documents-373-en.do?init=true

In other words, under Article 8 of the Service Regulation, documents to be transmitted and the respective service document containing the time limit for presentation of the defence or response and the sanction, if any, to be delivered to the addressee, must be translated into:

- a language which the addressee understands and which must be indicated by the applicant when notified pursuant to Article 5 of the Service Regulation; or
- the official language of the Member State addressed or one of the official languages of the place where service is to be effected.

When receiving this information the applicant must be given a time limit in which to carry out the translation or to indicate that he or she wishes the documents to be transmitted in the language in which they are written. In the absence of any indication otherwise, the documents and the service shall be transmitted in Portuguese. At this stage neither the registry officer nor the notary has to give an opinion as to the language into which to translate the documents to be transmitted, the party concerned must decide – **cf. Judgment CJEU C-519/13.**

9. When deciding on the service through the standard form set out in Annex I (Form I) should the registry officer or the notary order the translation of the form and the attached documents?

The standard form set out in Annex I (Form I) is only sent when the registry officer or the notary choose the method of service provided for under Articles 4 to 11 of Regulation 1393/2007 (Chapter II, Section 1). If the service is effected by one of the methods provided for in Chapter II, Section 2, by post or by letter of request addressed to consular agents (in this case only if the party in question is Portuguese) the form set out in Annex I (Form I) is not sent.

When it has to be sent, the standard form set out in Annex I (Form I) must always be downloaded and filled in by the transmitting agency, in the official language of the Member State of destination (or one of the official languages where there is more than one).

The reason for this is that the form is equivalent to a letter rogatory to be executed by a Court or a *huissier de justice* of the other Member State. It must therefore be written in a language that is understood by the official who will execute it. The standard form in Annex I (Form I) is not delivered to the addressee. It must be downloaded in the language of destination and the registry officer or the notary must fill in the blank spaces, after which it will be translated into the official language of destination.

The applicant or the person who requested the registry shall bear any costs of translation prior to the transmission of the document – Article 5(2) of Regulation 1393/2007.

The text of the form itself does not require translation as it must be downloaded in the official language of destination from the European e-Justice Portal, on the European Judicial Atlas page, under Serving Documents[49].

In the standard form set out in Annex I (Form I), only the blank spaces that are to be filled in must be translated into the official language of the Member State of destination. As a rule, the fields with the names or addresses do not need translation.

The documents to be served to the addressee and the notification note accompanying them should mention the time limit for defence and the sanction applicable in case of no opposition, if any, and must be translated into one of the languages provided in Article 8 of the Service Regulation, which may be a different language to the one of the form set out in Annex I (Form I).

[49] https://e-justice.europa.eu/dynform_intro_form_action.do?idTaxonomy=269&plang=en&init=true&refresh=1

The documents to be transmitted and the certificate of service should only be translated if the addressee has indicated one of those languages, after being advised pursuant to Article 5 of the Service Regulation.

If, having been advised pursuant to Article 5 of the Service Regulation, the addressee does not respond, the registry officer or the notary shall send the documents to be transmitted in the language in which they are written, which will normally be Portuguese. In that case, the accompanying notification note will also be sent in Portuguese. Nevertheless, the form set out in Annex I (Form I) shall be completed in the official language of the Member State addressed and text written in the blank spaces, if any, shall be translated into that language for which the applicant shall bear the cost – Article 4(3) and Article 5(2) of Regulation 1393/2007.

10. Where the registry officer or the notary decide on service by post, what procedure should they adopt?

Service by post shall be effected by registered letter with acknowledgement of receipt or equivalent, as provided for in Article 14 of the Service Regulation.

As regards translation of the documents to be transmitted and the notification note, it is advisable to follow the procedure mentioned above pursuant to Article 5 of the Service Regulation.

Furthermore, if the service is effected by post, in order to comply with Article 8(4) of the Service Regulation, it should be accompanied by the form set out in Annex II, downloaded in the official language of the Member State of destination (or official language of the place, of residence, of the adressee if there is more than one), together with another copy in the language of the documents to be transmitted, to ensure that the addressee is advised that he may refuse to accept the documents if they have not been translated into one of the languages provided in Article 8 of Regulation 1393/2007.

As opposed to the service effected by means of the form set out in Annex I (Form I), where the Court, the *huissier de justice* or the receiving agency executing the service in the Member State of destination must deliver Form II to the addressee, when Form II is posted, it shall be sent together with the documents to be transmitted so as to comply with the formality provided in Article 8(4) of the Service Regulation.

Example
Can a Belgian company that is served at its head office in the official Dutch-speaking zone refuse to accept service by post if the documents and the notification note are not translated into Dutch? Yes, it can,if it does not understand the language in wich the documents are written. But only after the document has been refused because the addressee does not understand the language can the registry officer decide the issue. To do this he should notify the applicant and having heard its opinion, give a summary assessment of the incident. Once the applicant has been notified, he may submit proof that the legal representative of the company understands the language in which the documents were sent, in which case the registry officer must decide if the service was valid under the terms of Article 8(1)(a) of the Service Regulation; or if the service will have to be repeated following attachment of a Dutch translation, payable by the applicant, under Article 5(2) and Article 8(1)(b) of the Service Regulation. If, having received the service, the company does nothing, can it later allege that the fact that it did not understand the wording of the document precluded it from refusing the service? Yes, but only where the company has not received the form set out in Annex II in Dutch [the official language of the place where the document is served, in the Member State of destination which, in this case, has more than one official language, and which the legislator assumes the addressee understands – irrebuttable presumption as per Article 8(1)(b) of Regulation 1393/2007]. The form set out in Annex II should always be sent in an envelope. For practical reasons, the form should be downloaded and sent in two languages: the official language of the Member State of destination, which under the Service Regulation the addressee is presumed to understand, or in the official language of the place of service, if there are various official languages in that Member State, and in the language in which the documents to be transmitted were written, if it is a different language.

11. Who must procure and pay for the translation?

The following translations are arranged for and paid for by the applicant pursuant to Article 5(2) of Regulation 1393/2007: the text filling in the blank spaces on the form set out in Annex I (Form I) which are mandatory, the documents to be transmitted, and the service certificate (which are only translated if indicated by the applicant).

When the applicant does not pay legal costs and/or receives legal aid, the cost of the translation has to be advanced by the Court/authority seised/legal aid.

Example
In justification proceedings to establish a new succession in title, the registered owner has Ukrainian nationality and lives in Germany. Before serving the owner registered in Germany, the registry officer must notify the applicant in the justification proceeding and inform him of the provisions of Article 5 of the Service Regulation, setting a time limit to indicate the language the addressee understands (*e.g.* Ukrainian, Portuguese, German, or other) into which the documents and the certificate of service must be translated. At this stage, the applicant must indicate the language in which the documents to be delivered to the addressee must be sent. If the applicant fails to stipulate the language, the documents shall be transmitted and served in Portuguese. If the documents are translated into another language, then that is the language in which they must be transmitted. If they are translated into German, Article 8(1)(b) of the Service Regulation contains an irrebuttable presumption that the addressee understands the language of the Member State in which he resides and therefore cannot refuse the service based on lack of knowledge of the German language. Whatever the language indicated by the applicant, the form set out in Annex I must always be downloaded and any text completing the blank spaces must be translated into German, said translation to be paid for by the applicant – Article 5(2) of Regulation 1393/2007. If the registry officer decides to transmit the service through the form set out in Annex I (Form I) this should be downloaded and filled in in German. If certain sections of the filled-in blank spaces on the form have to be translated, the applicant shall bear the cost of the translation.

When the method of service is one of the methods under Articles 4 to 11 of the Service Regulation, the official effecting the service in the Member State of destination shall deliver, the form set out in Annex II, to the addressee.

If the registry officer chooses the by post method under Article 14 of the Service Regulation, the translation shall cover only the documents and the notification note to be transmitted, should the applicant have indicated into which language they should be translated. In the absence of any indication otherwise, having been notified pursuant to Article 5 of the Service Regulation, the documents and the certificate of service are transmitted in Portuguese.

Furthermore, the documents must always be accompanied by the form set out in Annex II of the Service Regulation, not filled in, preferably an example downloaded in the language of the Member State of the residence of the addressee, said addressee being presumed to understand this language, and another copy in the language in which the documents to be served are written, if it is different.

For instance, in an application for the issue of a European Certificate of Succession, the other heiresses are not applicants and are minors, living in France. To serve them the registry officer can opt for one of the methods provided in: Articles 4 to 11 of the Service Regulation [form set out in Annex I (Form I)]; Article 12 (letter of request addressed to the Portuguese Consulate if the addressees are Portuguese); or Article 14 (service by registered letter with acknowledgement of receipt or equivalent).

In any of the three cases it is mandatory to deliver to the addressee the form set out in Annex II, as results from Article 8(4) and (5) of the Service Regulation.

The minors must be served in the person of their legal representative, as a rule, one of the parents or whoever exercises parental responsibility.

In the Judgment given in Case **C-404/14 the CJEU** decided that:

– If the national legislation that governs the law of successions provides for the intervention of the legal representative of a

child who is an heir, his or her appointment is governed by the rules applicable to parental responsibilities;
- Overlapping norms in the two Regulations (the Brussels IIa Regulation and the EU Succession Regulation) and a legal vacuum are both to be avoided, for which reason Article 1(2)(b) of the Succession Regulation excludes the legal status of natural persons from the scope of its application;
- The ratification of an agreement as to the sharing out of an estate concluded by the special guardian on behalf of the children sharing the inheritance with the parent (surviving spouse) constitutes a measure regarding the exercise of parental responsibilities to which the Brussels IIa Regulation applies (including the rules of jurisdiction fixed therein) and not a measure regarding successions.

12. In the light of Regulation 1393/2007, on what grounds may the addressee refuse to accept the service?

The addressee can refuse to accept the service on the grounds specifically stipulated in Article 8 of Regulation 1393/2007. Article 8(1) stipulates that the addressee must be informed that he may refuse to accept the document to be served on the grounds that he does not understand the language in which said document is written. To that end, he must be given the standard form set out in Annex II, whether the service is effected pursuant to Chapter II Section 1 or pursuant to Chapter II Section 2 of the Service Regulation. Said refusal may occur at the time of service or on the return of the document served, within a one-week time limit.

The only grounds for refusal based on not understanding the language, as provided for in Article 8(1)(a) and (b) of the Service Regulation, are the following:

- The documents are not written in a language the addressee understands and have not been translated into that language;
- The documents are not written in the official language of the Member State addressed (or, if there are several official languages in that Member State, the official language of the place where service is to be effected).

Where the documents have been translated into the official language of the Member State of destination, the addressee may not validly refuse to be served, invoking that he does not understand the language.

13. Should the addressee refuse to be served, what body shall rule on such refusal and what are the consequences?

The body that is competent to rule on refusal to be served is always the transmitting agency – *e.g.* the Court, registry officer or notary before which the proceeding that gave rise to the need for service is brought – cf. **Judgment of the CJEU C-519/13**.

Even if the refusal is invoked in the Member State of destination, it should be returned to the transmitting agency for a ruling.

The consequences of refusal depend on the decision given concerning said refusal. Should the refusal be accepted the absence of a translation can be remedied. If the refusal is rejected, there is nothing to prevent application of the sanctions provided for in national law if the time limit for opposition has elapsed.

In the judgment of Case C-384/14, the CJEU ruled that:

- it is only after the addressee has effectively exercised his right to refuse to accept the document that the Court of the transmitting Member State may verify whether that refusal was well founded;

– for that purpose, that Court must take into account all the relevant information on the Court file in order to determine whether or not the party concerned understands the language in which the document was drafted;
– where that Court finds that the refusal by the addressee of the document was not justified, it may in principle apply the consequences under its national law for such a case (*e.g.* sanctions stipulated in case of lack of opposition).

This jurisprudence is applicable when the registry officer or notary, as transmitting agencies, must serve documents on a person resident in another Member State.

14. Can the absence of a translation be remedied?

Yes, pursuant to the provisions of Article 8(3) of the Service Regulation, the absence of a translation can be remedied by sending the translation of the documents to be served using one of the methods provided for in this Regulation, as soon as possible – cf. **Judgment of the CJEU C-443/03**.

15. Is it mandatory to deliver the form set out in Annex II to the addressee and must failure to do so be remedied informally?

Yes, it is mandatory to deliver the form set out in Annex II. Failure to do so does not constitute grounds for the procedure to be declared invalid, but an omission which must be rectified *ex officio*.

In judgments C-519/13 and C-384/14, the CJEU ruled that:

– the Court of the transmitting Member State must ensure that the addressee has been properly informed, by means of the standard form in Annex II, of his right to refuse to accept that document;
– where that requirement has not been complied with, it falls to that Court to return the proceedings to a lawful footing in accordance with the provisions of the Service Regulation.

16. If the addressee has received the documents on a certain date and only later was informed of his right to refuse the service, or only later received the translation of the documents, what is deemed to be the date of service of the document?

The answer is found in the provisions of Article 8(3) of Regulation 1393/2007.

If the addressee has refused to accept the document because no translation was sent, the date of service of the document shall be the date on which the document accompanied by the translation is served. However, where according to the law of a Member State, a document has to be served within a particular period — *e.g.*, to interrupt a period of prescription — the date to be taken into account for that purpose shall be the date of the service of the initial document even if incorrectly effected and depending on the case, Article 323(2) of the Portuguese Civil Code shall be applied. However, the date of the start of the time limit to submit a defence is the date of the correct service of the document – cf. **Judgment of the CJEU C-519/13** and Article 323(3) of the Civil Code.

This solution is also applicable to cases where it is necessary to remedy the lack of delivery of the form set out in Annex II.

17. Is service in another Member State effected in accordance with the method provided for under the law of the Member State of origin or of the Member State of destination?

The answer can be found in Article 7 of the Service Regulation.

As a rule, the document shall be served in accordance with the law of the Member State addressed. However, the transmitting agency may request [by filling in point 5.2 of the form set out under Annex I (Form I), in this case in a language that will require translation] that a specific form provided for in its own legislation be complied with, and must indicate as such. If the specific form in question is not incompatible with the law of that Member State, the request shall be respected.

18. When the registry officer or the notary wish to effect the service of a document under Regulation 1393/2007, where will they find information concerning the provisions of the other Member States regarding methods of service in force there?

By consulting information on national law provided by the Contact Points of the EJN – Civil, on the European e-Justice Portal, on the European Judicial Atlas page, under the *Serving Documents* factsheets. This contains information on the national law of Member States[50].

19. If the service is effected by post, what is deemed to constitute an equivalent document to the acknowledgement of receipt, as provided for in Article 14 of Regulation 1393/2007?

Article 14 of the Service Regulation requires that service by post

[50] https://e-justice.europa.eu/content_service_of_documents-371-en.do?init=true

must be effected by registered letter with acknowledgement of receipt or equivalent.

Évora Court of Appeal (Portugal) consulted the CJEU as to what should be considered equivalent to the acknowledgement of receipt.

In the judgment in this case, C-354/15, the CJEU ruled that the service of documents effected by post is valid even if the acknowledgment of receipt of the registered letter is not returned provided that it is replaced by another document that offers equivalent guarantees as regards the information and the evidence provided. Such guarantees are met whenever the document replacing the acknowledgement of receipt shows that the addressee has received the document in question in such a way as to ensure that his rights of defence have been respected, which the Court is responsible for verifying.

20. Can a third party validly receive the document to be served instead of the addressee?

Yes, a third party can validly receive the document to be served instead of the addressee, although limited to particular cases: it must have been served on an adult person who is inside the habitual residence of the addressee person and is either a member of his family or an employee in his service. Other third parties, such as neighbours, are not considered valid recipients – cf. **Judgment of the CJEU C-354/15**.

21. How should the registry officer or notary proceed if the addressee does not make an appearance (or does not present a defence or attach a power of attorney) or if the certificate of service under Article 10 is not returned?

The provisions of paragraphs (1), (2) or (4) of Article 19 of the Service Regulation shall apply, as the case may be.

Article 19(1): where the defendant has not appeared, the registry officer or the notary must ensure that:

- the document was served by a method prescribed by the Service Regulation or by another method; and
- the service was effected in sufficient time to enable the defendant to prepare his defence;

before judgment is given in the proceedings

Article 19(2): the registry officer or notary may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

- the document to be served was transmitted by one of the methods provided in the Service Regulation; and
- every reasonable effort has been made for the certificate of service or delivery to be returned; and
- a period of not less than six months has elapsed since the date of the transmission of the document.

Portugal has declared that once such conditions are verified, the Courts may issue a decision.

Article 19(4): When the addressee has been served in another Member State by one of the methods provided in the Service Regulation and has not appeared, a judgment having been entered against him, the registry officer will have to take into account that the judge shall have the power to relieve the defendant from the effects of the expiry of the time for appeal from the judgment if the following conditions are fulfilled:

- if within a year following the date of judgment the addressee requests to be relieved of the effects of the expiry of the time for appeal;

– if the defendant alleges that without any fault on his part, he was not served the document in sufficient time to prepare his defence;
– the defendant has disclosed a *prima facie* defence to the action on the merits.

Portugal has made it known that the maximum time limit to file this request is one year from the date of the judgment.

The information provided by Portugal and the other Member States on the functioning of Article 19 of the Service Regulation may be consulted on the European e-Justice Portal, under Serving Documents on the European Judicial Atlas page, under national information provided by the Justice Ministries[51].

22. And what if the service cannot be effected because the addressee's whereabouts are unknown?

In this case, once the addressee's whereabouts have been investigated, as required by the principles of diligence and good faith, there is nothing to prevent him being served by means of a public notice under national law – cf. **Judgment of the CJEU C-292/10**.

Public notices permitted under national law do not fall under any of the methods of service provided for in the Service Regulation. In this case, the proceeding becomes adversarial and Article 19 of this Regulation does not apply.

23. What costs may be applied in a cross-border service?

Pursuant to Article 11(2) payment may be due if the service is effected

[51] https://e-justice.europa.eu/content_serving_documents-373-en.do?init=true

by a public bailiff or other competent person (*e.g.*, a *huissier de justice* or private bailiff).

To ensure transparency regarding prices, each Member State must designate a single fixed rate which may be consulted on the European e-Justice Portal, on the page of the European Judicial Atlas, under Serving Documents[52].

24. What situations are excluded from the application of Regulation 1393/2007 by reason of matter, residence of the addressee or the nature of the document to be transmitted?

The Service Regulation shall only apply in civil and commercial matters regardless of the nature of the Court that is seised. It shall not extend to revenue, customs or administrative matters or to liability of the State for actions or omissions in the exercise of state authority (*acta iure imperii*). This results from Article 1 of this Regulation and from **its interpretation by the CJEU in the judgment given in the following related cases: C-226/13, C-245/13, C-247/13 and C-578/13.**

Also resulting from Article 1 of the Service Regulation and the interpretation given it by the **CJEU in the Judgment of Case C-325/11**, is that this Regulation shall apply where a judicial or extrajudicial document has to be served in the area of the European Union. There are two exceptions only to this rule: where the address of the person to be served with the document is not known; where the addressee has granted power of attorney to a representative with special powers to receive the service in the country in which the judicial proceedings are taking place.

The Service Regulation is applicable to all Member States including Denmark as results from the Agreement between the European Community

[52] https://e-justice.europa.eu/content_serving_documents-373-en.do?init=true

and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters published in the Official Journal of the European Union Series L of 17.11.2005.

Lastly, Articles 1 and 16 of the Service Regulation establish that this Regulation is applicable to judicial and extrajudicial documents. According to the interpretation of Article 16 of the Service Regulation by the **CJEU in judgments C-14/08 and C-223/14**, extra judicial documents include not only documents drawn up or certified by a public authority but also private documents which were not drawn up or certified by a public authority, provided that transmission is necessary for the purposes of exercising, proving or safeguarding a right or a claim in civil or commercial law.

Example
In a proceeding regarding maintenance of adult children, the father must be served to file an opposition. The father lives in a third State. Is this document covered by Regulation 1393/2007? No, but it may be covered by a bilateral or multilateral agreement, if any, or by the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, to which Portugal is a Party, if the third State is also a Party to that Convention (*e.g.* Brazil).

Example
The Registry disqualified a land registry act and must notify the applicant, a Frenchman, resident in another Member State. The Frenchman personally requested the registration and in all documents is identified as resident in France. This service must be effected by one of the methods provided in Regulation 1393/2007.

Example
In a rectification proceeding the non-applicant party concerned resides in Spain, his whereabouts are unknown. Regulation 1393/2007 is not applicable to this service because the addressee's address is not known – Article 1(2) of the Service Regulation.

Example
In a proceeding of justification to establish a new succession in title, the applicant designates the situation of the registered holders who are to be served by the Registry; A, English, died in the United Kingdom, having previously resided in Portugal, B, English, has his residence in the United Kingdom (although in the title certificate he has a residence in a post office box in the Algarve), and C, also resident in the United Kingdom, who granted power of attorney to a person to receive the service in this proceeding. Are all such services covered by Regulation 1393/2007? The Service Regulation is applicable to the service of documents on addressees or their heirs, at their known addresses in the United Kingdom, while it is still a Member State of the European Union. After Brexit, the service of documents in the United Kingdom shall be effected pursuant to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters to which both Portugal and the United Kingdom are Parties. The Service Regulation is not applicable to an addressee who has appointed an attorney with special powers to receive the service in Portugal; the service is effected pursuant to national law. The Service Regulation is not applicable to the service of a foreign addressee at an address in Portugal; the service is effected pursuant to national law.

