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portoghese

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**Matrimonial property regimes**

Portogallo

**1 Is there a statutory matrimonial property regime in this Member State? What does it provide?**

Yes. As a rule, spouses are free to draw up a marriage contract in order to choose their matrimonial property regime. This contract is known as a prenuptial agreement (*convenção antenupcial* - Article 1698 of the Civil Code (*Código Civil*)).

However, where spouses do not choose a regime or in certain cases where the prenuptial agreement is invalid, the statutory matrimonial property regime is the community of acquired property regime (*regime da comunhão de adquiridos*), in accordance with Articles 1717 and 1721 of the Civil Code.

In this case, the legal provisions of Articles 1721 to 1731 of the Civil Code have to be applied in order to determine which property is jointly owned and which property is separately owned.

Exceptionally, there are cases (set out in Article 1720 of the Civil Code) in which the mandatory regime is the separate property regime (*regime de separação de bens*).

**2 How can spouses arrange their matrimonial property regime? What are the formal requirements in this case?**

Spouses can arrange their matrimonial property regime by entering into a prenuptial agreement, through which they can choose one of the three property regimes set out in the Civil Code, or by agreeing something different within the limits of the applicable law (Article 1698 of the Civil Code).

The three matrimonial property regimes set out in the Civil Code are:

the community of acquired property regime (*regime da comunhão de adquiridos* - Articles 1721 to 1731 of the Civil Code);

the community of property regime (*regime da comunhão geral de bens* - Articles 1732 to 1734 of the Civil Code);

the separate property regime (*regime de separação de bens* - Articles 1735 to 1735 of the Civil Code).

As indicated above, spouses can agree something different within the limits of the applicable law. This has to be the case where the matrimonial property regime is the community of acquired property regime, but the spouses agree, in a prenuptial agreement, that a specific immovable property acquired by one of them prior to the marriage (for example, a family home) will become a jointly owned property after the marriage because they want both of them to be responsible for the respective mortgage

In terms of formal requirements, the prenuptial agreement must take the form of an authentic document drawn up before a notary (public deed) or a declaration made before a registrar (Article 1710 of the Civil Code and Articles 189 to 191 of the Civil Register Code (*Código do Registo Civil*)).

As a rule, the prenuptial agreement must be concluded before the marriage. In accordance with Article 1714 of the Civil Code, the prenuptial agreement and the matrimonial property regime cannot be changed after the marriage, except as otherwise provided by Article 1715 of the Civil Code.

Chapter IX, Section III, of the Civil Code contains the legal provisions applicable to prenuptial agreements (from Article 1698 to Article 1716).

The legal provisions applicable to marriage gifts and gifts between spouses can be found in Chapter X, Sections I and II, Articles 1753 to 1766 of the Civil Code.

**3 Are there restrictions on the freedom to arrange a matrimonial property regime?**

Article 1720 of the Civil Code identifies two cases in which the mandatory matrimonial property regime is the separate property regime: when the marriage is celebrated without going through the preliminary marriage process, and when the spouses are 60 years old or over.

Apart from in these cases, spouses are free to choose within the limits of the applicable law.

**4 What are the legal effects of divorce, separation or annulment on the matrimonial property?**

In accordance with Article 1688 of the Civil Code, the marriage relationship between spouses ends with divorce or annulment of the marriage, without prejudice to the provisions on maintenance. The legal separation of spouses and their property does not dissolve the marriage, but the legal effects in the case of separation are very similar to divorce, as will be explained below.

With regard to the partition of property and payment of debts, Article 1689 of the Civil Code states that, once the matrimonial property regime has ended, the spouses or their respective heirs are entitled to each receive their personal property and their share of any jointly owned