25. How is the service effected if the addressee resides in a third State Party to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters?

If the person to be served lives in a third State that is a Party to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the document must be served in accordance with this Convention, to which Portugal is a Party.

As with the Service Regulation, this Convention provides several methods of service and the registry officer or notary must choose the one deemed most suitable.

Article 3 of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters includes in its scope registry officers and notaries who are competent under Portuguese law to serve documents.

From the methods of service established in this Convention the registry officer or the notary may choose service via a letter rogatory sent annexed to the Model Form to the Central Authority of the country of destination.

Practical indications concerning the use of this Convention (text of the Convention, recommended forms, languages accepted, declarations and reservations, States parties, names and addresses of the central authorities and other authorities that are competent to receive the requests) may be consulted on the website of the Hague Conference on Private International Law, on Instruments and Conventions page, by selecting 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[53].

[53] https://www.hcch.net/en/instruments/conventions/specialised-sections/service.

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Useful Links	
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European Judicial Atlas: service of documents - forms	https://e-justice.europa.eu/content_serving_documents_forms-269-en.do?clang=en
Hague Conference on Private International Law: instruments and conventions	https://www.hcch.net/en/instruments/conventions/specialised-sections/service
European e-Justice Portal: Serving Documents	https://e-justice.europa.eu/content_service_of_documents-371-en.do?init=true

Section VI

Law applicable to contractual obligations in civil and commercial matters

Regulation 593/2008

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Introduction

Note: Any articles in this section with no indication of origin refer to Regulation (EU) No 593/2008; references to a code without mentioning the country refer to Portuguese legislation.

Regulation (EU) No 593/2008 of 17 June 2008	
On the law applicable to contractual obligations (Rome I)	
Informal designation	Rome I Regulation
Material scope	Contractual obligations in civil and commercial matters
Effective from	17 December 2009
Non-binding on these Member States	Denmark
Preceded by	Rome Convention
Non-applicable internal laws	Applicable law: Articles 41 and 42 of the Civil Code
Enforcement instruments	-

Territorial scope

Regulation (EU) No 593/2008, the Rome I Regulation, binds all Member States with the exception of Denmark. Its application to the United Kingdom is based on Commission Decision of 22 December 2008 published in the Official Journal of the European Union Series L 10/22 of 15 January 2009. It will no longer be binding on the United Kingdom after its exit from the European Union, without prejudice to the period of transition to be agreed.

Temporal scope

The Rome I Regulation was published in 04.07.2008 and entered into force on the twentieth day following that of its publication. However, it was partially applied as from 17 December 2009 in all Member States bound by the Regulation, including the United Kingdom, except as regards Article 26, which was applied from 17 June 2009 (cf. Article 29).

This Regulation applies only to contracts concluded after 17 December 2009, (*vide* Article 28). The applicable law of contracts concluded before that date is determined by the Rome Convention to the extent that such contracts are covered by its scope of application.

Material scope

The Rome I Regulation is applicable to contractual obligations in civil and commercial matters involving a conflict of laws (cf. Article 1). The prerequisite that a conflict of laws exists – pursuant to Article 1(1) of this Regulation – means that the Regulation is only applicable in situations involving at least two countries.

The Rome I Regulation is not applicable to taxation or administrative matters. Article 1(2) of the Regulation excludes from its material scope of application questions that involve the status or legal capacity of natural persons (except as provided for in Article 13), obligations arising from matrimonial property regimes, maintenance obligations; agreements on the choice of Court, arbitration agreements, questions governed by company law, obligations arising from cheques, bills of exchange and promissory notes, obligations arising out of dealings prior to the conclusion of a contract and all other questions thereunder.

In particular as regards agreements on the choice of Court, Recital (12) and Article 1(2)(e) of the Rome I Regulation stipulate that the Regulation does not apply to determine the law applicable to agreements on the choice of Court (*e.g.*, agreements on the choice of Court pursuant to Articles 15, 19, 23 and 25 of Regulation 1215/2012).

Regarding its material scope, the **CJEU provided an autonomous interpretation of the concept of civil and commercial matters in a number of cases (C-29/76; C-814/79; C-172/91; C-292/05; C- 226/13).**

Autonomous concept of contractual obligation

The concept of contractual obligations is also an autonomous concept interpreted by the CJEU (C-26/91; C-51/97 and the joined cases C-359/14 and C-475/14).

Judgment given in joined cases ***C-359/14 and C-475/14***

In this judgment, the CJEU defines the differences between the concepts of contractual obligation and non-contractual obligation, reaffirming that they are autonomous concepts. In particular, the definition of contractual obligation pursuant to the Rome I Regulation must be interpreted autonomously, by reference to the objectives of the Regulation. In this context, *(...) it must be held that the concept of 'contractual obligation' within the meaning of Article 1 of the Rome I Regulation designates a legal obligation freely consented to by one person towards another* – cf. paragraphs (43) and (44) of the judgment.

Separation between the scope of application of the Rome I and the Rome II Regulations:

The material scope of application of the Rome II Regulation (Regulation No 864/2007) determines the law applicable to non-contractual obligations including any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo* [Article 2(1) of Rome II Regulation), whilst the Rome I Regulation determines the law applicable to contractual obligations.

In the judgment given in case **C-191/15**, the CJEU defined the border separating the scope of application of each of these Regulations, Rome

I and Rome II, in a situation of unfair contractual clauses in contracts concluded with consumers.

In that judgment, the CJEU ruled that the law applicable (…) on injunctions for the protection of consumers' interests directed against the use of allegedly unfair contractual terms by an undertaking established in a Member State which concludes contracts in the course of electronic commerce with consumers resident in other Member States, in particular in the State of the Court seised, must be determined in accordance with Article 6(1) of Regulation No 864/2007 (Rome II Regulation), whereas the law applicable to assessing a particular contractual term must always be determined pursuant to Regulation No 593/2008 (Rome I Regulation), whether that assessment is made in an individual action or in a collective action.

1. To what contractual obligations does the Rome I Regulation apply?

In principle, the Rome I Regulation is applicable to international contractual obligations, in situations involving a conflict of laws, pursuant to Article 1(1) of the Regulation.

A situation involving a conflict of law may have a foreign factor – the residence of one of the parties, the location of the property or fulfilment of the obligation situated in different countries – making the contract an international one.

However, the Rome I Regulation is also applicable to situations that initially appear purely national but where the parties choose the applicable law of another country, said choice constitutes a foreign factor.

2. What rules of conflict are defined in the Rome I Regulation?

In matters of international contractual obligations the Rome I Regulation has different rules of conflict to determine the applicable law:

- The substance of the contracts (Articles 3 to 9);
- The formal validity of the contracts (Article 11);
- The existence and substantive validity of the contracts and the difference between intention and declaration (Article 10);
- Voluntary assignment and contractual subrogation (Article 14);
- Legal subrogation (Article 15);
- Multiple liability (Article 16);
- Set-off (Article 17);
- Burden of proof and presumptions of law (Article 18).

Depending on the rules of conflict and the specific circumstances of the case, the law applicable to each of the above questions may be different.

3. Once the applicable law is determined, what does it regulate?

All aspects regulated by the applicable law are as indicated in Article 12 of the Rome I Regulation. The wording of the article appears to indicate that the list is merely indicative.

Thus, the applicable law determined pursuant to the Rome I Regulation, regulates the following issues in particular:

- Interpretation and performance of the contract;
- Discharge of obligations;
- Prescription and limitation;
- Consequences of the nullity of the contract.

Within the limits of the powers conferred on the Court by the procedural law of the forum, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law.

Article 12(2) of the Rome I Regulation stipulates that in relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

4. Is renvoi possible?

Renvoi is not possible unless stipulated in the Rome I Regulation (cf. Article 20).

Accordingly, the provisions of the applicable law determined pursuant to the Rome I Regulation do not include the provisions of private international law (rules of conflict) enshrined in that law.

The latter appears to be a logical consequence of the autonomy of the parties and of legal safety, objectives pursued by the Rome I Regulation. If the contracting parties can choose the applicable law of a particular country, it would not be coherent with the Regulation objectives mentioned above that the designation of another applicable law should be relegated to the law of that country.

5. How must the registry officer or the notary determine the law applicable to the formal validity of international contracts? Can that law differ from the law applicable to the substance of international contracts?

The law applicable to the formal validity of international contracts is determined pursuant to Article 11 of the Rome I Regulation and, depending on the case as indicated below, this or another law may be applicable to the substance.

The connecting factors to bear in mind when determining the law applicable to the formal validity of international contracts are alternative. Thus, pursuant to Article 11(1) and (2) of the Rome I Regulation:

- **If the persons or their agents are in the same country when the contract in concluded**, either the formal requirements of the law which governs the substance of the contract pursuant to the Rome I Regulation, or the formal requirements of the law of the country where it is concluded can be applied to the formal validity of the contract,
- **If the persons or their agents are not in the same country when the contract is concluded**, a number of laws are alternatively applicable to the formal validity of the contract: it is valid if it complies with the formal requirements of the law which governs its substance under the Rome I Regulation, or of the law of the country where either of the parties or their agents is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

6. Are there specific rules of conflict concerning the law applicable to the form of a unilateral legal act regarding a contract already concluded or to be concluded?

Pursuant to Article 11(3) of the Rome I Regulation, the formal requirements must satisfy either the law which governs the contract in substance under the Rome I Regulation, or the law of the country where the act was done, or the law of the country where the person by whom it was done had his habitual residence at that time.

Without prejudice to the various definitions of the legal act under doctrine, discussion of which has no place here, for practical purposes we indicate the following examples that may be classified as unilateral legal

acts in respect of a contract concluded or to be concluded, as provided for in the Portuguese Civil Code: a creditor's notice to pay (Article 805); notice to the debtor of the assignment of a claim (Article 583); establishment of voluntary domicile (Article 82).

7. Are there specific rules of conflict to determine the law applicable to the formal validity of contracts concluded by consumers?

The formal validity of contracts concluded by consumers is governed by the law of the country where the consumer has his habitual residence [cf. Article 11(4)].

Accordingly, where contracts are concluded by consumers, and fall within the scope of Article 6 of the Rome I Regulation, the rules of conflict pursuant to Article 11(1), (2) and (3) of this same Regulation are not applicable as to the form of the contract, to determine the law applicable to the form.

8. Are there specific rules of conflict to determine the law applicable to the formal validity of contracts with the object of establishing a right *in rem* of immovable property or a tenancy of immovable property?

Article 11(5) of the Rome I Regulation stipulates that "notwithstanding" paragraphs 1 to 4 of said article, a contract regarding a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law (*lex rei sitae*): (i) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and (ii) those requirements cannot be derogated from by agreement.

It appears, that in the case of the two conditions cumulatively required pursuant to Article 11(5) of the Rome I Regulation, in a contract regarding a right *in rem* in immovable property or a tenancy of immovable property, the requirements of form of the law of the country where the property is situated are combined with the requirements resulting from the law applicable to form, determined pursuant to Article 11(1), (2) or (4) of the Rome I Regulation, as the case may be.

9. To determine the law applicable to the legal capacity of the parties in international contracts, should the registry officer or notary refer to the Rome I Regulation?

As a rule and pursuant to Article 1(2)(a) and (f), questions regarding the capacity of natural persons and that of legal persons are excluded from the scope of the Rome I Regulation.

Accordingly, in the absence of another instrument of the European Union or an international convention that is binding on Portugal, the registry officer or the notary shall have to resort to national rules of conflict to determine the law applicable to the capacity of natural and legal persons, when they have to assess that capacity at the time of the conclusion of the contract.

As regards legal capacity, the Rome I Regulation is only applied to determine the law applicable to the capacity of natural persons, in the exceptional case provided for in Article 13. In other words, in a contract concluded between two persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country. Invoking Article 13 is only possible, however, if the other party to the contract was aware of this incapacity at the time the contract was concluded or even if he was unaware of it, if such lack of awareness was as a result of negligence.

10. How must the registry officer or the notary determine the law applicable to the substance of the obligations arising from international contracts?

As regards the law applicable to the substance of international contracts there is autonomy in making this choice. Pursuant to Article 3(1) of the Rome I Regulation, the parties can select the law applicable to the whole or only part of the contract. The choice of law may fall on the law of one country or, by reference to the parties in their contract, to a non-State body of law or an international convention [see Recital (13)].

Additionally, Article 3(2) of the Rome I Regulation stipulates that the parties may at any time agree to make a change to the choice of law or, not having made a choice of law, to conclude an agreement on the choice of law after conclusion of the contract. In such cases, the change in the choice of law applicable to the substance of the contract does not prejudice the formal validity of the contract viewed in the light of Article 11 of the Rome I Regulation, nor can it negatively affect the rights of third parties.

There is autonomy between the contract concluded by the parties on the one hand and the choice of law agreement on the other. As a rule, the validity or nullity of the one does not imply the validity or nullity of the other, and vice versa. By reference to Article 3(5) of the Rome I Regulation, the formal validity of the choice of law agreement in the true sense of the word is governed by the law determined in accordance with the provisions of Article 11, the validity of the consent to and existence of the choice of law agreement is governed by the law determined in accordance with the provisions of Article 10; Article 13 of that same Regulation is applicable where the incapacity of a natural person who concluded a choice of law agreement is invoked.

The requirements provided for in Article 3(1) of the Rome I Regulation shall also apply, to wit: the choice of law agreement must be expressly concluded; alternatively, it must result clearly from the terms of the contract or the circumstances of the case.

When the choice of law is not expressly made, in order to ascertain if said choice of law is clear from the contract or the circumstances of the case, the existence of a choice-of-court agreement granting jurisdiction to the Court of a Member State can be taken into account. However, the Rome I Regulation does not attach importance to this factor if the choice--of-court agreement concerns a third State. Furthermore, the existence of a choice-of-court agreement attributing jurisdiction to the Court of a Member State does not automatically lead to the conclusion that there was an agreement as to the choice of law. This is merely one of the factors that may in conjunction with others lead to the conclusion that there was a tacit agreement on the choice of law, as mentioned in Recital (12) of the Rome I Regulation: *An agreement between the parties to confer on one or more Courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated*.

There are limits, however, to the freedom of the choice of law applicable to the substance of the contract, when the contract is fully internal but has one sole foreign factor which is the choice of law of another State. Such limits, enshrined in Article 3(3) and (4) of the Rome I Regulation, result from application of the non-derogable provisions of the country with which the contract is most closely connected, in the following two cases:

– Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of law shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (see Recital (15) and Article 3(3). Such would be the case, for instance, if the choice of law to regulate the contract is that of a Member State and the remaining elements of the situation are located in another Member State or if the choice of law is that of a third State and

the remaining elements of the situation are located in another third State.

- Where all other elements relevant to the situation (with the exception of the law chosen) at the time of the choice are located in one or more Member States, and the law chosen is that of a third State, the parties' choice of applicable law to the substance of the contract shall not prejudice the application of the provisions of European Union law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement [cf. Article 3(4)].

Another limitation to the freedom of choice of law applicable to the substance of the contracts results from consumer protection as enshrined in Article 6(1) of the Rome I Regulation. In the presence of the conditions provided for in said Article, contracts concluded with a consumer shall be governed by the law of the country where the consumer has habitual residence. To determine the habitual residence of the consumer the moment of the conclusion of the contract must be taken into account [cf. Article 19(3)]. The residence of natural persons is determined as a rule in accordance with the national law that results from application of the criteria provided for in Article 62 of Regulation 1215/2012 (Brussels IA Regulation).

In order to know when we are in the presence of a contract concluded with a consumer, it is important to know what is taken to be a consumer for purposes of applying the Rome I Regulation. **The autonomous concept of consumer was defined by the CJEU in case C-508/12:**

- In this judgment, regarding the actual situation to which is applicable the Regulation that creates a European Enforcement Order (Regulation 805/2004), the CJEU noted that Regulation 44/2001 (Brussels I Regulation, repealed by Regulation 1215/2012), Council Directive 93/13/EEC (on unfair terms in consumer contracts) and Regulation 593/2008 (Rome I

Regulation), are legal instruments of the European Union that recognise the need to protect the consumer for the simple reason that he is the weaker party in the contract concluded between a consumer and a professional.

- The imbalance between the contracting parties is linked to two circumstances: the consumer has less negotiating power and less information than the professional supplier or vendor.
- Accordingly, the special protection system provided for in such legal instruments cannot be extended to situations in which the imbalance between contracting parties does not exist.
- No such imbalance exists when neither party to the contract is acting in the exercising of his commercial or professional capacity; nor is there any imbalance when both act in the exercising of their commercial or professional capacity.
- In that context, the concept of consumer provided in the Regulation that created the European Enforcement Order must not be broader than that provided in the Brussels I Regulation, to avoid any incoherence in applying these two instruments which may in certain cases be used instead.
- Thus, the CJEU defines the autonomous concept of consumer as a person who concludes a contract for a purpose which can be regarded as being outside his trade or profession with a person who is acting in the exercising of his trade or profession.
- In other words, the concept of consumer does not cover contracts concluded between two persons who are not engaged in commercial or professional activities, or contracts concluded between two persons both acting in the exercising of a trade or profession.

Notwithstanding the above, and pursuant to Recital (25) of the Rome I Regulation, the protection of consumers enshrined in Article 6 should occur in the following two situations:

Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country.

The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

In that context, it appears that the consumer must be a natural person and if the contract has two objects – *e.g.*, supply of cleaning services in an immovable property that serves as residence and workplace of a sole trader – one must consider the main object of the contract.

Although the rule enshrined in Article 6(1) of the Rome I Regulation is that a consumer contract must be regulated as to substance by the law of the country where the consumer has habitual residence, Article 6(2) of this same Regulation provides for the limited autonomy of the conflictual will of the parties when stipulating that in a consumer contract the parties may choose the law applicable to a contract, although such a choice may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which would be applicable in the absence of choice.

As regards contracts concluded with consumers relating to immovable property (*e.g.*, acquisition of a property to serve as residence), Article 6(3) and (4) of the Rome I Regulation provides for several exceptions to the general rules of conflict of laws stipulated for contracts concluded by consumers. Pursuant to one of those exceptions, the general rule provided for in Article 6(1) and (2) should not be applied to contracts concluded by consumers whose object is a right *in rem* on an immovable property or the tenancy of an immovable property, unless the object of the contract is a timeshare, in other words, unless its object is periodic use, long-term holiday products, resale and exchange, as provided for in Council Directive 2008/122/EC.

ln the case of timesharing, it appears that consumers enjoy the protection of Article 6, (1) and (2), even if the immovable property is located in a Member State that is not the Member-State of their habitual residence, since the aim of Council Directive 2008/102 / EC is to protect consumers whenever the immovable property is located within territory of the Union.

Accordingly, with the exception of the timeshare referred to above, there are three types of contract on immovable property that are excluded from the scope of application of Article 6 of the Rome I Regulation: purchase and sale of immovable property, short or long-term leases on immovable property and mortgages.

As regards the law applicable to obligations, the Rome I Regulation also has specific rules of conflict for certain contracts. In addition to the above-mentioned rule of conflict on consumer contracts (Article 6), the Regulation contains specific rules of conflict to determine the law applicable to contracts of carriage (Article 5), insurance contracts (Article 7) and employment contracts (Article 8).

Other than the contracts just mentioned that fall within the scope of Articles 5 to 8, in the absence of choice of law applicable to an international contract, it shall be determined in accordance with the rules of conflict enshrined in Article 4(1) of the Rome I Regulation for the specific type of contract in question.

Subsidiarily, where an international contract does not fall within any of the specific types of contract provided for in Article 4(1) of the Regulation, or when it falls within more than one of such specific types of contract, the rule of conflict provided for in Article 4(2) of the Rome I Regulation shall apply, that is: the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has habitual residence.

Article 4(3) of the Rome I Regulation contains a safeguard clause and a subsidiary criterion contained in Article 4(4).

The safeguard clause under Article 4(3) means that even if the law applicable to the contract can be determined by applying either Article 4

paragraph 1 or paragraph 2, that law shall not apply and instead it shall be the law of that other country with which the contract is more closely connected, whenever said connection to the other country results clearly from all circumstances of the case.

To find the manifestly closest connection with the law of another country where the contract is related to one or to a series of contracts, recourse may be made to Recital (21) of the Rome I Regulation, according to which: *In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts*.

The subsidiary criterion provided for in Article 4(4) of the Rome I Regulation, on the other hand, functions differently to the safeguard clause mentioned above. The subsidiary criterion provided for in Article 4(4) of the Regulation shall only apply if the law applicable cannot be determined pursuant to paragraphs 1 or 2 of Article 4. In that case, the contract shall be governed by the law of the country with which it is most closely connected.

11. How does the registry officer or the notary determine the law applicable to international contracts in the following special situations:

– ***International contractual obligations resulting from the purchase and sale of immovable property, mortgage, loan or other credit and financing contracts, concluded by credit institutions, with mortgage, with or without surety?***

The issue is a delicate one, but as it often arises in practice, it follows a contribution to a possible solution.

To answer this question, therefore, the registry officer or notary, and in general the law enforcer, must first resolve another question relating to the legal classification: whether it is a mixed contract or a coalition, junction or union of contracts.

A mixed contract is one in which elements of two or more contracts, totally or partially regulated by law, are brought together (*e.g.* if A rents a holiday home to B for two months and also undertakes to provide it with laundry and house cleaning services, for a single rent, elements of the tenancy of immovable property and clauses of a contract of provision of services are brought together in the same contract).

On the contrary, in a coalition, junction or union of contracts, two or more contracts are entered into without losing their individuality; they are linked to each other by a certain connection (*e.g.* a company commissions a project from a team of architects at the same time as it rents them the premises where they will work). What unites the related contracts may be a purely external link (*e.g.* they were concluded at the same time, between the same people; they are under the same title) or it may be a functional, substantial link, which, by creating a relationship of dependence between two or more contracts, influences the respective discipline. However, whatever the relationship between the related contracts, they do not lose their individuality.

Having said that, in the case of a coalition of contracts, and this seems to be the most appropriate qualification for the situation under consideration here, if there is an element of strangeness entailing the application of conflict rules (*e.g.* because one of the parties is habitually resident in another country, or because the parties have chosen the law of another country), the conflict rule set out in the Regulation to which it relates must be applied to each contract respectively. Thus, depending on whether or not there is a choice of law, the provisions of Articles 3 or 4(1)(c), are applicable to a contract of purchase of immovable property, regardless the fact that the contract is concluded with a consumer [see

Article 6(4)(c)]; the same applies to mortgages; as to the loan contract concluded with a consumer it falls within the scope of Article 6; and the same will apply to a surety contract if it is concluded with a consumer (the autonomous concept of consumer already mentioned above must be used for this purpose).

In the case of a mixed contract, Article 3 or Article 4(2) of the Regulation seem to apply, depending on whether or not there is a choice of law. When interpreting Article 4(2), recital 19 should be taken into consideration.

– ***International contractual obligations resulting from assignment of claims or contractual subrogation to the rights and guarantees of the mortgage creditor as a consequence of a loan made to the debtor?***

The law applicable to contractual assignment of claims and contractual subrogation to the rights and guarantees of the mortgage creditor in consequence of a loan made to the debtor is determined under Article 14 of the Rome I Regulation and is governed by the law that applies to the contract between the assignor and assignee under the Rome I Regulation.

Under Article 3 of the Rome I Regulation, the law chosen by the parties (assignor and assignee or subrogated creditor and debtor) shall thus be applicable. In the absence of a choice of law the provisions of Article 4 thereunder shall apply, which functions as mentioned above. Even if the contract is concluded with a consumer, Article 6(4)(c) of the Rome I Regulation stipulates that in this case, as the assignment or subrogation concerns a right or guarantee on an immovable property, paragraphs 1 and 2 of that article do not apply.

Furthermore, the law governing the assigned or subrogated claim, which may differ, is what shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

As regards property aspects of assignment or subrogation, Recital (38) stipulates: *In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term 'relationship' should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment of claims or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment of claims or contractual subrogation in question.*

Quite another matter is the law applicable to the form of assignment or subrogation. The law applicable to form is determined by Article 11 of the Rome I Regulation, including the additional requirements as to form provided for in paragraph 5 thereunder, when the contract concerns a mortgage.

As regards opposition of the assignment to third parties, the CJEU has given a negative judgment regarding the question of knowing if Article 14 of the Rome I Regulation applies directly or by analogy to determine the law applicable to third parties in claim assignments, in the case of multiple claim assignments.

See, in the judgment of case C-548/18, the CJEU's interpretation of Article 14 of the Rome I Regulation regarding the situation described below:

- A debtor, domiciled in Germany hired as civil servant in Luxembourg successively concluded two loan agreements – the first with a bank based in Germany, governed by German law; the second with a bank based in Luxembourg. To guarantee both contracts, the debtor successively assigned to each of the credit institutions the attachable part of her salaries.
- In accordance with Luxembourg law the employer must be informed of that assignment as prerequisite for it to take

effect vis-à-vis third parties. The bank in Luxembourg duly informed the employer (assigned the second loan) but the bank in Germany did not (and it was assigned the first loan).

– The debtor was declared insolvent and the appointed insolvency practitioner received from the debtor's employer a share of her salaries. The two creditor banks both disputed the right to that amount in the German Courts. In the first instance the Court upheld the claim of the bank in Germany with whom the first assignment of claims was signed, but the bank in Luxembourg appealed against that decision.
– The referring Court therefore asked the CJEU if the Rome I Regulation determines the law applicable to third-party effects in the event of multiple assignments.
– **The CJEU's decision was negative. Article 14 of the Rome I Regulation on the law applicable to contractual obligations does not designate, directly or by analogy, the applicable law concerning the third-party effects of the assignment of a claim in the event of multiple assignments of a claim by the same creditor to successive assignees.**

If the rules of conflict mentioned above result in Portuguese law being applicable to subrogation and assignment of claims, the national regime is set out in the following legal provisions.

In the Portuguese Civil Code, contractual subrogation is provided for in Articles 589 (subrogation of a third party by the creditor), 590 (subrogation of a third party by the debtor), 591 (subrogation in consequence of a loan to the debtor) and 593 to 594 (effects and applicable provisions). Subrogation is considered a form of assignment of claim and not a discharge of the obligation, and this is reflected in its regime.

Assignment of assets to creditors is provided for in Articles 831 to 836 of the Civil Code. Where it includes claims by the debtor it is also subject to the requirements as to form provided for in Article 832, in addition to the formalities required for it to produce effects regarding third parties.

– ***International contracts of voluntary alienation of a legitimate share?***

To ascertain whether recourse should be had to the Rome I Regulation or to the EU Succession Regulation to determine the law applicable to the legitimate share with a foreign element, one of the methods that can be used consists in analysing whether the content of the voluntary alienation of the legitimate share has a placement, a systematic framework or an object within the internal law of the forum, corresponding to a legal concept enshrined in the rules of conflict of law of the European Union, on the principle that the rules of conflict determined its scope of application through legal and technical concepts.

The draft answer below does not prejudice the interpretation the Court of Justice of the European Union may make regarding the legal concepts enshrined in the rules of conflict of law of the European Union. The purpose of this reflection is mainly to analyse the systematic framework and the object provided for in national law. In case of doubt as to the extent of the rules of conflict enshrined in European Union law, national Courts must consult the CJEU.

In Portuguese law, when the succession is opened, there is a condition of indivisibility among the heirs, that ends only with the sharing out. Accordingly, when the succession is opened the heirs do not acquire the property of certain assets but rather have a right to an abstract legitimate share, which only becomes a specific item or items at the time of the sharing out.

During the indivisible stage, the heirs are the owners of all the assets of the inheritance, in common and with no determination of share or right. They hold an ideal share in the universal assets of undivided inheritance. In that situation, an heir cannot dispose of or alienate certain assets of the inheritance. However, he can conclude acts to dispose of or encumber his legitimate share. In addition to cases resulting from a voluntary act, the alienation of the legitimate share may result from the succession or from forced transmission following enforcement proceedings.

In any of these cases, transmission of the right to the inheritance does not involve materialisation of any assets, and after transmission said assets continue to be part of the estate, although with different owners.

Registering in the Land Register the acquisition of a common inheritance with no determination of share or right, or the alienation of a legitimate share, is not mandatory – Article 8-A(1)(a)(i) and (ii) of the Land Registry Code.

However, it is possible to voluntarily register the transmission of the legitimate share. In this case, it shall be done by annotating the transmission of the heir's position in the inscription of the acquisition of the common inheritance with no determination of share or right – Article 101(1)(e) of the Land Registry Code. Where a registration of acquisition of the common inheritance with no determination of share or right does not exist, a registration shall be made of acquisition of the common inheritance with no determination of share or right identifying the heirs (those previously entitled who maintain that status, and the person or persons who acquired the hereditary position through voluntary transmission or by succession, always with reference to the deceased).

Voluntary alienation of the legitimate share is a transaction provided for in Book V *Succession Law*, Title I, *On Successions in General*, Chapter XI, *Alienation of Inheritance*, in the Civil Code. Although systematically included in the section concerning succession law, Article 2124 of the Civil Code stipulates the following: "Alienation of the inheritance or the legitimate share is subject to the regulating provisions of the legal transaction behind it, except as provided for in the following articles".

Thus, alienation of a legitimate share is subject to the general rules governing purchase and sale (Article 874 et seq. of the Civil Code) or to the general rules on donations (Article 940 et seq. of the Civil Code), depending on whether the alienation is for a consideration or free of charge, with the specificities provided for in Articles 2125 to 2130 of the Civil Code.

National law stipulates formal requirements in Article 2126 of the Civil Code: alienation of the estate or the legitimate share is done by public deed or by private authentic instrument where the assets must be alienated in one of these forms. Outside these cases, alienation must be set out in a private instrument. However, the law applicable to form shall be determined pursuant to Article 11 of the Rome I Regulation, if it is concluded that the alienation of the legitimate share is covered by the scope of application of this Regulation.

Equating the alienation of the legitimate share to purchase and sale or gift, as provided for in Article 2124 of the Civil Code, depending on whether it is for valuable consideration or free of charge, allows the conclusion that the fact that the transaction of alienation of the legitimate share is provided for in the book on succession law does not mean that it depends on the rules of conflict applicable to succession law.

In the light of Portuguese law, it can be concluded that although the object of the transaction is a patrimonial right arising *mortis causa*, the transaction itself is *inter vivos*, subject to the specific discipline governing contractual relations albeit with some specific characteristics of its own, mainly relating to the content of the right transmitted.

Thus, in the case of an international contract of alienation of the legitimate share (*e.g.*, because the parties chose to apply a foreign law; because one of them lives in another country; or because part of the estate is located in another country) it appears that the law applicable to the substance of the obligations arising from that contract can be determined by the Portuguese registry officer or notary, pursuant to the Rome I Regulation.

That being the case, under Article 3 of the Rome I Regulation the law chosen by the parties is applicable. In the absence of a choice of law, Article 4 of this Regulation is applicable to determine the law applicable to the substance of the contract.

Example
A, Portuguese, dies without leaving a will or disposition of last wishes in France, where he had his habitual residence, in January 2018. He leaves immovable property in Portugal and in France. The administrator of the estate, resident in Portugal, entitles the heirs (herself, B, C, D and E), which can be done through a deed of entitlement of heirs at a Portuguese Notary Office or through a simplified procedure of entitlement of heirs and registries in a Civil Registry. The law applicable to the succession is the one determined by the EU Succession Regulation. In principle, this shall be the law of the Member State where the deceased had habitual residence at the time of death (French law) and not the law of his nationality (Articles 21, 22 and 23). The administrator liquidates the stamp duty due under Article 26 of the Stamp Duty Code and requests registration of the immovable property located in Portugal in favour of the entitled heirs, in common and without determination of share or right (optional registration under Article 8-A of the Land Registry Code), at a Land Registry. Heir C, with habitual residence in Portugal, gifts his legitimate share to his grandson, who accepts, through a public deed before a Portuguese Notary Office. The latter also liquidates the stamp duty and effects the registration (also optional - Article 8-A of the Land Registry Code). Later, the heir D waives the inheritance. In this situation can this share be added to the share of the remaining heirs, in particular heir C, who had previously transmitted his legitimate share? Is Article 2125(2) of the Civil Code applicable? Or, in this regard, should the provisions of French law, which are applicable to the succession under the EU Succession Regulation, apply? The substantial validity of the waiver or acceptance of the inheritance or legacy and the legitimacy to waiver or accept are governed by the law applicable to the succession. The formal validity of acceptance or waiver of the inheritance or legacy may alternatively be governed by the law applicable to the succession resulting from Articles 21 and 22 of the EU Succession Regulation, or by the law of the Member State where the author of the declaration has his habitual residence, which may be a Member State of the European Union or a third State (Article 28 of the Succession Regulation). As regards the right of adding to the heir's share and under what terms, this appears to be a succession matter and not a contract to dispose of a legitimate share in the true sense of the word. If so, the applicable law to ascertain whether and under what terms the right to add the share exists, is French law, the law applicable to the succession. Portuguese law, meanwhile, shall apply to the contract alienating the legitimate share, pursuant to Article 4(2) of the Rome I Regulation, in the absence of choice of law.

– ***International contracts for voluntary alienation of a half-share in common assets?***

As mentioned in the reply to the previous question, in order to know whether the Rome I Regulation or the Matrimonial Property Regulation is used to determine the law applicable to voluntary alienation by one of the spouses of his or her half-share in the common assets, where there is a foreign element in the contract, it is important first to verify if the internal content of the contract, in the national law of the forum, has placement, systematic framework or purpose corresponding to the concept enshrined in the rules of conflict of law of the European Union, on the principle that the rules of conflict determine its scope of application through technical and legal concepts.

Likewise in this answer, the following reflection does not prejudice the interpretation which the Court of Justice of the European Union may make regarding the legal concepts enshrined in the rules of conflict of law of the European Union. The purpose of this reflection is mainly to analyse the systematic framework and the object of the rule enshrined in national law. This may facilitate the decision to include it in the scope of application of one or more rules of conflict of law. National Courts must consult the CJEU where doubt exists as to the scope of application of a rule of European Union law.

Under Portuguese law, once common assets are shared, either by death, or by divorce or legal separation, the surviving spouse (in the case of dissolution by death) or each of the spouses (in the case of divorce or legal separation) is entitled to his or her half share in the common property of the couple, under Articles 1724, 1730(1) and 1734 of the Civil Code.

Marital communion cannot be mistaken for or equated to co-ownership of common property; spouses have no ideal shares of common property, rather they have half of the assets and liabilities of the communion, which are divided when the marriage is dissolved (by death or by divorce) or legal separation occurs – Articles 1688, 1689 and 1788 of the Civil Code.

In this context, voluntary alienation, *inter vivos*, of the right to the half share of the as yet undivided common property may take place by means of a contract – *e.g.*, a contract of purchase and sale for a consideration, or a gift agreement, free of charge.

The contract transfers the content of a right to a legal universality to the legal sphere of the purchaser/acquiring party. The purchaser/acquiring party may then legitimately liquidate the common assets jointly with the other heirs (when the division of the common property arises from dissolution of the marriage by death) or with the other owner of a half share (when the division of the common property arises from divorce or legal separation of the spouses).

However, relations between purchaser and seller/transferor are not governed by the laws applicable to matrimonial property regimes but rather by the rules applicable to the contract they conclude.

This being the framework in the light of national law, it appears that the obligations resulting for the parties in the alienation of the right to a half share in the common property of the couple do not arise from the rules providing for the matrimonial property regime but rather from those providing for the regime applicable to contracts, in particular a contract of purchase and sale or gift agreement, if the conveyance is done by means of one or the other of these contracts.

In such a case, the matter does not appear to be excluded from the scope of application of the Rome I Regulation pursuant to Article 1(2)(c).

Accordingly, to determine the law applicable to the substance of an international contract of alienation of the right to a half share in the common property of the couple, whether for a consideration or free of charge, the rules of conflict provided for in the Rome I Regulation shall apply. The law applicable to the form of said contract shall be determined in accordance with the provisions of Article 11 of the Rome I Regulation.

The law to be applied to determine which assets are included in the couple's common property shall be the law determined in accordance with the rules of conflict set out in the Matrimonial Property Regulation, whenever the situation falls within its temporal and territorial scope.

– ***International contract of purchase and sale between father and son, without the consent of the other children, of an immovable property located in Portugal?***

Consider the example of a father, of Italian nationality and resident in Italy, who sells to one of his sons, of Portuguese nationality and resident in Portugal, an immovable property located in Portugal without the consent of his other children.

If the other children oppose the sale, pursuant to the provisions of Article 877 of the Civil Code, determining the law applicable to this specific problem rests on whether recourse should be had to the Rome I Regulation containing the rules of conflict applicable to contracts, or rather to the rules of conflict regarding legal and family relationships, in particular those set out in the Civil Code, in the absence of a legal instrument of the European Union or any other international instrument containing rules of conflict pertaining to legal and family relationships.

Where the problem has to be analysed in the light of national law, which is the law of the forum, [*vide* recital (8)] Article 877(1) of the Civil Code must be considered. This article forbids the sale by parents or grandparents to children or grandchildren, if the other children or grandchildren do not consent, since although it comes under the chapter of purchase and sale, it contains a legal and family object that deviates from the respective ruling. That being the case, then, Article 1(2)(b) of the Rome I Regulation stipulates that obligations arising from family relationships are excluded from the scope of this Regulation.

Accordingly, to determine the law applicable to this specific problem recourse must be had to the rules of conflict governing legal and family relationships (Article 57 of the Civil Code) and not to the law governing the substance of contractual obligations (Articles 3 or 4 of the Rome I Regulation).

12. Can the applicable law resulting from the rules of conflict provided for in the Rome I Regulation be the law of a third State?

Yes, pursuant to Article 2 of the Rome I Regulation, this has universal vocation. The applicable law determined according to the rules provided for in this Regulation may be the law of a Member State or the law of a third State.

13. In what cases may the registry officer or the notary refuse to apply a provision of the applicable law determined in accordance to the Rome I Regulation?

If a legal provision under foreign legislation that results from the rules of the Rome I Regulation is incompatible with public policy in Portugal, the registry officer or the notary may, under Article 21 of the Rome I Regulation, refuse the application based solely on that legal provision.

As regards public policy, **the CJEU ruled the following, in the judgment delivered in case C-302/13**, regarding interpretation of Article 45(1)(a) of Regulation 1215/2012 (Brussels IIa): national Courts are free to determine in conformity with their national concepts the requirements of their public policy (*ordre public*), pursuant to Article 45(1)(a) of Regulation 1215/2012 (Brussels IIa); it is not the place of the CJEU to define the content of such concept; however, the CJEU shall control the limits within which the national judge can resort to the concept of *ordre public* to refuse recognition or enforcement of a decision.

This interpretation is equally valid as regards the concept of national public policy provided for in Article 21 of the Rome I Regulation. It is binding not only on the Courts but also on other national authorities that apply the Regulation.

14. What are overriding mandatory provisions?

Article 9(1) of the Rome I Regulation describes overriding mandatory provisions as: (…) *provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*

This definition is based on jurisprudence that preceded the Rome I Regulation, in **joined cases C-369/96 and C-376/96**, in which the CJEU ruled on the applicability of the Belgian overriding rules and safety laws to a situation in which workers at the service of companies based in other Member States were deployed in Belgium to perform construction services. The CJEU underlined that the overriding rules of the forum cannot contravene the law of the treaties, as this would jeopardise the principle of the rule of law of the European Union. In that context, the CJEU ruled that the rules of the Treaty instituting the European Community, at stake in those cases, did not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in Belgium, of an obligation to pay the workers deployed by it the minimum remuneration fixed by the collective labour agreement applicable in Belgium, provided that the provisions in question are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply. Thus the idea of overriding mandatory provisions had an eminently Community origin.

Overriding mandatory provisions are overriding rules of international law foreseen by the national legal system, aimed at protecting certain vulnerable categories – such as minors, consumers, workers – or the Member State's political, social or economic organisation. Overriding mandatory provisions are international overriding rules that have mandatory application in the country of the forum and to that extent are

distinguished from national public policy provisions. While national public policy provisions pursuant to Article 21 react to the application of a provision of the foreign law governing the contract, once said law has been determined, and setting aside this application, the overriding mandatory provisions or international overriding rules, as the name indicates, are immediately applicable because they are given imperative status in the law of the forum, but not because they are a reaction to the foreign law applicable to the contract.

Thus, according to Article 9(2) of the Rome I Regulation, the provisions thereunder shall not restrict the application of the overriding mandatory provisions of the law of the forum.

Additionally, pursuant to Article 9(3) of the Rome I Regulation: *Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising from the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, due consideration shall be given to their nature and purpose and to the consequences of their application or non-application*.

Article 9 of this Regulation therefore stipulates that despite the law that governs the contract being the law of another country, the overriding mandatory provisions or international overriding rules in force in the country of the forum and the international overriding rules of the country where the obligations have or should have been fulfilled, shall apply when, according to such rules, the enforcement of the contract is illegal. The Regulation does not refer to the overriding mandatory provisions of the country whose law governs the contract as said provisions apply as a result of the rules of conflict enshrined in the Rome I Regulation.

Examples of international overriding rules, or overriding mandatory provisions include: certain norms under which the European Union imposes economic sanctions as a result of which it is forbidden for credit institutions operating in the Member States to conclude financing contracts with companies based in the countries targeted by the sanctions;

furthermore, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are forbidden, as per Article 101 of the Treaty on the Functioning of the European Union.

In any case, whether protecting the public interests or the private interests of more vulnerable groups, an overriding rule of the law of the forum shall only be deemed to be internationally mandatory if its overriding application is also applicable to international situations.

Overriding mandatory provisions must be interpreted restrictively. As a rule, it is up to the Courts to apply them and determine their effects on the contract, which may be nullity of the contract, when so provided or demanded by the rule (*e.g.*, Article 101 TFEU), or merely limiting the effects of the contract.

15. How is the habitual residence of the parties determined for purposes of applying the Rome I Regulation?

The habitual residence is determined in the light of the provisions of Article 19 of the Rome I Regulation.

Thus, the habitual residence of companies and other entities, with or without legal personality, shall be the place where their central administration is situated.

Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

To determine the habitual residence of a natural person concluding contractual obligations outside the course of his business activity, one may resort to the criterion provided for in Article 62 of Regulation 1215/2012: in order to determine whether that natural person is domiciled in the Member State of the forum, the Court shall apply its internal law; if said person is not domiciled in the Member State of the forum, in order to determine whether the party is domiciled in another Member State, the Court shall apply the law of that Member State.

This criterion of itself is not sufficient. Other elements will have to be added to conclude that a person has not only his domicile but also his habitual residence in a Member State or, where the case may be, in a third State. Some of these factors have already been mentioned regarding the EU Succession Regulation.

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Section VII

Jurisdiction, recognition and enforcement of judgments in civil and commercial matters

Regulation 1215/2012

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Introduction

Note: Any articles in this section with no indication of origin refer to Regulation (EU) No 1215/2012; references to a code without mentioning the country refer to Portuguese legislation.

Regulation (EU) No 1215/2012 of 12 December, amended by Regulation (EU) No 542/2014 of 15 May	
on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters	
Informal designation	Brussels Ia Regulation
Material scope of application	Civil and commercial matters except those mentioned in Article 1
Effective from	10 January 2015, except as regards Articles 75 and 76
Non-binding on these Member States	-
Preceded by	Council Regulation (EC) No 44/2001 of 22 December 2000
Amended by	Regulation (EU) 542/2014 of 15 May 2014
Enforcement instruments	Commission Delegated Regulation (EU) 2015/281 of 26 November 2014
Non-applicable internal norms	International jurisdiction: Articles 62 and 63 of the Code of Civil Procedure Recognition: Article 978 et seq. of the Code of Civil Procedure

Temporal scope

Regulation 1215/2012, or the Brussels Ia Regulation, was published in the Official Journal of the European Union L351/1-21 on 20.12.2012. It

entered into force on the twentieth day following that of its publication and, with the exception of Articles 75 and 76 which shall apply from 10 January 2014 (cf. Article 81), this Regulation shall apply as from 10 January 2015.

In practical terms, this Regulation shall apply only to legal proceedings instituted, authentic instruments formally drawn up or registered, and court settlements approved or concluded on or after 10 January 2015 (cf. Article 66(1)).

Regulation 1215/2012 was amended by Regulation 542/2014, which added Articles 71a to 71d to Chapter VII, and by Commission Delegated Regulation (EU) 2015/281 which substituted Annexes I and II.

Territorial scope

The Brussels Ia Regulation is binding on all Member States including the United Kingdom, Ireland and Denmark.

Ireland and the United Kingdom chose to apply the Regulation as results from recital (40).

This Regulation applies to the United Kingdom whilst it is still a Member State, after which the United Kingdom will no longer be bound, without prejudice to the period of transition to be agreed, or to the judicial authorities continuing to apply the provisions of the Regulation in legal proceedings and requests for cooperation initiated before Brexit and still pending after Brexit.

Denmark notified the European Commission on 20.12.2012 of its decision to apply Regulation 1215/2012 under Article 3 of the Agreement signed with the European Community set out in Council Decision 2005/790/EC.

Material scope

The matters included and the matters excluded from the scope of application of the Brussels Ia Regulation are determined by Article 1 of

this Regulation. Under the terms of Recital (10), this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters specifically covered by other Regulations – *e.g.*, maintenance obligations, successions, insolvency, matrimonial property regimes, divorce and parental responsibilities, all of which are covered by their own rules of international jurisdiction, recognition, enforcement and enforceability stipulated in the respective European Union Regulations.

Arbitration is excluded from the scope of application of the Brussels Ia Regulation. A judgment by a Court on the validity of an arbitration agreement is also excluded from the scope of application of this Regulation. However, this does not prevent a decision by a Court of a Member State that has international jurisdiction under the rules of the Brussels Ia Regulation to rule on the substance of the question, once the arbitration agreement has been declared invalid. In such a case, the decision on merit enjoys the rules of recognition and enforcement laid down in this Regulation (cf. Recital (12)).

CJEU jurisprudence has ruled on the concept of civil and commercial matters, which is an autonomous concept of European Union law (and so should not be interpreted in the light of the national law of any of the Member States) and some of these decisions have already been mentioned in Section VI on the Rome I Regulation, under "*Material scope*".

Rules on jurisdiction, recognition and enforcement

To attain its objective of free movement of judgments in civil and commercial matters, the Brussels Ia Regulation is a *règlement double* containing norms on the international jurisdiction of Courts (cf. Articles 4 to 35), recognition and enforcement of judgments, execution of authentic instruments and court settlements (cf. Articles 36 to 60), in matters of a civil and commercial nature covered by its material scope of application. This Regulation does not contain rules of applicable law.

The provisions of the Regulation regarding the determination of international jurisdiction are applicable when the defendant has his domicile in a Member State [cf. Article 6(1)].

If a defendant has his domicile in a third State, the Regulation is applicable when a dispute concerns consumer contracts [Article 18(1)], individual employment contracts [Article 21(2)], matters under the exclusive jurisdiction of the Courts of a Member State (Article 24), the jurisdiction of the Unified Patent Court, or the Benelux Court of Justice [Article 71b(2) and (3) as amended under Regulation 542/2014], or when it is the result of choice-of-court agreement [Article 25(1)]. Outside such cases, if the defendant lives in a third State, Article 6 of the Regulation refers to the private international law of the forum.

The key features of the international jurisdiction system stipulated by the Brussels Ia Regulation can be grouped under the following nine points.

The Brussels Ia Regulation:

1) Contains a general jurisdiction rule based on the domicile of the defendant whenever he resides in a Member State (Article 4) and rules of jurisdiction for cases where the defendant does not reside in a Member State [Article 6 and Articles 71a to 71c];
2) Contains rules of alternative jurisdiction based on the domicile of the defendant in a Member State, where the proceedings have a stronger connection with another Member State (*e.g.*, where the harmful event occurred or the services should have been provided – Article 7) and rules of special jurisdiction enshrining protective forums for the weaker party to the legal relationship (insured, injured, consumer, worker – see Sections 3, 4 and 5); in the first case, it should be noted that it is only possible to apply rules of alternative jurisdiction pursuant to Article 7 when the defendant has his domicile in a Member State;

3) Contains rules of exclusive jurisdiction which breach shall be declared *ex officio* (*e.g.*, in matters of rights *in rem*, validity of registration acts, procedures arising from the enforcement of legal judgments – Article 24) which may result in legal proceedings not being instituted in the Member State of domicile of any one of the parties;
4) Allows prorogation of international jurisdiction by means of agreements conferring jurisdiction (Article 25);
5) Allows prorogation of the international jurisdiction of a Court of a Member State through tacit acceptance of jurisdiction in cases not covered by Article 24 [Article 26(1)];
6) Provides for only two cases where the Court of a Member State can and should of its own motion rule on the issue of international jurisdiction (when rules of exclusive jurisdiction are breached – Article 27), or declare that it has no international jurisdiction (when the defendant is not sued in the Member State where he has his domicile, in addition to the fulfilment of other requirements – Article 28).
7) It stipulates the duty of the Court to inform the weaker party (the insured, the injured party, the consumer or worker) of his right to invoke a breach of the rules of special jurisdiction designed to protect said weaker party, although not allowing the Court to rule *ex officio* on the violation of said laws [Article 26(2)];
8) Contains the rules applicable to *lis pendens* (Section 9);
9) It provides for prorogation of limited and exceptional jurisdiction in Article 35, enabling a Court that does not have jurisdiction as to the substance of the matter to decree a provisional, protective measure confined to national territory – cf. Recital (33) (unlike protective measures decreed by the Court that has jurisdiction as to the substance of the matter which benefit from recognition and enforcement in another Member State, as provided for in

the Regulation, protective measures under Article 35 do not benefit from this possibility).

Additionally, the Brussels Ia Regulation provides for recognition and enforcement of judgments under Chapter III, and enforcement of extrajudicial titles, including authentic instruments and Court settlements, in Chapter IV.

As regards recognition and enforcement, the Brussels Ia Regulation waives the need for any formality or specific procedure [*cf.* Article 36(1), Article 39 and Recital (26)], so that judgments given in one Member State are, *ipso jure*, recognised in all other Member States and do not require *exequatur* proceedings.

However, enforcement in one Member State of a judgment given in another Member State depends always on the initiative of the interested party.

Furthermore, although this point might be controversial, it appears that the rule of exclusive jurisdiction provided for in Article 24(5) refers only to the jurisdiction of declarative proceedings resulting from enforcement of a judgment given in another Member State (*e.g.*, embargoes, opposition).

If that is the case, the Regulation does not provide for rules of international jurisdiction for enforcement proceedings, whether these are based on judgments or on an extrajudicial title originating in another Member State. Thus, international jurisdiction for enforcement proceedings based on titles originating in another Member State shall be determined according to the rules of jurisdiction of the law of the forum.

Whatever the rules applicable to the international jurisdiction of enforcement proceedings, in the absence of an international instrument that allows it, it results from the principles of public international law that the Courts of a Member State cannot within the context of enforcement proceedings order extraterritorial enforcement measures (*e.g.*, seizure of assets in the territory of another Member State), given that said measures imply the use of force outside its own territory. This conclusion was confirmed by the CJEU in judgment C-261/90 paragraph 26: *it is necessary*

to take account of the fact that the essential purpose of the exclusive jurisdiction of the Courts of the place in which the judgment has been or is to be enforced is that it is only for the Courts of the Member State on whose territory enforcement is sought to apply the rules concerning the action on that territory of the authorities responsible for enforcement.

In the Portuguese legal framework, certain difficulties might arise in enforcing judicial or extrajudicial titles originating in another Member State, some of which are described below.

Like recognition, enforcement is also applicable to judgments given in protective measures provided these are decreed by a Court with international jurisdiction as to the substance of the matter, in accordance with the rules of the Regulation, and also that the other party was heard or in the case of *ex parte* protective measures, the other party was informed of the judgment before enforcement.

This gives rise to two consequences.

The first regards control of the jurisdiction of the Court of origin by the Court where enforcement of a judgment given in a protective measure is requested. Accordingly, it appears that the Court of destination shall have to verify *ex officio*, based on the certificate set out in Annex I submitted thereto, if said certificate mentions that the Court of origin has international jurisdiction to rule on the substance of the matter, as required by Article 42(2)(b)(i). In that case only, may a protective measure be enforced on another Member State under the Regulation.

The second consequence concerns the effectiveness of enforcement of *ex parte* protective measures. Although Article 43(3) of the Regulation does not apply to protective measures, the need to notify the requested party of the decision ordering a protective measure before enforcement is provided for in Article 42(2)(c) of this same Regulation. To satisfy this requirement, when enforcement is requested to the Portuguese Courts an exception must be made to the internal law of enforcement of *ex parte* protective measures which, under national law, are only served on the requested party after having been enforced. The requirement to serve the requested party before enforcement may also compromise the

effectiveness of the measure in the opposite sense, also, when the parties wish to enforce in another Member State a judgment given in an *ex parte* protective measure given in Portugal.

However, in this regard, Recital (33) of this Regulation appears to admit the alternative possibility of recognising judgments given in *ex parte* protective measures under the national law of the forum, possibly without having to notify the requested party beforehand if not required by the law of the forum, when it says that: (…) *this should not preclude the recognition and enforcement of such measures under national law*.

Another difficulty that may arise when enforcement measures for a foreign judicial or extrajudicial title are instituted in Portugal concern the need to harmonise the procedural rules applicable to the form of enforcement arising out of Article 550 of the Code of Civil Procedure with the specific rules of the Regulation, which shall prevail.

Thus, in enforcing a judgment on the substance of the matter or an extrajudicial title, Article 43(1), applicable to judgments and embracing authentic instruments and court settlements pursuant to Article 58(1), second paragraph, requires that the certificate set out in Annex I or Annex II, as the case may be, shall be served on the defendant before the first enforcement measure is put in place, and must be accompanied by a copy of the judgment or the authentic instrument, if this has not already been served on the defendant.

Additionally, Article 41 of the Regulation stipulates that enforcement must take the form provided for in national legislation regarding enforcement of national titles under the same conditions.

In cases where enforcement is based on national enforcement titles such as sentences and certain extrajudicial titles provided for in Article 550 of the Code of Civil Procedure, said enforcement must comply with the summary form therein stipulated, according to which as a rule the enforcement agent first attaches the property and only later notifies the defendant. The fact is that in a summary enforcement the defendant should only be served before the attachment in certain exceptional cases (*e.g.*, Article 855(5) of the Code of Civil Procedure).

In addition to such exceptional cases there is the enforcement of judicial titles and certain extrajudicial titles issued in another Member State, when it is understood that enforcement should be in summary form as it corresponds to one of the situations under Article 550 of the Code of Civil Procedure. This article provides this form of proceeding for national titles under the same conditions (cf. Article 41 of the Regulation). In these cases, prior to the attachment, the enforcement agent must notify the requested party in compliance with Article 43(1) of the Brussels Ia Regulation. In other words, in addition to the exceptional cases provided for in Article 855(5) of the Code of Civil Procedure, where the defendant is notified before the attachment, there a provision stipulated in Article 43(1) of the Regulation which is directly applicable to internal law. It therefore appears that in order to comply with Article 43(1) of this Regulation, the national Court must observe the provisions of Article 726(8) of the Code of Civil Procedure, according to which: *when a defendant must be served, the secretariat shall send to the enforcement agent by electronic mail the enforcement certificate and accompanying documents, notifying said agent that he must proceed with the service*.

Article 43(1) of the Regulation does not however stipulate that prior notification of the defendant is done to enable him to challenge the enforcement. It is only Article 43(2) which establishes that where the person against whom enforcement is sought is domiciled in a Member State other than the Member State of origin, he may request a translation of the judgment in order to contest the enforcement. Nor does the Regulation indicate any time limit to be observed between the date of the service and the first enforcement measure. In this regard Recital (32) says that the service should be made in reasonable time before the first enforcement measure, and that it is done in order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State. As regards what is considered to be the first enforcement measure in this context, Recital (32) establishes that the first enforcement measure should mean the first enforcement measure after such service. It

remains to be seen whether the notion of an enforcement measure should be an autonomous concept that is uniform throughout the European Union (*e.g.*, the first measure involving seizure of assets), or whether it should correspond to the notion of an enforcement measure adopted by the legislation of each Member State.

The decision on these questions, which the Regulation does not address, is a jurisdictional matter. It is up to the national Court to determine a reasonable time between the notice served on the defendant and the first enforcement measure adopted following the service, what measures under national law fall within the notion of an enforcement measure to that effect and whether, when served, the defendant must also be informed of the period within which he may lodge an objection to the enforcement. As this is a jurisdictional matter, the most suitable solution in practice would be to issue a preliminary injunction.

When in doubt as to the interpretation of the rules of the Regulation in finding a solution to any of these questions, the national Courts should refer the matter to the CJEU.

The above-mentioned formalities are carried out during the enforcement proceeding and it falls to the Courts and the enforcement agents, not to the registry officers or the notaries. As far as the latter two are concerned, and in particular regarding registration or the issuing of the certificate set out in Annex II of the Brussels Ia Regulation, recognition of judgments and the enforcement of authentic instruments provided for in the Regulation have greater relevance. They will be the object of practical questions in this Section.

The same goes for the rules of international jurisdiction provided for in the Brussels Ia Regulation, which are applicable in principle to Courts and not to registry officers or notaries. Accordingly, they will not be considered in the questions discussed below.

Additionally, even in the cases mentioned above in which the Brussels Ia Regulation allows *ex officio* examination of a breach of the rules of international jurisdiction by the Court of origin, if such rules were still

breached, the Regulation does not stipulate that refusal to recognise or enforce a judgment on such grounds may take place *ex officio*. Bearing in mind the wording of Article 45(1) of this Regulation, according to which *on the application of any interested party, the recognition of a judgment shall be refused if* (…), it appears that the grounds for refusal set out in the Regulation, including the fact that it is manifestly contrary to public policy, may only be known if they are invoked by the interested parties. The regime governing refusal to recognise judgments extends to the refusal to enforce both judgments and extrajudicial titles pursuant to Articles 46 and 58(1) of the Brussels Ia Regulation. However, if the point is considered controversial, the national Courts should consult the CJEU on doubts in interpreting Article 45.

1. Can a judgment given in a Member State be recognised and accepted by the registry officer or notary in Portugal without *exequatur* proceedings being required?

Yes. The Brussels Ia Regulation stipulates automatic recognition of a judgment given in another Member State [cf. Article 36(1)].

For that purpose, a judgment – a concept that should be interpreted autonomously – means any judgment given by a Court (by a judge or by another organ of the Court) of a Member State, whatever the judgment may be called (such as decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses, provided it concerns civil and commercial matters and falls within the notion of judgments as stipulated in Articles 1 and 2 of the Brussels Ia Regulation).

Otherwise, the rules of the Regulation do not apply to obtaining recognition or enforcement of judgments by third States (even when they have already been recognised in another Member State), Courts of arbitration or the Court of Justice of the European Union.

However, the Regulation is applicable to determine the international jurisdiction of Courts common to several Member States with regard to defendants residing in third States, and also applies to recognition and enforcement of judgments given by said common Courts in terms of Articles 71a to 71d.

The Brussels Ia Regulation is applicable to civil and commercial matters whatever the nature of the Court that gave the judgment [*e.g.*, it may be a criminal Court giving a judgment on a civil claim where the civil proceedings have been added to the criminal proceedings, under the provisions of Article 1(1) and Article 7(3) of this Regulation].

The principle of automatic recognition also extends to provisional, protective measures, provided the two conditions under Article 2(1)(a) of the Brussels Ia Regulation are fulfilled:

– Such measures must be ordered by the Court having jurisdiction as to the substance of the matter (which is not the case in provisional, protective measures as provided for in Article 35 of the Regulation, which shall have territorial effect only, and be limited to the Member State where they are decreed); and
– The defendant has been summoned to appear before the measure is decreed or, in the case of *ex parte* protective measures, the judgment containing the measure is served on the defendant prior to enforcement [cf. Article 42(2)(c)].

Accordingly, a party interested in obtaining recognition and acceptance in Portugal by a registry officer or notary of a judgment given in another Member State – *e.g.*, to request in Portugal an entry in a register or to prove title to a right – does not have to bring prior review or confirmation proceedings or indeed proceedings declaring recognition and/or enforceability of that judgment. The Brussels Ia Regulation abolished the *exequatur* procedure.

This also results from Recital (26): (…) *the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State*

addressed. As a result, a judgment given by the Courts of a Member State should be treated as if it had been given in the Member State addressed.

Furthermore, under Recital (27) of this Regulation: (…) *a judgment given in a Member State should be recognised and enforced in another Member State even if it is given against a person not domiciled in a Member State.*

The final decision of a judgment given in the Member State of origin is not a requirement for its recognition or enforcement in another Member State; it is enough that the judgment is enforceable in the Member State of origin. In the event of an appeal brought in the Member State of origin, the judgment may be enforced if, under the law of the Member State of origin, the appeal is merely devolutive in that the defendant may request suspension of enforcement in the Member State of destination, under Article 44(2).

However, in the case of judgments ordering a penalty payment (cf. Article 55), the Regulation requires final determination of the amount by the Court of origin for the judgment to be recognised and enforced in another Member State.

Despite having abolished the *exequatur* procedure, the Brussels Ia Regulation allows any interested party to opt to bring declarative proceedings to obtain a decision that there are no grounds for refusal of recognition of a judgment given in another Member State (cf. Article 36(2)). Furthermore, to counterbalance the abolition of the *exequatur* procedure, Article 45 of the Regulation provides for the interested party to invoke grounds for refusal to recognise a judgment, if need be. Lastly, the Regulation allows the grounds for refusal of recognition to be invoked and decided, as an incidental question, in the context of proceedings pending in another Member State. Thus:

– An interested party may institute proceedings in a Member State requesting the Court to rule that there are no grounds for refusal of recognition of a judgment given in another Member State, as listed in Article 45 [cf. Article 36(2)];

- An interested party may invoke the grounds for refusal of recognition of a judgment given in another Member State, under the provisions of Article 45 of the Brussels Ia Regulation;
- Whenever the grounds for refusal to recognise a judgment given in a Member State are invoked, as an incidental question, in proceedings running in another Member State, the Court with jurisdiction for these proceedings has jurisdiction to rule on the matter of the refusal of recognition of said judgment; where the judgment is invoked but not the refusal, it appears that recognition is automatic, without the Court bring able to rule of its own motion on the grounds for refusal [cf. Article 36(3)].

The actions provided for in Articles 36(2) and 45 take the form of proceedings provided for in Articles 46 to 51, where appropriate applying the provisions of Articles 52 to 57 of the Brussels Ia Regulation – Article 36(2) and Article 45(4) of the Regulation. In cases not provided for in the Regulation, the law of the forum [cf. Article 47(2)] shall be applicable.

In Portugal, the Courts with jurisdiction for the proceedings provided for in Article 36(2), Article 45 and Article 47 of the Brussels Ia Regulation, are those that the Ministry of Justice has indicated to the European Commission through communications that can be consulted on the European e-Justice Portal[54].

2. Can the registry officer or the notary examine by their own motion the grounds for refusal of recognition of a decision delivered in another Member State, provided for in Brussels Ia Regulation?

No. Indeed, while the Regulation does not provide for the Court of destination to rule of its own motion on verification of the grounds for

[54] https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

refusal, according to the wording of Article 45 of the Brussels Ia Regulation: [on] *the application of any interested party, the recognition of a judgment shall be refused if* […], as already mentioned, appears to indicate that grounds for refusal must be invoked by the interested party. If that is the case, the registry officer, the notary or the Court, before which recognition of a judgment given in another Member State is invoked, cannot of its own motion rule on the existence of grounds for refusal as set out in Article 45, not even when these are contrary to public policy. However, in case of doubt, national Courts should refer the case to the CJEU.

As regards the repercussions that a breach of the rules of jurisdiction might have on the matter of protective forums, recognition and enforcement of the judgment in another Member State, the CJEU has already ruled in the following judgment.

Judgment of the CJEU in case C-347/18

In a preliminary question regarding the issue by the Court of origin of the certificate of a definitive judgment – the certificate set out in Annex I provided for in Article 53 of the Brussels Ia Regulation – the CJEU ruled that not even the Court of origin can establish *a posteriori* whether there has been an infringement of the rules of jurisdiction under that Regulation, i.e., after the judgment has acquired the force of *res judicata* and it has been asked merely to issue the certificate set out in Annex I.

In this judgment, the CJEU clarified that Article 42(1)(b) and (2)(b) of the Brussels Ia Regulation does not stipulate that the Court of origin, when issuing the certificate of a judgment already having acquired the force of *res judicata*, as provided for in Article 53, should examine the international jurisdiction; that should only happen when a certificate of provisional or protective measures has been issued, regarding which it must be known if they were given by a Court with international jurisdiction for the substance of the cause, for in that case only can they be enforced in another Member State (when the Court of the Member State that gave the provisional or protective measure does not have jurisdiction in the main

proceedings, pursuant to Article 35 of the Brussels Ia Regulation, said judgment shall have territorial effect only, restricted to the Member State where it was given).

Accordingly, the CJEU ruled that Article 53 of the Brussels Ia Regulation precludes the Court issuing the certificate thereunder, with regard to a definitive judgment, from ascertaining of its own motion whether there has been a breach of the rules of consumer protection in order to inform the consumer of the provisions of Articles 45 and 46 of this Regulation, under which he may apply for refusal of the enforcement proceedings instituted against him in another Member State.

A fortiori, the same reasoning should be applied as regards control of jurisdiction effected by the Court of destination.

3. Can other grounds provided for in national legislation leading to refusal to recognise a judgment given in another Member State be invoked or examined?

No. The only grounds stipulated in the Brussels Ia Regulation for an authority of a Member State to refuse to recognise a definitive judgment given in another Member State, are those laid down in Article 45. These concern judgments that are contrary to public policy in the Member State of destination, violation of the defendant's right of defence, *resjudicata*, violation of protective rules of jurisdiction or rules of exclusive jurisdiction provided for in the Regulation.

In fact, the Brussels Ia Regulation does not allow the possibility of an authority of the Member State of destination invoking any other grounds to refuse recognition of the judgment, other than those set out in Article 45. This also appears to be the case pursuant to Recital (30) paragraph 2: *The recognition of a judgment should, however, be refused only if one or more of the grounds for refusal provided for in this Regulation are present*.

Notwithstanding the above, as regards refusal to enforce (and not only to recognise) judgments given in another Member State, Article 41(2) of the Brussels Ia Regulation allows the party to invoke, before the destination Member State, grounds for refusal (*e.g.*, extinction of obligation by payment; the unseizable nature of certain assets) or suspension of enforcement, provided for in the law of the forum (the law of the Member State where the enforcement was instituted), provided they are not incompatible with the grounds for refusal under Article 45 of the Regulation.

Recognition of judgments pursuant to the Brussels Ia Regulation does not preclude the party having to meet the conditions required by national law to enter a particular fact in the register, whenever such conditions do not concern the legal value of the judgment given in another Member State, that is, the Regulation stipulates that such judgment should be dealt with as a national judgment.

4. What documents and respective translation may the registry officer or the notary require from the party interested in obtaining recognition of a judgment given in another Member State?

The party who wishes to invoke recognition of a judgment given in another Member State in Portugal shall produce the documents provided for in Article 37 of the Brussels Ia Regulation, which are:

- a certified copy of the judgment;
- the certificate set out in Annex I issued pursuant to Article 53 of the Brussels Ia Regulation.

Where necessary, the registry officer or notary may require the interested party to provide a translation of the contents of the certificate set out in Annex I or, alternatively, a translation, as a rule into Portuguese (cf. Article 37(2), of the judgment.

In this case, the provisions of Article 57(1) of the Brussels Ia Regulation shall apply to the translation of the judgment, and the provisions of Article 57(2) to the translation of the contents of the certificate set out in Annex I. Pursuant to Article 57(3) of this Regulation, the translation shall be done by a person qualified to do translations in one of the Member States. This rule is applied directly and prevails over any other requirements under national law regarding the translation of foreign documents. The translation shall be procured and paid for by the party interested in obtaining recognition of the judgment, without prejudice to the regime applicable to legal aid.

As already mentioned, presentation of the documents under Article 37 of the Brussels Ia Regulation does not prejudice the other requirements under national legislation for entry in a register, which also have to be met. Under Portuguese law, for instance, the Land Registry Code requires re-establishment of the succession in title (cf. Article 34) or the legitimacy of the requesting party (cf. Article 36). The party requesting registration will still have to meet these requirements.

In conclusion, if one of the documents of the application for registration is a judgment given in another Member State, the Brussels Ia Regulation waives the need for prior *exequatur* of that decision, which must, accordingly, be accepted by the registry officer in the same terms as a national judgment.

Furthermore, under Article 61 of the Brussels Ia Regulation the registry officer, notary or other national authority may not require any legalisation or other similar formality (*e.g.*, apostille) for documents – certificates of judgments or certificates set out under Annex I – issued in another Member State in the context of this Regulation.

5. How does an interested party go about invoking grounds for refusal to recognise a judgment given in another Member State based on the provisions of Article 45 of the Regulation?

As already mentioned, recognition of a judgment given in another Member State may only be refused on the grounds set out in Article 45 of the Regulation and not on grounds provided for under national law.

In the light of the provisions of Article 45, any interested party may invoke the grounds for refusal set out on the Regulation before national Courts or competent authorities.

Under said Regulation, the interested party may invoke refusal of recognition, as an incidental question, in proceedings still pending [cf. Article 36(3)] or may institute declarative proceedings invoking the grounds for refusal to recognise a judgment given in another Member State. The procedural rules provided for in Article 45(4) of the Regulation shall apply to these proceedings, and in so far as it is not covered by the Regulation it shall be governed by the law of the forum [Article 47(2)].

In practice, the party interested in invoking the refusal of recognition is not always a party to the proceeding invoking recognition of the judgment given in another Member State. To guarantee the principles of equivalence and effectiveness of the rights attributed by the Regulation, internally, the national legislator must provide for the appropriate proceeding to ensure that any interested party may invoke the grounds for refusal of recognition as established in Article 45.

The Regulation does not provide for a time limit to invoke said grounds for refusal of recognition of a judgment given in another Member State. It is therefore up to the national Courts to apply the rules under their own law, provided they respect the principles of equivalence and effectiveness.

The CJEU has already ruled in this regard, concerning the period allowed for commencing compensation proceedings as established in Regulation 261/2004 (compensation in the event of denied boarding and of cancellation or long delay of flights), under **Judgment C-139/11,** paragraphs 25 and 26, quoted below:

25. *It is settled caselaw that, in the absence of provisions of EU law on the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that those rules observe the principles of equivalence and effectiveness (see, to that effect, Judgment of 25 November 2010, Fuß, Case C-429/09 [2010] ECR I-12167, paragraph 72).*
26. *It follows that the time-limits for bringing actions for compensation under Articles 5 and 7 of Regulation No 261/2004 are determined by the national law of each Member State, provided that those rules observe the principles of equivalence and effectiveness.*

In particular as regards registers, national law establishes that any interested party or the Public Prosecutor may commence legal proceedings to declare nullity of a register entry (cf. Articles 16 and 17 of the Land Registry Code). Similarly, even if not entered, any interested party may commence proceedings to amend a register, for which the registry officer has competence to document and rule on. The registry officer's ruling in the amendment proceeding may be the subject of a hierarchical appeal and/or an appeal to the Courts, under the double degree of jurisdiction (cf. Articles 121 and 130 to 132A of the Land Registry Code).

In that context, it appears that there is nothing to prevent any interested party from invoking in any such proceeding the grounds for refusing recognition of a judgment given in another Member State, if the application has been filed, as an incidental question, and/or whenever this might lead to nullity or amendment of the register. However, in practice, such situations are not expected to be frequent in matters within the scope of application of this Regulation, by force of the rule of exclusive jurisdiction provided for in Article 24.

6. May the interested party apply to the registry officer or the notary in Portugal for recognition of an authentic instrument or a Court settlement originating in another Member State?

No. Indeed, the Brussels Ia Regulation does not provide for recognition of extrajudicial titles similar to that of judgments given in another Member State. Chapter IV of the Regulation establishes only that extrajudicial titles may be enforced in another Member State and have the same enforceable effects as in the Member State of origin. Thus, for instance, an interested party cannot invoke recognition under the Brussels Ia Regulation to document an application for registration with an authentic instrument or a Court settlement originating in another Member State. In that case the national legal framework will be applicable to the recognition of foreign documents.

7. Can an authentic instrument or a court settlement issued in Portugal be enforced in another Member State?

Yes. Under Article 58(1) of the Brussels Ia Regulation, an authentic instrument enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required. This regime also applies to court settlements.

The authentic instrument or the court settlement must comply with the following conditions:

- ***i)*** they must be enforceable in the Member State of origin;
- ***ii)*** they must satisfy the conditions necessary to establish authenticity in the Member State of origin (cf. Articles 58 and 59).

The Brussels Ia Regulation appears to equate court settlements to authentic instruments, subjecting them to the same regime of enforceability of extrajudicial titles as provided for in Chapter IV.

Article 2(b) and (c) of the Brussels Ia Regulation gives the following definitions for court settlement and authentic instrument, which are to be taken into account:

"Court settlement" means a settlement which has been approved by a Court of a Member State or concluded before a Court of a Member State in the course of proceedings;

"Authentic instrument" means a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:

i) *relates to the signature and the content of the instrument; and*

ii) *has been established by a public authority or other authority empowered for that purpose.*

Accordingly, an authentic instrument (*e.g.*, an authentic document), meeting all the conditions of authenticity required by national legislation and serving as the basis for an enforcement in Portugal has, in another Member State, the same enforceability as it has in Portugal, with no prior legalisation procedure being required in the destination Member State. The same regime applies to court settlements by reference to Article 59 of the Brussels Ia Regulation. Court settlements may be enforced in the Member State of destination without the need for a prior *exequatur* procedure.

Additionally, Article 58(1), second paragraph, of this Regulation stipulates that in such cases the provisions of Section 2 of Chapter III (Articles 39 to 43), adapted where necessary, shall apply as appropriate. So, as is the case with enforcement of judgments given in another Member

State, in order to enforce an authentic instrument or a court settlement in another Member State, the person against whom the enforcement is sought must be served with the certificate set out in Annex II, together with a copy of the extrajudicial enforcement document, if said person has not previously been served, as required under Article 43(1) of the Regulation.

The enforcement of extrajudicial titles is governed by the law of the forum and the applicable provisions of Section 2 of Chapter III of the Brussels Ia Regulation, adapted where necessary.

However, the only grounds for refusing to enforce an authentic instrument or a court settlement originating in another Member State, as provided for in the Regulation, is if it is manifestly contrary to public policy [cf. Article 58(1) second part]. The Regulation does not provide that such grounds for refusal should be declared by the court of its own motion. In addition to these grounds for refusal, as provided for in the Regulation, one should also consider the possibility pursuant to Article 41(2), of the grounds for refusal or suspension of enforcement under the law of the forum applying in so far as they are not incompatible with the grounds referred to in the Regulation.

When the grounds for refusal regard public policy and are invoked by the party against whom the enforcement is requested, the procedure established in Articles 46 to 51 and the provisions of Articles 52 to 57, by reference to Article 58(1) second paragraph, and Article 59 of the Brussels Ia Regulation, shall apply.

8. What documents are required by the party who is interested in enforcing in another Member State an authentic instrument issued before a registry officer or notary in Portugal?

The party wishing to enforce in another Member State an authentic instrument issued by a registry officer or notary in Portugal must present the following to the competent authority for enforcement in the Member State of destination:

– the authentic instrument satisfying the conditions necessary to establish its authenticity in Portugal (Articles 58(2) and 59); and
– the certificate set out in Annex II provided for in Article 60 of the Brussels Ia Regulation, issued by the competent authority of origin at the request of the interested party; the competent authority of origin may be a notary, a registry officer, an official with the authority to attest documents or another authority with jurisdiction under Portuguese legislation, before whom the authentic instrument was drawn up.

The provisions of Article 57 by reference to Article 58(1) second part, are applicable to the translation of such documents, no other requirements being applied as provided for in the national law of the Member State of destination in this matter. This is so, given the primacy of the Regulation over national law and its direct application to the internal legal order of the Member States.

The Brussels Ia Regulation dispenses the need for legalisation or other similar formality (*e.g.*, apostille) for certificates and documents issued in this context (cf. Articles 58(1) and 61). Once issued under the terms of the Regulation these may be enforced in the other Member State under the same terms as they would be enforced in Portugal.

9. Do Registries and Notary Offices in Portugal have jurisdiction to issue enforceable authentic instruments in matters coming under the Brussels Ia Regulation?

Yes. Registries and Notary Offices are authorities empowered to draw up enforceable authentic instruments in matters coming under the Brussels Ia Regulation – *e.g.*, public deeds of purchase and sale of immovable property; mortgages.

Within the limits of the enforcement effects in Portugal such documents may be subsequently enforced in another Member State.

As mentioned above, provided that the authentic instrument [as defined in Article 2(c) of the Regulation] drawn up by the registry officer or the notary can be enforced in Portugal and satisfies the conditions as to authenticity required under Portuguese law, it shall be enforceable in another Member State, without any declaration of enforceability or legalisation or other similar formality being required [cf. Articles 58(1) and 61].

Under Article 363 of the Civil Code, Portuguese legal documents may be either authentic or private. Private documents may be authenticated by the notary.

Accordingly, authentic documents *are those instruments issued with all legal formalities by public authorities within the limits of their jurisdiction or within the sphere of activity attributed to them by the notary or by another public official with authority to attest documents; all other instruments are private instruments* (cf. Article 363(2) of the Civil Code). Authenticated private documents are *those that are confirmed by the parties before a notary, under the terms of notarial laws* [cf. Article 363(3) of the Civil Code].

Under Article 703 of the Code of Civil Procedure, authentic instruments that are enforceable and satisfy the conditions as to authenticity are the following in particular: *documents drawn up or authenticated by a notary or by other bodies or professionals with powers for the act, regarding the constitution or recognition of an obligation; documents which, by special provision, are granted enforceability*. Such documents may be used as the basis for the enforcement.

Under Article 707 of the Code of Civil Procedure, authentic instruments regarding an agreement as to future payments or providing for the constitution of future obligations, may serve as the basis for the enforcement provided it is proven, by means of a document issued in accordance with the clauses therein contained or, where these are omitted, by means of a document with specific enforceability, that a payment was made for conclusion of the contract or that an obligation was constituted as provided for by the parties.

Decree-Law No 263-A/2007 of 23 July created a special procedure of one-stop conveyance of immovable property, encumbrance and immediate registration of immovable property, commonly known as "Casa Pronta". At present, this procedure is applicable to the following legal transactions: purchase and sale, loan or other credit and financing agreements concluded by credit institutions with consumers, with mortgage, with or without surety; mortgage, subrogation to the rights and guarantees of the mortgage creditor, under Article 591 of the Civil Code [Article 2(1)(a) to (d) of Decree-Law No 263-A/2007 of 23 July]; payment in kind (Ordinance No 1126/2009 of 1 October); donation and exchange (Ordinance No 67/2010 of 3 February); Constitution or amendment of Sectional Title (Ordinance No 1167/2010 of 10 November); division of a common asset, and purchase and sale with finance lease (Ordinance No 122/2017 of 24 March).

The "Casa Pronta" procedure implies verification of all presuppositions and formalities, the annotation in the log (software support for chronological annotation of requests for registers and respective documents), the drawing up of documents titling the legal transactions, followed by the reading and explanation of the respective contents, obtaining signatures on the documents, and procedures for liquidation of municipal tax on conveyance and other taxes that may be due, in order to ensure payment prior to the conclusion of the legal transaction, and the immediate and mandatory registration, of its own motion, of the registers presented.

Accordingly, in the light of Portuguese law as expounded above, the concept of an enforceable authentic instrument includes the authentic documents and the authenticated private documents mentioned above in national legislation, in particular: purchase and sale of an immovable

property, loan or other credit and financing agreements guaranteed by mortgage, with or without warranty, or a loan agreement guaranteed by consignation, drawn up in Portugal at a Registry, a “Casa Pronta” counter of the IRN IP, or a Notary Office.

At the request of any interested party, the Registry, the “Casa Pronta” counter, the notary, lawyer or solicitor before whom such authentic instruments were drawn up, shall issue the certificate using the form set out in Annex II, containing a summary of the enforceable obligation recorded in the authentic instrument as results from Portuguese legislation (cf. Article 60 of the Regulation). The summary of the enforcement obligation to be included in Annex II must indicate clearly and accurately the enforcement effects attributed by national law, to enable the authority to whom the enforcement is to be requested in the Member State of destination to attribute the same enforceability to that authentic instrument.

Furthermore, the competent authority shall issue a certificate of the authentic instrument satisfying the requirements as to authenticity provided for in Portuguese law.

No legalisation or other similar formality such as an apostille is required for the documents issued (cf. Article 61).

If the authority of the Member State of destination requests a translation or if the party wishes to produce it of his own volition, the procedures for translation and payment thereof shall be carried out by the interested party, who for the purpose must ensure the authentic instrument is translated together with text in the spaces filled in in Annex II. It is advisable to use the form set out in Annex II already translated into the language of destination and translate only the text inserted in the blank spaces. The provisions of Article 57 by reference to Article 58(1) of the Brussels Ia Regulation, are applicable to the translation of such documents.

The form set out in Annex II may be downloaded in the official languages of the European Union on the European e-Justice Portal[55].

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[55] https://e-justice.europa.eu/dynform_intro_form_action.do?idTaxonomy=273&plang=en&init=true&refresh=1

Example
A of Portuguese nationality, buys an immovable property situated in Portugal, by means of a bank loan. For that purpose, he concludes the following at a "Casa Pronta" counter: a purchase and sale agreement in respect of immovable property; a bank loan agreement to pay the respective price; and, to guarantee fulfilment of the bank loan, a mortgage agreement on the immovable property purchased, as well as a warranty agreement. The warranty contract is concluded between A and his parents in favour of the credit institution. In it, A's parents declare themselves to be the guarantors and principal payers, renouncing the benefit of excussion. A's parents have Portuguese nationality but have emigrated to France, where they reside and have their assets. The parties agreed that the law applicable to all these contractual relations, including surety (Articles 634 and 640 of the Civil Code), would be Portuguese law (Articles 3 and 6 of the Rome I Regulation). A ceases payment of the instalments to amortise the loan. The credit institution wishes to bring enforcement proceedings in France against the guarantors, according to the rules of jurisdiction in force in that country. For that purpose, the credit institution requests that "Casa Pronta", where the documents were drawn up, should issue the certificate of authentic instrument through Annex II of the Brussels Ia Regulation, therein describing the enforceable effects of the loan agreement with warranty, as provided for in Article 703 of the Code of Civil Procedure.

10. How should the registry officer proceed should the judgment contain a measure or an order that is not recognised in Portuguese law?

If the request for registration is based on a judgment containing a measure or enshrining an order that is not recognised in Portuguese law, the registry officer will have to adapt said measure or order, as provided for in Article 54 of the Brussels Ia Regulation.

Recital (28) of the Brussels Ia Regulation is an important element of interpretation to be considered: *Where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. It should be for each Member State to determine how, and by whom, the adaptation is to be carried out.*

The effects of the adaptation cannot go beyond those provided for in the law of the Member State of origin [cf. Article 54(1) second paragraph]. The form set out in Annex I provides for a brief description of the grounds and the mention of the judgment given by the Court of the Member State of origin, to be taken into account, where adaptation is carried out.

Pursuant to Recital (28), competence to carry out the adaptation and the procedure to be followed are governed by national legislation. In Portugal, Courts or Registry Offices are responsible for carrying out the adaptation, depending on whether recognition of the judgment is invoked before the Courts or the Registries.

The Regulation stipulates that any of the parties may challenge in Court the adaptation of the decision [cf. Article 54(2)]. Therefore, where the registry officer carries out the adaptation, the internal regulations establishing an appeal against the registry officer's decision and the legitimacy of the appellant must be interpreted, in accordance with the principles of equivalence and effectiveness mentioned above, to safeguard the parties' right to the legal challenge provided for in the Regulation.

The factors to be considered by the registry officer in carrying out the adaptation, as well as examples of possible solutions, have already been mentioned in Section I, under implementation of the EU Succession Regulation.

11. Is it possible in Portugal to apply for registration of a proceeding, a judgment or a protective measure where these are still pending or are given in another Member State?

In Portugal, Article 3 of the Land Registry Code and Article 9 of the Companies Code provide for the registration of proceedings, judgments and protective measures, and from the list therein included, some of the cases fall within the material scope of the Brussels Ia Regulation.

The fact of being registered, as provided for therein, is the proceeding and the ensuing judgment, in proceedings whose principal or accessory purpose is, in particular, recognition, constitution, modification or extinction of rights *in rem* of enjoyment, guarantee and acquisition, the *actio pauliana*, incorporation of companies, declaration of nullity or annulment of memoranda of association, declaration of nullity of company decisions, reform, declaration of nullity or rectification of a register and certain protective measures decreed in such proceedings or that affect the free disposition of assets.

With the exception of the *actio pauliana* and the resulting judgment, whose register is provided for in Article 3 of the Land Registry Code, as a rule in order to register all other proceedings, it is not enough for their object to be one of the rights or legal relations set out in Article 3 of the Land Registry Code and Article 9 of the Companies Code. To effect the register of the proceeding and subsequent judgment, the proceeding must be able to produce an objective or subjective modification or extinction of the right in question.

Under this legal framework, the question arises as to whether registration of an action pending in the Courts of another Member State or the registration of a judgment given there, pursuant to the provisions of the Brussels Ia Regulation, can be applied for in Portugal.

Provided it comes under the situations stipulated in national legislation regarding certain actions and judgments being entered in the register, a judgment given in another Member State may be registered in Portugal, and enjoys the automatic recognition enshrined in the Brussels Ia Regulation.

In the case of the registration of an action (and not a judgment), this can be documented with a foreign document proving that the action was instituted in another Member State [cf. Article 43(3) of the Land Registry Code or Article 32(2) of the Companies Code]. However, this document will not enjoy recognition as provided for in the Brussels Ia Regulation, for, as mentioned above, the Regulation provides only for enforcement of authentic instruments but not simple recognition.

In practice, there are probably not many applications to register a proceeding or judgment originating in a proceeding instituted in another Member State since in terms of the rules of exclusive jurisdiction pursuant to Article 24 of the Brussels Ia Regulation, most lawsuits subject to registration under national law come under the exclusive jurisdiction of Portuguese Courts. This is not always the case, however: for example, an *actio pauliana* may be instituted in France, because it is the Member State of the defendant's domicile, and the registration of the action and the ensuing judgment may be requested in Portugal, which is where the immovable property whose alienation the creditor claims was prejudicial to him, is located.

In this regard the CJEU has already ruled on the nature of *actio pauliana* in judgments C-115/88, C-261/90 and C-337/17.

In judgment C-115/88 the CJEU ruled that the *actio pauliana* is not covered by the notion of proceedings regarding rights *in rem* in immovable property pursuant to Article 16(1) of the 1968 Brussels Convention, currently Article 24(1) of the Brussels Ia Regulation. This legal provision should not be interpreted too broadly as it might lead to attributing jurisdiction to a Court that is not the Court of the domicile of either party. Accordingly, in the *actio pauliana,* the connecting factor to determine international jurisdiction is not that of the location of the immovable property but of the domicile of the defendant (cf. Article 2 of the 1968 Brussels Convention, currently Article 4 of the Brussels Ia Regulation).

In judgment C-261/90 three additional questions were put to the CJEU in the same proceeding pending in the referring Court that gave

rise to the interpretation made in judgment C-115/88. It was a question of knowing whether, primarily and given the nature of the *actio pauliana*, said action should be equated to a proceeding regarding extra-contractual liability for a harmful event. In such a case, the Court of the Member State where such a harmful event took place has special, alternative, jurisdiction in the light of Article 5(3) of the 1968 Brussels Convention, now Article 7(2) of the Brussels Ia Regulation. Secondly, it was a question of knowing whether, as the *actio pauliana* precedes the enforcement, to ensure seizure of the assets to take place with enforcement, it should not be considered to be covered by the rule of exclusive jurisdiction pursuant to Article 16(5) of the 1968 Brussels Convention, currently Article 24(5) of the Brussels Ia Regulation, which attributes exclusive jurisdiction in proceedings related to enforcement of a judgment to the Court of the place of enforcement. Thirdly, it was a question of knowing whether the *actio pauliana* has the nature of a provisional, or protective measure for the future enforcement and, if so, whether it can be instituted in the Court that does not have international jurisdiction as to the substance, in the light of the national law of the Member State of the Court, under Article 24 of the 1968 Brussels Convention, now Article 35 of the Brussels Ia Regulation, which allows for limited prorogation of jurisdiction in this case. The CJEU replied negatively to all three questions. Hence, the *actio pauliana* should as a rule be brought before the Court of the domicile of the defendant when he resides in a Member State, pursuant to Article 4 of the Brussels Ia Regulation.

In judgment C-337/17 the CJEU developed its earlier interpretation, ruling that the *actio pauliana,* once it is brought on the basis of the credit arising from contractual obligations, falls within "matters relating to a contract". Consequently, the forum of the defendant's domicile should be completed by the alternative forum, allowed pursuant to Article 7(1)(a) of Regulation No 1215/2012, when situated in a Member State. Taking into account the contractual origin of the relationship between the creditor and debtor this solution meets both the requirement for legal certainty and foreseeability and the aim to facilitate the sound administration of justice.

As opposed to an *actio pauliana*, the CJEU ruled that an action having the object of terminating the **co-ownership in undivided shares of an immovable property (C-605/14)** or a proceeding regarding the declaration of invalidity of a **right *in rem* of pre-emption (C-438/12) should be considered proceedings in matters of rights *in rem* on immovable properties covered by the rule of exclusive jurisdiction provided for in Article 24(1) of the Brussels Ia Regulation.**

Jurisprudence

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Useful links	
Opinions of the Advisory Council of IRN, IP	https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal
European e-Justice Portal	https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do?init=true
European e-Justice Portal: forms relating to judgments in civil and commercial matters	https://e-justice.europa.eu/dynform_intro_form_action.do?idTaxonomy=273&plang=en&init=true&refresh=1

Section VIII

Insolvency Proceedings

Regulation 2015/848

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Introduction

Note: Any articles in this section with no indication of origin refer to Regulation (EU) No 2015/848; references to a code without mentioning the country refer to Portuguese legislation.

Regulation (EU) No 2015/848 of 20 May	
on insolvency proceedings	
Informal designation	The Recast Insolvency Regulation
Material scope	Public collective insolvency proceedings
Effective from:	Insolvency proceedings opened after 26 June 2017
Non-binding on these Member States	Denmark
Preceded by	Regulation (CE) No 1346/2000 of 29 November 2000
Non-applicable internal norms	International jurisdiction: Article 7 of the Insolvency and Business Recovery Code (CIRE), Articles 62 and 63 of the Code of Civil Procedure Recognition: Article 288 et seq. of the Insolvency and Business Recovery Code, Article 978 et seq. of the Code of Civil Procedure
Enforcement instruments	Commission Implementing Regulation (EU) 2017/1105 Commission Implementing Regulation (EU) 2019/917

Amendment of Annexes

Up to the date on which this manual was being drafted the Regulation was amended twice by:

- Regulation 2017/353 replacing Annex A (list of insolvency proceedings) and Annex B (insolvency practitioners) with new lists taking into account information provided by Polan[56].
- Regulation (EU) 2018/946 replacing Annexes A and B following notifications of changes received from Belgium, Bulgaria, Latvia and Portugal[57].

Forms referred to in Regulation 2015/848

Commission Implementing Regulation (EU) 2017/1105 of 12 June 2017 establishes the following forms referred to in Regulation (EU) 2015/848:

- Notice of insolvency proceedings as referred in Article 54 (whose use is mandatory);
- The standard claims form as referred in Article 55 (whose use is not mandatory);
- The standard form to be used for the lodgement of objections in group coordination proceedings as referred in Article 64 (whose use is not mandatory).

[56] Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, http://data.europa.eu/eli/reg/2017/353/oj

[57] Regulation (EU) 2018/946 of the European Parliament and of the Council of 4 July 2018 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, http://data.europa.eu/eli/reg/2018/946/oj

These forms may be downloaded in the official languages of the European Union from the European e-Justice Portal[58].

Introduction

Regulation (EU) 2015/848 contains rules of international jurisdiction, rules of conflict of laws and rules on recognition and enforcement of judgments given in another Member State regarding insolvency proceedings in national legislation covered by its scope of application.

The relevant connecting factor to determine international jurisdiction is the place where the centre of the debtor's main interests is situated (Article 3).

As regards the applicable law, as a rule the law of the Member State where the proceedings are opened determines all the effects of the proceedings (*lex fori concursus*) (Article 7). As results from Recital (66) *lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings*. However, given the widely differing substantive laws of the Member States [cf. Recital (22)], this rule contains exceptions or limitations expressly provided for in the Regulation [*e.g.*, Articles 8 to 18 and Article 36(2)].

Any judgment opening insolvency proceedings handed down by a Court of another Member State which has jurisdiction pursuant to Article 3 shall be recognised with no further formalities being required (Articles 19 and 20).

The Regulation provides for the opening of main insolvency proceedings and, while such proceedings are not concluded, allows for the opening of any number of secondary proceedings as well as, in certain cases, one or more territorial proceedings (secondary proceedings opened before the main insolvency proceedings) [Articles 3 and 41(1)].

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[58] https://e-justice.europa.eu/content_insolvency-447-en.do?init=true

The Regulation establishes two mechanisms to allow coordination of insolvency proceedings of companies belonging to the same group of companies:

- insolvency proceedings relating to a group of companies (Article 56), under which the duties of cooperation and direct judicial communication between insolvency practitioners and/or courts appears to be mandatory;
- group coordination proceedings (Article 61), in which participation is voluntary.

In this context, the Regulation provides for duties of cooperation and direct judicial communication between insolvency practitioners and/or courts in proceedings opened against the same debtor (Articles 41 to 43).

Recital (62) establishes that the rules on cooperation, communication and coordination provided for in this Regulation in the framework of the insolvency of members of a group of companies should only apply to the extent that proceedings have been opened in more than one Member State, in other words, it must be cross-border in nature.

The Regulation also contains procedural norms that prevail over norms under national law and are directly applicable internally, in particular rules providing for the powers of insolvency practitioners, including powers to act in other insolvency proceedings in the case of the coexistence of main proceedings and one or more secondary proceedings (*e.g.*, Articles 21, 28, 29, 37 to 39, 45 to 47 and 51), and procedural rules on notification, time limits and standard claims forms [Articles 45(1), 55(2) and 54].

Lastly, it should be noted that the Regulation establishes the creation in Member States of one or more public, free of charge and interconnected insolvency registers, lists the facts that have to be registered in the Member State where the proceedings were opened and indicates the cases in which the insolvency practitioner (or the debtor in possession) can or should request publication and register in another Member State (Articles 24 to 29).

Material scope

The material scope of the Regulation can be determined by recourse to Recitals (7) to (19) and to Article 1, to be combined with the definitions under Article 2, in particular paragraphs (2) and (4). Accordingly, this Regulation is applicable to public collective proceedings, including interim proceedings, which are based on the national law relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation, at least one of the following three situations occurs:

a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
b) the assets and affairs of a debtor are subject to control or supervision by a Court; or
c) a temporary stay of individual enforcement proceedings is granted by a Court or by operation of law.

As was the case under Regulation 1346/2000[59], which it replaces, this Regulation does not enshrine a European Insolvency Law harmonising the discipline of insolvency proceedings. Rather, it regulates the opening and the effects of insolvency proceedings. Essentially, it deals with aspects of private international law such as international jurisdiction, determination of the applicable law and recognition of foreign judgments.

To facilitate matters, the checklist below may be consulted to find out whether or not proceedings are covered by the material scope of the Regulation.

The Regulation should be applied whenever insolvency proceedings fulfil the following conditions, indicated in said Regulation:

[59] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, http://data.europa.eu/eli/reg/2000/1346/oj.

- **The Regulation shall only apply to the proceedings provided for in national legislation and listed exhaustively in Annex A of said Regulation [Article 1(1)];**
- The proceedings shall be based on national insolvency legislation where the debtor is a natural or a legal person – cf. Recitals (9) and (16);
- The centre of main interests of the debtor (COMI in the English acronym) must be located in the European Union – cf. Recital (25);
- The collective proceedings which are covered by this Regulation shall include all or a significant part of the creditors to whom a debtor owes all or a substantial proportion of the debtor's outstanding debts – cf. Recital (14) and its clarifications;
- The scope of this Regulation also extends to proceedings which promote the rescue of distressed businesses, debt adjustment, reorganisation or liquidation – cf. Recital (10);
- The Regulation only applies to proceedings whose opening is subject to publication, so that insolvency proceedings which are confidential should be excluded from its scope of application – cf. Recitals (12) and (13);
- The Regulation's scope shall extend to proceedings which are triggered by situations in which the debtor faces non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due – cf. Recital (17);
- The Regulation shall also apply to interim proceedings (those that, under the law of some Member States, are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis), provided such proceedings meet all other requirements under this Regulation - cf. Recital (15);

- The Regulation shall not apply to insolvency proceedings of insurance undertakings, credit institutions, investment forms, or collective investment undertakings (Article 1(2).

Temporal scope

The Regulation applies to insolvency proceedings opened after 26 June 2017 – cf. Article 84.

Acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed.

Regulation (EC) No 1346/2000 shall continue to apply to insolvency proceedings which fall within the scope of that Regulation and which were opened before 26 June 2017.

Territorial scope

As mentioned in Recitals (87) and (88) the Regulation binds all Member States with the exception of Denmark.

The United Kingdom will be considered a third State following its departure from the European Union, without prejudice to the period of transition to be agreed.

Examination as to jurisdiction

Recitals (3) and (4) establish that the activities of undertakings are having more and more cross-border effects and that the insolvency of such undertakings affects the proper functioning of the internal market. One of the aims of the Regulation is thus the efficient and effective operation of insolvency proceedings which have cross-border effects in order to

achieve the proper functioning of the internal market. Another aim is to avoid fraudulent or abusive forum shopping – cf. Recital (29).

In this context, and without prejudice of the application of certain rules under this Regulation requiring a foreign element (*e.g.*, rules regarding communication and coordination in cases involving companies within the same group of companies, enforcement of publication and registration measures in another Member State, rules of conflict on the applicable law), the Regulation does not appear to stipulate that the Court must ascertain the concrete cross-border effects of insolvency proceedings as a requirement when applying the rules of jurisdiction of said Regulation. For the Regulation to be applicable it seems to be sufficient for the centre of main interest of the company to be located within the European Union to conclude that the bankruptcy will affect the proper functioning of the internal market.

Accordingly, Article 4 of said Regulation stipulates that a Court of a Member State bound by this Regulation shall, before opening insolvency proceedings examine, of its own motion, whether it has international jurisdiction. The Court must decide on which paragraph of Article 3 of this Regulation this decision is based (if it has jurisdiction in main or secondary proceedings, which depends on whether the centre of the debtor's main interests is situated in its own Member State or whether the debtor possesses an establishment within that territory but its centre of main interests is in another Member State).

Indeed, Recital (27) makes it clear that: *Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction.*

To that end, the Court must apply the criteria under Article 3, interpreted in accordance with Recitals (27) to (31), to determine the centre of the main interests of the debtor, the place where a debtor habitually conducts the administration of its interests in a manner that is ascertainable by third parties, which the Regulation presumes corresponds to its registered office in the case of a company, or the place of the main activity or habitual residence in the case of an individual.

In case of doubt, the Court *should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity to present their views on the question of jurisdiction*, pursuant to Recital (32).

If the opening of proceedings is declared, the legal basis for the Court's international jurisdiction pursuant to this Regulation is a fact subject to mandatory publication in the insolvency registers provided for in Article 24(1) (cf. Article 24(2)(d)). In such a case, and as mentioned above, recognition in another Member State of the judgment opening insolvency proceedings given by a Court with jurisdiction pursuant to Article 3, shall produce effects with no further formalities (Articles 19 and 20).

1. What proceedings under insolvency laws are covered by the material scope of application of Regulation 2015/848?

Proceedings under the national law of each Member State within the material scope of application of Regulation 2015/848 are listed in Annex A – cf. Article 1(1), last paragraph, of this Regulation.

In Portugal, the proceedings provided for in Article 1 of the Insolvency and Business Recovery Code covered by the material scope of application of Regulation 2015/848 are the following in particular:

- Insolvency proceedings affecting individuals, companies or an autonomous patrimony (Articles 2(1) and 18 to 222 of the Insolvency and Business Recovery Code);
- The Special Revitalisation Process (PER), available to companies only (Articles 17-A to 17-J of the Insolvency and Business Recovery Code);

– The Special Procedure for Payment Agreement (PEAP), regarding debtors that are not companies (Articles 222-A to 222-J of the Insolvency and Business Recovery Code).

For purposes of applying the Regulation, the notion of insolvency proceedings thus covers any proceedings included in Annex A. This notion includes the three procedures mentioned above provided for in Portuguese legislation and the procedures provided for in the law of the other Member States, whatever its designation, provided they are included in Annex A (even if all the conditions established in Article 1 of Regulation 2015/848 are met, only those procedures included in Annex A are covered by the Regulation).

Hereinafter, any mention of insolvency proceedings for purposes of applying the Regulation shall be taken to mean this broad definition.

2. What is the definition of an insolvency practitioner for the purposes of applying the Regulation and what are its powers and duties, in particular in another Member State?

For the purposes of applying the Regulation, the definition of an insolvency practitioner is that set out under Article 2(5) and means any person or body whose function in the Member States is as described in this legal provision, who must be listed in Annex B. These include both the insolvency practitioner and the interim judicial practitioner as provided for in Portuguese law and listed in Annex B to the Regulation.

Hereinafter, any mention of an insolvency practitioner for purposes of applying the Regulation shall be taken to mean this broad definition.

Pursuant to Article 21 of the Regulation, the insolvency practitioner appointed by a Court which has jurisdiction may exercise powers in another Member State. Said powers vary, depending on whether the insolvency practitioner is appointed in the main or secondary proceedings.

The powers of the insolvency practitioner appointed in the **main insolvency proceedings** are the following [Article 21(1)]:

– It may exercise all the powers conferred on it, by the law of the State of the opening of proceedings (as long as no other insolvency proceedings have been opened in another Member State, and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that Member State);
– The insolvency practitioner may, in particular, remove the debtor's assets from the territory of the Member State in which they are situated without prejudice to Article 8 (third parties' rights *in rem* situated in the territory of another Member State) and to Article 10 (reservation of title when the assets are situated in the territory of another Member State).

The powers of the insolvency practitioner appointed in the **secondary insolvency proceedings** are as follows [Article 21(2)]:

– The insolvency practitioner may in any other Member State claim through the Courts or out of Court that movable property was removed from the territory of the Member State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings;
– The insolvency practitioner may also bring any action to set aside which is in the interests of the creditors.

In exercising its powers, as referred above, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action (*e.g.*, with regard to procedures for the realisation of assets); it may not resort to coercive measures unless these have been ordered by a Court of that Member State; it has no right to rule on legal proceedings or disputes in another Member State – cf. Article 21(3).

Further to the powers referred above and powers regarding enforcement of publication measures in another Member State, to be mentioned in

the answer to question 7, the Regulation has norms **providing for other powers and other duties of the insolvency practitioner**, as follows:

- Both the insolvency practitioners in the main and in any secondary insolvency proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, participate in other proceedings on the same basis as a creditor, and attend creditors' meetings [Article 45(2) and (3)];
- The insolvency practitioner appointed in the secondary proceedings shall immediately transfer any assets remaining to the insolvency practitioner in the main insolvency proceedings, after paying all claims in the secondary proceedings (Article 49).

The insolvency practitioner in the main insolvency proceedings may exercise the following powers in **the secondary insolvency proceedings:**

- Request the opening of secondary insolvency proceedings [Article 37(1)(a)];
- To avoid the opening of secondary insolvency proceedings, it may give a unilateral undertaking (*e.g.*, that when distributing assets situated in a Member State where the secondary insolvency proceedings would be opened, and/or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights that creditors would have if secondary insolvency proceedings were opened) (Article 36);
- Open another type of insolvency proceedings as listed in Annex A or later order its conversion into this type of insolvency proceedings [Articles 38(4) and 51];

- Challenge the decision to open secondary insolvency proceedings on the grounds that the conditions and requirements of Article 38 were not met (Article 39);
- Lodge claims which have already been lodged in the main insolvency proceedings, participate in other proceedings on the same basis as a creditor, and attend creditors' meetings in secondary insolvency proceedings [Article 45(2) and (3)];
- Request a stay of the process of the liquidation of assets in the secondary insolvency proceedings for up to 3 months, renewable (in this case the Court may require the insolvency practitioner to take any suitable measure to guarantee the interests of the creditors in the secondary insolvency proceedings) (Article 46);
- Propose restructuring plans (Article 47).

Where prior territorial insolvency proceedings have already been opened, pursuant to Article 50, which become secondary proceedings with the opening of the main insolvency proceedings, Articles 41, 45, 46, 47 and 49 are applicable to the insolvency proceedings that were opened first (which other than in this case, are inversely applicable to the main insolvency proceedings). In other words, insofar as possible:

- The insolvency practitioner in the main insolvency proceedings shall give the insolvency practitioner in the secondary insolvency proceedings the opportunity to submit proposals on the liquidation or use of the assets in the main insolvency proceedings [Article 41(2)(c)];
- The insolvency practitioner in the secondary insolvency proceedings may request a stay of the process of the liquidation of assets in whole or in part in the main insolvency proceedings (Article 46);
- The insolvency practitioner in the secondary insolvency proceedings may propose for the main insolvency proceedings

to be closed without liquidation, either by putting in place a recovery plan or a filing for bankrupcy (Article 47);
- If, by the liquidation of assets in the main insolvency proceedings, it is possible to meet all claims allowed under those proceedings, the insolvency practitioner appointed in those proceedings shall immediately transfer any assets remaining to the secondary insolvency proceedings.

Under Article 60, an insolvency practitioner appointed in **insolvency proceedings opened in respect of a member of a group of companies** may, to the extent appropriate to facilitate the effective administration of the proceedings:

- Be heard in any of the proceedings opened in respect of any other member of the same group;
- Request a stay related to the realisation of the assets in the other insolvency proceedings of no longer than 3 months, provided that a restructuring plan for all or some members of the group has been proposed, in addition to all other requirements pursuant to Article 60(1)(b)(i) to (iv); in this case, before ordering the stay, the Court shall hear the insolvency practitioner appointed in the proceedings for which the stay is requested;
- Apply for the opening of group coordination proceedings in accordance with Article 61.

Should group coordination proceedings be opened (Article 61), a coordinator is appointed in such proceedings. Article 71 stipulates that the coordinator appointed shall have the following tasks and rights:

- Propose a group coordination plan;
- Propose measures to be taken in order to re-establish the economic performance of the group or any part of it;

– Mediate any dispute arising between two or more insolvency practitioners involved;
– Participate in creditors' meetings in any of the proceedings opened in respect of any member of the group;
– Request information from any insolvency practitioner in respect of any member of the group.

It is in this context that Article 69 provides for the possibility of the subsequent opt-in by insolvency practitioners within group coordination proceedings.

3. Should a judgment opening insolvency proceedings given in one Member State be automatically recognised in another Member State, and, if so, what are its effects?

Yes. Articles 19 and 20 of Regulation 2015/848 shall apply to the recognition and effects of the judgment opening insolvency proceedings in another Member State, when the Court giving that judgment bases its international jurisdiction pursuant to Article 3 thereof. Articles 19 and 20 provide for automatic recognition in all other Member States of any judgment opening insolvency proceedings even where, on account of the debtor's capacity, insolvency proceedings cannot be brought against that debtor in other Member States [Article 19(1)]. Consequently, the judgment shall be accepted, in particular to document an application for registration, with no prior review or confirmation or prior declaration of recognition and enforceability being required.

In insolvency proceedings covered by the scope of this Regulation, the procedure for recognition and enforcement provided for therein supersedes and dismisses the procedure for recognition of a judgment declaring insolvency given in foreign proceedings, as provided for in Articles 288 to 291 of the Insolvency and Business Recovery Code.

Under the Regulation, in case of multiple judgments, the principle of recognition of the first judgment opening the insolvency proceedings shall be valid, as interpreted by the **CJEU in judgments C-341/04 and C-116/11** (judgments given in the context of Regulation 1346/2000 which preceded the current Regulation 2015/848, although the interpretation is still valid in light of the wording of Article 19 of the Recast Insolvency Regulation).

Accordingly, a judgment opening main insolvency proceedings shall automatically be recognised in all other Member States from the moment that it becomes effective in the Member State of the main insolvency proceedings until the opening of secondary insolvency proceedings.

As regards recognition and enforcement in a Member State of a judgment opening insolvency proceedings in another Member State, the **CJEU reaffirmed the universal scope of the main insolvency proceedings in judgment C-444/07:**

– The facts in dispute consisted of an attachment, by the authorities of a Member State, of funds held in a bank account of a company after insolvency proceedings had been opened in another Member State, in violation of the provisions of the national law of the State in which those proceedings had been opened.
– The CJEU ruled that Regulation No 1346/2000 on insolvency proceedings, in particular Articles 3, 4, 16, 17 and 25, shall be interpreted as meaning that after the main insolvency proceedings have been opened in a Member State the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal under Articles 25(3) and 26 of that Regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and are therefore not entitled to order, pursuant to the legislation

of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the Regulation is subject are not met.

– This interpretation is equally valid regarding Articles 3, 7, 8, 13, 19, 21, 32 and 33 of Regulation 2015/848.

Recognition of the judgment opening main insolvency proceedings does not preclude the opening of secondary insolvency proceedings in another Member State. However, in such a case, ascertaining whether the debtor is insolvent cannot be re-examined in the secondary proceedings, even though the main insolvency proceedings are preventive, aiming to recover and not to liquidate – **judgment of the CJEU C-116/11.**

The effects of the secondary insolvency proceedings cannot be challenged in other Member States. In secondary insolvency proceedings, any restriction of creditors' rights – *e.g.*, a stay or discharge of a debt – may be challenged vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent (territorial scope) – cf. Article 20(2) of the Regulation.

For purposes of applying this Regulation, Article 2(7) and (8) thereunder defines the concept of the decision to open insolvency proceedings and the time of the opening of proceedings, as follows:

(7) 'judgment opening insolvency proceedings' includes: (i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and (ii) the decision of a court to appoint an insolvency practitioner;

(8) 'the time of the opening of proceedings' means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not;

According to **CJEU jurisprudence in judgment C-116/11**, the concept of the decision to open insolvency proceedings is defined in light of two independent criteria provided for in the Regulation: (i) the rule of international law (*lex concursus*), currently provided for in Article 3(1); (ii) and the principle of recognition of the first judgment that opened the insolvency proceedings, currently provided for in Article 19. This judgment was given within the scope of application of Regulation 1346/2000, although the interpretation is still valid in light of the wording of Articles 3 and 19 of the Recast Insolvency Regulation.

Accordingly, the rule of Article 3(1) revokes the national rules on private international law within the scope covered by the Regulation and stipulates that the Court of the Member State where the centre of the main interests of the debtor is located has jurisdiction to rule on the main insolvency proceedings.

The opening of main insolvency proceedings in a Member State does not preclude secondary insolvency proceedings being opened with territorial effects in another Member State where the debtor has an establishment. However, as a rule, secondary insolvency proceedings may only be opened whilst the main insolvency proceedings are pending [without prejudice to the opening of territorial insolvency proceedings before the main insolvency proceedings as provided for in Article 3(4)]. It is not possible to open secondary insolvency proceedings in another Member State once the main insolvency proceedings have been concluded. Although new main insolvency proceedings may be opened in a different Member State once the first proceedings have been concluded, provided that it is proved that the centre of the main interests of the debtor has meanwhile moved to that other Member State. This results from the interpretation made by the **CJEU in judgment C-116/11**.

4. When can an authority in Portugal or another Member State refuse to recognise or enforce a judgment opening insolvency proceedings given in another Member State?

Only when such judgment is contrary to public policy.

Under Article 33: *Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.*

Resorting to the public policy exception to refuse to recognise a judgment is, however, an exceptional decision and as such should be interpreted in its strict sense – **judgment of the CJEU C-341/04**.

5. Are there limits to the effects in one Member State of a judgment opening insolvency proceedings handed down in another Member State?

Yes, such limits are provided for in Articles 8 to 18 of the Regulation and aim to protect certain rights of creditors and third parties, ensure legal security, good administration of justice and protection of more vulnerable creditors (workers).

For that purpose, the norms referred above establish limits to the effects produced in a Member State by a judgment opening insolvency proceedings in another Member State where certain rights (*e.g.*, rights *in rem*), certain creditors (*e.g.*, workers) or assets subject to registration are concerned. Additionally, such norms enshrine exceptions to the general rules provided for in the Regulation as to the applicable law (Article 7) and/or on international jurisdiction (Articles 3 and 6), as follows:

– The protection of the rights *in rem* of creditors or third parties is provided for under Article 8. In that regard, Recitals (68) and (69) should be considered:

(68) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem*, since such rights are of considerable importance for the granting of credit. The basis, validity and extent of rights* in rem *should therefore normally be determined according to the* lex situs *and not be affected by the opening of insolvency proceedings. The proprietor of a right* in rem *should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security. Where assets are subject to rights* in rem *under the* lex situs *in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights* in rem *arise if the debtor has an establishment there. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights in rem should be paid to the insolvency practitioner in the main insolvency proceedings.*

(69) This Regulation lays down several provisions for a court to order a stay of opening proceedings or a stay of enforcement proceedings. Any such stay should not affect the rights in rem *of creditors or third parties.*

In the judgment given in case C-195/15. The CJEU ruled on a question regarding immunity of the rights *in rem* of third parties as follows: *Article 5 of Council Regulation*

(EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted to the effect that security created by virtue of a provision of national law, such as that at issue in the main proceedings, by which the real property of a person owing real property taxes is, by operation of law, to be subject to a public charge and that property owner must accept enforcement of the decision recording that tax debt against that property, constitutes a 'right in rem' for the purposes of that article. This interpretation remains valid as regards Article 8 of Regulation 2015/848 now in force.

– Protection of the creditors' right to invoke set-off under certain circumstances is provided for in Article 9. In this regard, Recital (70) clarifies the following:

(70) If a set-off of claims is not permitted under the law of the State of the opening of proceedings, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off would acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

– Sellers' rights on a reservation of title when the insolvency proceedings are opened, and the right to an asset acquired by the buyer when the insolvency proceedings are opened against the seller, are protected under Article 10.
– Article 11 stipulates the rules of law applicable to the effects of the insolvency proceedings on a contract conferring the right to acquire or make use of immovable property (*lex situs* is applicable) and the rules of international jurisdiction giving

the Court where the insolvency proceedings were opened jurisdiction to approve the resolution or modification of such a contract under certain conditions.

- Article 12 of the Regulation provides for the rules of law applicable to the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market, which shall be governed solely by the law of the Member State applicable to that system or market, without prejudice to the rights *in rem* of third parties pursuant to Article 8. In this regard, Recital (71) cites the grounds for such protection.
- As regards protection of employees, the Regulation contains rules of law applicable to the effects of insolvency proceedings on employment agreements and labour relations, governed exclusively by the law of the Member State that is applicable to the employment agreement, determined in accordance with the general norm of conflicts applicable (*e.g.*, the Rome I Regulation if they are covered by its scope of application). However, as mentioned in Recital (72): *Any other questions relating to the law of insolvency, such as whether the employees' claims are protected by preferential rights and the status such preferential rights may have, should be determined by the law of the Member State in which the insolvency proceedings (main or secondary) have been opened, except in cases where an undertaking to avoid secondary insolvency proceedings has been given in accordance with this Regulation.* Additionally, the Regulation stipulates the rules of international jurisdiction attributing competence to Courts or other national authorities of the Member State in which secondary insolvency proceedings may be opened, for approving the termination or modification of employment contracts even if no insolvency proceedings have been opened in that Member State – cf. Article 13.

– The Regulation contains rules on the law applicable to the effects of insolvency proceedings on the rights of a debtor over immoveable property, a ship or an aircraft subject to registration in a public register. Pursuant to Article 14, the law applicable shall be the law of the Member State under the authority of which the register is kept.
– A European patent with unitary effect, a Community trade mark or any other similar right established by European Union law may be included only in main insolvency proceedings pursuant to Article 15.
– The person who benefited from an act detrimental to all the creditors shall be protected if he or she offers proof of the requirements under Article 16.
– Protection of third-party purchasers who acquire for consideration, by an act concluded after the opening of insolvency proceedings, an immovable asset, a ship or an aircraft subject to registration in a public register or securities the existence of which requires registration in a register laid down by law, is ensured under the terms of Article 17. Pursuant to this Article, the validity of the act shall be governed by *lex situs* in the case of immovable property or by law of the State within the territory of which the register is kept, in all other cases.
– The rules of law applicable to the effects of insolvency proceedings on pending lawsuits or arbitral proceedings concerning an asset or a right which forms part of an insolvent estate provide that such proceedings shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat – cf. Article 18.

To the extent that they are relevant in terms of registration, these limits on the effects of the decision to open insolvency proceedings handed down

in another Member State are directly applicable by registry officers and prevail over the rules of internal law.

6. What are the effects in a Member State of other judgments, in particular judgments concerning the course and closure of insolvency proceedings, handed down in another Member State?

The answer to this question can be found in Article 32 of Regulation 2015/848.

The following are included in this category:

- Judgments handed down by a Court whose judgment concerning the opening of insolvency proceedings is recognised in accordance with Article 19 and which concern the course and closure of insolvency proceedings;
- Any agreement by that Court;
- Judgments deriving directly from and closely related to the insolvency proceedings, even if they were handed down by another Court (Article 6).
- Judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it (Article 52).

All such judgments shall be recognised with no further formalities in another Member State when the judgment opening the insolvency proceedings is also automatically recognised in such Member State.

Additionally, pursuant to Article 32(1) of Regulation 2015/848, the judgments referred above shall be enforced immediately in another Member State, with no further need of *exequatur* proceedings, in accordance with Articles 39 to 44 and 47 to 57 of Regulation 1215/2012

(the Brussels Ia Regulation) whose enforcement scheme has already been addressed in detail in Section VII of this manual.

Although there may be doubts concerning this point, which should be referred to the CJEU for judgment, it does not appear that the grounds for refusal to recognise and/or enforce judgments provided for in Articles 45 and 58 of the Brussels Ia Regulation can be invoked, given that Article 32(1) of Regulation 2015/848 does not refer to such legal provisions. Accordingly, the only grounds for refusing to recognise and/or enforce judgments appear to be the grounds provided for in Article 33 of this Regulation (contrary to public policy).

The recognition and enforcement of judgments other than those referred to above shall be governed by the provisions of Regulation 1215/2012, provided that that Regulation is applicable, including the grounds for refusal to recognise and/or enforce judgments therein contained, which cannot be declared *ex officio* – cf. Article 32(2) of Regulation 2015/848 and Section VII of this manual.

The time from which insolvency proceedings are considered closed, pursuant to Article 7(2)(j), is determined by the law of the Member State of the opening of such proceedings – **judgment of the CJEU C-116/11**.

While Article 24(2)(i) of Regulation 2015/848 stipulates mandatory inclusion of the judgment closing insolvency proceedings in the insolvency register of the Member State where the insolvency proceedings were opened, Articles 28 and 29 do not require that the judgment closing insolvency proceedings should be published or registered in the other Member States where publication and registration measures regarding the opening of the proceedings were executed. However, under Article 32 of this Regulation, the judgment on the closure of insolvency proceedings shall be recognised with no further formalities in another Member State required. It therefore appears that said judgment must be accepted for publication and registration purposes in another Member State where the opening of insolvency proceedings was published or registered.

As regards actions that are strictly linked to the insolvency proceedings, in **judgment C-295/13, the CJEU** ruled that a liability action brought by

the insolvency practitioner against the manager of a company on grounds of acts of management or disposal of insolvent assets by said manager after the company became insolvent, is strictly linked to the insolvency proceedings. This interpretation given in the context of Regulation 1346/2000 appears still to be valid as regards Article 6(1) of the Recast Insolvency Regulation.

7. Which publication and registration measures are provided for in the Regulation regarding insolvency proceedings covered by its scope of application?

Measures concerning the publication and entry into a public register are provided for in Articles 24, 28 and 29 of the Regulation.

The Regulation provides for publication and entry into a public register. These measures include those taking place in the Member State where the insolvency proceedings were opened and those taking place in other Member States; they may be mandatory and optional measures.

Publication and registration measures in the Member State of the opening of insolvency proceedings

As a rule, the publication and registration measures in the Member State of the opening of insolvency proceedings are mandatory – cf. Article 24.

This Article provides for the mandatory publication of the information therein contained in the insolvency register or registers established and maintained by the Member State of the opening of insolvency proceedings. It is contentious knowing whether the insolvency registers under this provision should be established in Registries or occur by simple electronic filing, which is public and free of charge (*e.g.*, in Portugal on the Citius portal, at the courts website).

The combined provisions of Articles 24(1) and 92(b) of Regulation 2015/848 stipulate that up to 26.6.2018, Member States shall establish

and maintain in their territory one or several registers in which information concerning insolvency proceedings is published ('insolvency registers').

The mandatory information to be made publicly available in this or these insolvency registers is laid down in Article 24(2), as follows:

- The date of the opening of insolvency proceedings;
- The Court opening insolvency proceedings and the case reference number;
- The type of insolvency proceedings referred to in Annex A that were opened in accordance with national law;
- Indication that the Court has jurisdiction for main, secondary or territorial proceedings based on any paragraph of Article 3;
- If the debtor is a company or a legal person, the debtor's name, registration number, registered office or, if different, postal address;
- If the debtor is an individual whether or not exercising an independent business or professional activity, the debtor's name, registration number, if any, and postal address or, where the address is protected, the debtor's place and date of birth;
- The name, postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings;
- The time limit for lodging claims, if any, or a reference to the criteria for calculating that time limit;
- The date of closing main insolvency proceedings, as the case may be;
- The Court before which and, where applicable, the time limit within which a challenge of the decision opening insolvency proceedings is to be lodged in accordance with Article 5, or a reference to the criteria for calculating that time limit.

That information shall be published as soon as possible after the opening of such proceedings [Article 24(1)].

Access to said information is as follows:

– The mandatory information referred to in points (a) to (j) of Article 24(2) is available free of charge via the system of interconnection of insolvency registers [Article 27(1)];
– Member States may charge a reasonable fee for access to the documents or to additional information established in their national systems that are accessible via the system of interconnection of insolvency registers (*e.g.*, directors' disqualifications related to insolvency) [Articles 24(3) and 27(2)];
– Member States may establish additional criteria (in addition to the minimum criteria laid down in Article 25) for access to mandatory information concerning individuals who are not exercising an independent business or professional activity, and concerning individuals exercising an independent business or professional activity when the insolvency proceedings are not related to that activity [Article 24(4)];
– Member States shall not be obliged to include in the insolvency registers the information referred to in Article 24(2) in relation to individuals not exercising an independent business or professional activity, or to make such information publicly available through the system of interconnection of those registers, provided that known foreign creditors are informed, pursuant to Article 54 (by means of the standard form set out in Annex I), of the Court before which and the time limit within which the decision opening insolvency proceedings can be challenged and reference to the criteria for calculating that time limit (cf. Articles 5, 24(4) and 54).

At the date on which this manual is being drafted, the facts published electronically on the Citius portal refer to insolvency proceedings regarding companies and individuals alike, as a rule include:

- The case reference number of the insolvency proceedings;
- The Court where they are pending
- The type of insolvency proceedings referred to in Annex A;
- The identification of the debtor, including the registration number of the company or the registration number of a natural person;
- The name, postal address or e-mail address of the insolvency practitioner;
- The time limit for lodging claims;
- The date of the declaration of insolvency;
- The date of closure of the insolvency proceedings.

In practice, the facts referred to in points (d) and (j) of Article 24(2) of the Regulation are not always present in the notice published on the Citius portal.

However, Article 38(12) of the Insolvency and Business Recovery Code establishes that entries in commercial or civil registries, as the case may be, and in other bodies charged with public registers by which the debtor is subject, shall contain the facts laid down in Article 24(2) of the Regulation, which indicates that the intention of said Article 38(12) of the Insolvency and Business Recovery Code is to comply with the provisions of Article 24(2).

Whether it is understood that Article 24 of the Regulation provides for the creation of one or more registers in the Registries, or that public access, free of charge electronic filing on the Citius portal is sufficient, for practical reasons, it should nevertheless be ensured that all the facts

laid down in said Article 24 of the Regulation are indeed published on the Citius portal. (see answer to question 9 in this section).

Publication and registration measures in other Member States

Additionally, the Regulation establishes that information regarding the opening of insolvency proceedings and the appointment of the insolvency practitioner be published in other Member States, which is mandatory under Article 28(1) and optional under Article 28(2).

Similarly, it establishes that such information should be entered into the public register of other Member States, which is mandatory under Article 29(1) and optional under Article 29(2).

As a rule, the insolvency practitioner or the debtor in possession should promote the publication and registration measures laid down in Articles 28 and 29, as will be mentioned in the answer to the following question.

8. Which publication and registration measures can or must an insolvency practitioner require in another Member State and how does the insolvency practitioner prove its status?

As already mentioned, insolvency practitioner means any person or body performing the functions laid down in Article 2(5), regardless of their designation, which must be listed in Annex B.

The measures of publication and registration that the insolvency practitioner may request in other Member States, other than those regarding the opening of the insolvency proceedings, are as follows:

– The insolvency practitioner shall request that notice of the judgment opening insolvency proceedings and the decision

appointing the insolvency practitioner be published in the insolvency register of the Member State where an establishment of the debtor is located, specifying, where appropriate, the insolvency practitioner appointed and the jurisdiction rule applied (whether these are main, secondary or territorial proceedings) – Article 28(1);

- The insolvency practitioner may (optionally) request that the notice referred to above be published in any other Member State - Article 28(2);
- It must require that the judgment on the opening of insolvency proceedings be published in the Land register, Commercial register or any other public register, in the Member State in which an establishment of the debtor is located, if required by the law of that Member State – Article 29(1);
- The insolvency practitioner may (optionally) request that the register referred to above be published in any other Member State – Article 29(2).

The insolvency practitioner's appointment shall be evidenced in another Member State by a certified copy of the original decision appointing it or by any other certificate issued by the Court which has jurisdiction, together with a translation into the official language of the Member State within which it intends to act – Article 22 of the Regulation.

The publication and registration measures in another Member State as laid down in Articles 28 and 29 should, as the case may be, be carried out by the debtor in possession.

The costs of the publication and registration in another Member State shall be regarded as costs and expenses incurred in the proceedings – Article 30 of the Regulation.

9. Can publication and registration of information on insolvency proceedings, as provided for in the Regulation, have repercussions on the exercise of creditors' rights?

Yes, publication and registration of said information may have repercussions on the exercise of creditors' rights, in particular in the cases provided for in Article 55(6) and 31(2) of the Regulation.

Accordingly, under said Regulation, the publication of information in the insolvency register as laid down in Article 24, in the Member State of the opening of the insolvency proceedings, has repercussions on the time limit for the exercise of creditors' rights:

- Although governed by the law of the forum, the time limit for claims lodged by a foreign creditor shall not be less than 30 days following the publication of the opening of insolvency proceedings in the insolvency register of the State of the opening of proceedings [cf. Article 55(6)];
- Where a Member State decides to limit the information regarding natural persons set out in the register [Article 24(3)], known foreign creditors shall be informed by the insolvency practitioner pursuant to Article 54, and the time limit for claiming their credits shall not be less than 30 days following a creditor having been so informed [cf. Article 55(6)].

In addition to the cases mentioned above, the Regulation also provides for the consequences regarding enforcement of publication measures in a Member State other than the Member State where the insolvency proceedings were opened. Enforcement in another Member State of the publication measures of the opening of insolvency proceedings, as provided for in Article 28, has repercussions as regards the presumption of good faith or burden of proof regarding payments unduly made to the debtor to the prejudice of the creditors in the Member State in which such measures are enforced:

- The person honouring an obligation to the debtor that is the subject of insolvency proceedings opened in another Member State instead of honouring an obligation to the insolvency practitioner of such proceedings before enforcement of the publication measures under Article 28, shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings [cf. Article 31(2)];
- Where this obligation is honoured after such publication has been effected pursuant to Article 28, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings [cf. Article 31(2)].

10. What are the publication and registration measures in national proceedings covered by the scope of application of the Regulation, in accordance with the Portuguese insolvency law?

The answer to this question provides a schematic outline of the facts which, under national insolvency legislation, must be published and registered, regarding the three proceedings covered by the scope of Regulation 2015/848 (insolvency; the Special Revitalisation Process; and the Special Procedure for Payment Agreement). These rules, however, have to be coordinated with the rules provided for in the Regulation, which have primacy and are directly applicable.

Publication of facts regarding the opening of proceedings

Publication and registration measures regarding the judgment that opened insolvency proceedings and the appointment of the insolvency practitioner are laid down in Articles 37 and 38 of the Insolvency and Business Recovery Code.

Such measures apply, and are adapted accordingly, to the Special Revitalisation Process (PER) and to the Special Procedure for Payment Agreement (PEAP), in accordance with Articles 17-C(5), 17-F(10), 222-C(5) and 222-F(8), respectively, of the Insolvency and Business Recovery Code.

In any of the proceedings referred above the measures are processed *ex officio* by the court clerk.

Accordingly, in proceedings pending in Portugal, the court clerk ensures registration, as the case may be, of the judgment declaring the insolvency and appoints the insolvency practitioner (in insolvency proceedings) or the decision appointing the provisional insolvency practitioner, confirming the recovery plan (in Special Revitalisation Processes) or the decision appointing the provisional insolvency practitioner and confirms the payment agreement (in Special Procedure for Payment Agreements) before the following authorities:

- Civil Registry Office (only where the debtor is a natural person);
- Commercial Registry (where there are facts regarding the insolvent debtor subject to said registration);
- Land Registry (regarding immovable assets included in the insolvent estate);
- The authority charged with another public register to which the debtor may be subject.

Additionally, the clerk of the Court:
publishes the facts mentioned above

- in the electronic Court records,
- on the court's website, on the Citius portal, as well as the time limit for claiming credits, under a public notice,

and informs the Bank of Portugal of this decision so that it may be entered in the credit risk centre.

However, if the object of the Special Procedure for Payment Agreement is to ratify an out-of-court settlement, the publication and registration measures are as provided for in Article 222-I of the Insolvency and Business Recovery Code (serving notice on creditors that were not party to the agreement, and publication of the list of claims on the Citius portal).

The termination of the duties of an insolvency practitioner and the appointment of another person to this position must be entered in the registers and published as provided for in Articles 37 and 38 of the Insolvency and Business Recovery Code – cf. Articles 56 and 57 of the same Code. This regime also appears to apply to the Special Revitalisation Process and to the Special Procedure for Payment Agreement – cf. Articles 17-A(3) and 222-A(3) of the Insolvency and Business Recovery Code.

The facts to be published on the Citius portal in insolvency proceedings, Special Revitalisation Processes and Special Procedure for Payment Agreements have already been mentioned above and may be consulted online[60].

The Citius portal may be consulted free of charge.

In addition to the publication and registration measures provided for in Article 38, Article 37 of the Insolvency and Business Recovery Code stipulates the services that must be made at the start of the proceedings and under what form, depending on the status of the persons being served (*e.g.* the debtor's executive managers, the five biggest creditors, other known creditors, State and public entities, unknown creditors and other interested parties, Public Prosecutor, and notifications required under the labour law).

Publication of facts regarding the closure of proceedings

Portuguese law stipulates publication and registration of closure of the national proceedings covered by the scope of application of the Regulation, in the following cases.

[60] https://www.citius.mj.pt/portal/consultas/ConsultasCire.aspx

A final judgment or a limited judgment regarding insolvency may be handed down in insolvency proceedings. In the former case, the proceedings continue; in the latter case, the proceedings close as soon as the judgment declaring the insolvency becomes final (without prejudice to continuation limited to the classification of the insolvency as culpable) as the judge concluded that the debtor's assets presumably are not sufficient to meet the costs of the proceedings and the foreseeable debts of the insolvent estate [cf. Articles 39(7)(b) and 230 of the Insolvency and Business Recovery Code].

Where a final insolvency judgment is handed down it should mention the facts listed in Article 36 of the Insolvency and Business Recovery Code. In such a case, if the proceedings continue under Article 230(2) of the Insolvency and Business Recovery Code, the judgment closing the insolvency proceedings must be published and registered as provided for in Articles 37 and 38 of said Code, as already mentioned above regarding the opening of such insolvency proceedings.

Additionally, in the cases provided for under Article 222(1) of the Insolvency and Business Recovery Code, as the enforcement of the insolvency plan is monitored, publication and registration of the judgment closing the proceedings should make reference to that and other facts mentioned in that Article. Under the terms of Article 222(2) of the same Code, the judge's confirmation that the monitoring period has ended must be published and registered as provided for regarding the judgment on closure of the proceedings.

However, where a limited judgment is handed down, Article 39(7)(b) does not stipulate publication or registration of said judgment.

In the Special Revitalisation Process, closure of proceedings may take two forms: (i) the closure of proceedings with a recovery plan occurs following the final judgment confirming the recovery plan, which is notified, published and registered by the judicial secretariat pursuant to Article 17-F(10) of the Insolvency and Business Recovery Code; (ii) the closure of negotiation proceedings where the recovery plan was not approved must be published by the interim insolvency practitioner on the

Citius portal (on the Courts website) – cf. Articles 17-G(1) and 17-J of the Insolvency and Business Recovery Code.

The closure of a Special Procedure for Payment Agreement may also take two forms: (i) closure following the final judgment regarding confirmation of the recovery plan, which is notified, published and registered by the judicial secretariat pursuant to Article 222-F(8) of the Insolvency and Business Recovery Code; (ii) closure where the payment agreement was not approved or confirmed, in which case closure of proceedings must be published by the interim insolvency practitioner on the Citius portal (on the Courts website) – cf. Articles 222-G(1) and 222-J of the Insolvency and Business Recovery Code.

Facts to be published by registration in the Registries shall be mentioned in greater detail in the answers to the questions below.

It is important to take into account that, pursuant to Article 38(12) of the Insolvency and Business Recovery Code, registration in civil registries, commercial registries and in other entities charged with public registers to which the debtor may be subject and which are mentioned in paragraph (2) of that legal provision, must include the facts laid down in Article 24(2) of Regulation 2015/848.

11. In proceedings covered by the scope of application of the Regulation, which facts are subject to registration in Public Registries, in accordance with the Portuguese law on registers?

Commercial Registry

In Portugal, under Articles 9(i)(l)(n) and (o), 10-A(1)(a) and 10(g) of the Commercial Registry Code the following must be registered:

- Judgments declaring the insolvency of commercial companies, civil companies under commercial law, cooperatives, joint

ventures, EU joint ventures and individual limited liability establishments, and judgments dismissing the respective application in cases of preliminary appointment of an interim insolvency practitioner, as well as the *res judicata* of said judgments;

- Decisions appointing and dismissing insolvency practitioners and interim insolvency practitioners, attributing administration of the insolvent estate to the debtor and the prohibition of certain acts without the consent of the insolvency practitioner or provisional insolvency practitioner, as well as decisions terminating said administration;
- Decisions, with *res judicata*, of the exoneration of the remaining liabilities of sole traders, as well as the initial and early cessation decisions of the respective proceeding and revocation of said exoneration;
- Judicial decisions closing insolvency proceedings;
- Judicial decisions confirming the end of the period during which enforcement of the insolvency plan is monitored;
- The opening and closure of liquidation and insolvency proceedings of permanent representations of limited liability companies with registered office in another Member State of the European Union.

The Commercial Registry Regulation (approved by Ordinance No 657-A/2006 of 29 June, in its consolidated version under Ordinance No 1256/2009 of 14 October) specifies the facts that must be included in the register under Article 10(x) to (ag):

- In the insolvency declaration: the date and time of delivery of the judgment and the date of *res judicata*, and, if applicable, further mention of the debtor's presumably insufficient assets

to meet the costs of the proceedings and the foreseeable debts of the insolvent estate;

- Where a request for a declaration of insolvency is dismissed, the date of *res judicata* of the respective judgment;
- On appointing an insolvency practitioner and a provisional insolvency practitioner, the professional domicile of the appointed practitioner and where a provisional insolvency practitioner has been appointed, the powers attributed thereto;
- When attributing administration of the insolvent estate to the debtor, the date of the respective decision and, if the debtor has been prohibited from performing certain acts without the consent of the insolvency practitioner, the specification of such acts;
- Where sole traders are disqualified or prevented from exercising and occupying certain positions, the date of the judgment with *res judicata*, the period of disqualification and impediment and the specification of the disqualifications decreed;
- Where a curator of an impeded insolvent person is appointed, the curator's professional domicile;
- In the initial decision in the procedure of exoneration of the remaining liabilities of the sole trader, the date of the decision and mention of the name and professional domicile of the trustee of the debtor's disposable income;
- On exoneration of the remaining liabilities of the sole trader, the date of *res judicata* of the respective decision;
- On opening and closure of the insolvency proceedings the date of the respective judicial decision and the decisive reason for closure. Where closure occurs on confirmation of the insolvency plan whose enforcement is subject to monitoring, mention of the last condition and, where applicable, of the acts whose exercise depends on the consent of the insolvency practitioner and the quantitative limit within which new claims can be granted priority.

As a rule, judgments declaring insolvency enter the register as provisional by nature, under Article 64(1)(e) of the Commercial Registry Code, as registration is initiated prior to *res judicata*. As a rule, the appointments of the insolvency practitioner and the interim judicial insolvency practitioner are registered as definitive. Accordingly, where both facts are attributed a different qualification, the registration of both facts cannot obey the principle of single inscription, rather two different registrations must be entered. The possibility of accumulation may occur, however, where the judgment declaring the insolvency and appointing the insolvency practitioner is already *res judicata* (this accumulation is reflected in the different emoluments regime) – cf. opinion of the IRN, IP, given in Case 50/CC/2014[61].

The definitive registration of the declaration of insolvency of a commercial company involves updating the registration with an addendum under the legal name mentioning "company in liquidation" or "in liquidation". The addendum should be drawn up as a means of indicating the legal position of the company and should even take place in cases where the liquidation phase terminates without the liquidation procedure being enforced, because a plan establishing the recovery of the company and its return to activity has been approved instead.

The closure of proceedings, on termination of the recovery plan which was confirmed by a final judgment, which establishes the continued existence of the commercial company, will involve registration of the return to activity of the non-liquidated company [Article 67(2)(a) of the Commercial Registry Code] and will lead to elimination of the addendum "company in liquidation" or "in liquidation" done under the legal name of the company (cf. Opinion of the IRN, IP, given in Case 54/2017)[62].

Actions, decisions, procedures and protective measures under Article 9 of the Commercial Registry Code – including proceedings covered by the Regulation's scope of application mentioned above –

61 https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal
62 https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

are subject to mandatory registration, pursuant to Article 15(5) of this Code. This registration can be challenged by third parties (Article 14(1) of the Commercial Registry Code). This registration is entered by means of a transcription, constituting the presumption of the existence of the legal situation under the precise terms of its definition [Article 11 of the Commercial Registry Code].

Several opinions have been issued by the IRN, IP, on facts subject to registration in the context of insolvency proceedings in light of internal law (Opinions of IRN, IP: 31/CC/2017; C. Co. 22/2016 STJ-CC; and P. C.Co. 19/2018 STJSR-CC)[63].

Land Registry and Vehicle Registry

Declarations of insolvency are also entered in the Land Registry, regarding immovable property included in the insolvent estate, based on the judicial certificate of the definitive declaration of insolvency and on a declaration by the insolvency practitioner identifying said property – Article 1(1)(n) of the Land Registry Code and Article 38(3) of the Insolvency and Business Recovery Code.Whilst not yet definitive, the registration shall be made as provisional by nature – cf. Article 92(1) (n) of the Land Registry Code.

The declaration of insolvency must also be entered in the Vehicle Registry Office, regarding vehicles subject to registration that are included in the insolvent estate. This entry, too, is done based on the certificate of the definitive declaration of insolvency and on a declaration by the insolvency practitioner identifying the assets.

Where the property is common to a couple and the declaration of insolvency affects only one spouse, the definitive entry of the decision in the registration regarding the common property of the couple subject to registration is conditioned by the demonstration that the debtor's

[63] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

spouse or ex-spouse was served notice to request separation of property or to attach a certificate proving that the separation has been requested and the proceedings are pending – cf. Articles 141(1)(b) and (3) of the Insolvency and Business Recovery Code and Article 740 of the Code of Civil Procedure.

Lastly, where immovable property is alienated in insolvency proceedings, in a Special Revitalisation Process or in a Special Procedure for Payment Agreement, the entry of said acquisition determines an annotation of its own motion of the cancellation of the registrations of rights *in rem*, extinction of which results from Article 824(2) of the Civil Code – cf. Article 101(5) of the Land Registry Code.

The title serving as the basis for cancellation of the registrations depends on the mode chosen by the insolvency practitioner or interim insolvency practitioner to alienate property, under the powers it has been attributed. For example, insolvency proceedings may give rise to the sale by online auction of any of the means of disposal permitted in executive proceedings, or another means deemed more convenient, under Article 164 of the Insolvency and Business Recovery Code. In that context, the insolvency practitioner will represent the debtor in all financial matters concerning the insolvency, as results from the provisions of Article 81(4) of the Insolvency and Business Recovery Code.

Several opinions have been issued by the IRN, IP, on this matter, in light of internal law (Proc. R.P. 29/2013 STJ-CC; Proc. R.P. 20/2012 SJC-CT; Proc. R.P. 112/2012 SJC-CT; Proc. R.P. 25, 26 and 27/2010 SJC-CT)[64].

Civil Registry

Article 38(2)(a) of the Insolvency and Business Recovery Code stipulates that entries in the Civil Registry are only done under the

[64] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

terms thereof, where the debtor is a natural person, which may occur in insolvency proceedings of natural persons or in the Special Procedure for Payment Agreement where the debtor is a natural person (cf. Articles 2(1)(a), 222-A(2) and 235 of the Insolvency and Business Recovery Code.

Accordingly, under the terms of Article 1(l)(m)(n) and (o) of the Civil Registry Code in conjunction with Article 2 thereunder, when the debtor is a natural person, the following facts are subject to mandatory registration and may only be invoked after being registered:

- The declaration of insolvency, dismissal of the respective request in cases where an interim insolvency practitioner was appointed, and closure of the insolvency proceedings;
- The appointment and termination of the functions of the insolvency practitioner and the interim insolvency practitioner, the attribution of the administration of the insolvent estate to the debtor and the prohibition of certain acts without the consent of the insolvency practitioner, as well as the termination of said administration;
- The debtor's disqualification from and impediment to exercising commerce and occupying certain positions;
- The exoneration of the remaining liabilities as well as the initial and early cessation decisions of the respective proceeding and revocation of the exoneration.

Likewise, Article 69(i)(j)(l) and (m) of the Civil Registry Code determines that the following in particular should be annotated on a birth entry:

- The declaration of insolvency, the dismissal of the respective request and the closure of the insolvency proceedings;
- The appointment and termination of the functions of the insolvency practitioner and the interim insolvency practitioner,

the attribution of the administration of the insolvent estate to the debtor and the prohibition of certain acts without the consent of the insolvency practitioner, as well as the termination of said administration;

– The debtor's disqualification from and impediment to exercising commerce and occupying certain positions;
– The start, early cessation and final judgment of the exoneration proceedings of the remaining liabilities and revocation of exoneration.

Once annotated, said facts are an integral part of the birth entry (Article 50(2) of the Civil Registry Code).

Civil registration is a public register although publication is subject to certain legal limitations insofar as they may be necessary and proportional to protect the right to the privacy of their personal and family life as provided for in Article 26 of the Constitution of the Portuguese Republic. Accordingly, the law establishes certain limitations to the obtaining of certificates and to the *ex officio* performance of a new birth entry and cancellation of the original birth entry, to eliminate the annotation of facts regarding insolvency proceedings – cf. Articles 81-A and 214(2) to (5) of the Civil Registry Code.

Several opinions have been issued by the IRN, IP, on the facts that are subject to civil registration in insolvency proceedings and the effects of said registration, in light of national law (Opinion N.º 27/ CC /2014, given in Process CC 34/2014 STJ-CT; Pº C. N. 74/2011 SJC-CT; Pº C. N. 74/2011 SJC-CT; Opinion 28/CC/2017, given in Case CC 66/2015 STJ-CT)[65].

[65] https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal

12. How can the insolvency practitioner or the debtor in possession, so designated in insolvency proceedings opened in another Member State, require the publication and registration measures under Articles 28 and 29 in Portugal?

This can be done under the terms of Article 38(9) to (11) of the Insolvency and Business Recovery Code. To that purpose, the insolvency practitioner (or the debtor in possession, as the case may be) must ask the Portuguese Court for publication and inscription in a public register as provided for in Articles 28 and 29 of the Regulation.

Accordingly, the insolvency practitioner or the debtor in possession must submit a petition to the competent Portuguese Court, specifically indicating which rules of the Regulation provide grounds for the claim. The insolvency practitioner must attach proof of status as insolvency practitioner as provided for in Article 22 of the Regulation, and the certificate of the judgment opening the insolvency proceedings or appointing the insolvency practitioner that offers guarantees of authenticity. The Portuguese Court may require a translation of the decision into Portuguese although the Regulation expressly stipulates that no other legalisation or formality is exigible (cf. Article 22).

The petition must be addressed to the Court (Commercial Court) in the area where the debtor's establishment is situated in Portugal or, in other cases, to Lisbon Commercial Court.

If the right that has to be registered is unknown in Portuguese legislation, the Court will adapt it, and determine the registration of a right that most closely resembles said right. This appears to be the interpretation to be made of Article 38(10) of the Insolvency and Business Recovery Code.

However, whenever the debtor owns an establishment situated in Portugal, the inscription in the register (*e.g.* Commercial Register) provided for in Article 29(1) of Regulation 2015/848 is determined *ex officio* by the officials of the competent registration services in Portugal, as provided for under Article 38(11) of the Insolvency and Business Recovery Code

– cf. Directive 2017/1132 (Articles 16 and 29), Regulation 2015/884 and Directive 2009/101/EC as regards the interconnection of the registrations of companies and branches of companies.

Such publication and registration measures may or should be requested (according to whether they are optional or mandatory).

Jurisprudence

Judgment of the Court of Justice of the European Union of 2 May 2006
C-341/04, ECLI:EU:C:2006:281 .... 408, 411

Judgment of the Court of Justice of the European Union of 21 January 2010
C-444/07, ECLI:EU:C:2010:24 408

Judgment of the Court of Justice of the European Union of 22 November 2012
C-116/11, ECLI:EU:C:2012:739 .... 408, 409, 410, 417

Judgment of the Court of Justice of the European Union of 26 October 2016
C-195/15, ECLI:EU:C:2016:804 412

Judgment of the Court of Justice of the European Union of 4 December 2014,
C-295/13, ECLI:EU:C:2014:2410 417

Useful links	
Opinions of the Advisory Board of the IRN, I.P.	https://irn.justica.gov.pt/Sobre-o-IRN/Doutrina-registal
European e-Justice Portal	https://beta.e-justice.europa.eu/content_insolvency-447-en.do?clang=en
European Justice Portal: bankruptcy and insolvency registers	https://beta.e-justice.europa.eu/110/PT/bankruptcy_and_insolvency_registers?clang=en
Miguel Virgós and Etienne Schmit, Explanatory Report on the Convention of Insolvency Proceedings, Council of the European Union DOC. 6500/96	http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf

Acronyms and Abbreviations

CJEU – Court of Justice of the European Union

COMI – Centre of Main lnterests of the Debtor

Commission – European Commission

CSM – Conselho Superior da Magistratura (High Judicial Council)

DGAJ – Directorate General for Administration of Justice

ECS – European Certificate of Succession

EJN Civil – European Judicial Network in civil and commercial matters

EU – European Union

HC – The Hague Covention

ICCS – International Commission on Civil Status

IRN, I.P. – Institute of Registries and Notary, I.P.

PEAP – Procedimento Especial para Acordo de Pagamento
(Special Procedure for Payment Agreement)

PER – Processo Especial de Revitalização
(Special Revitalisation Process)

TFUE – Treaty on the Functioning of the European Union

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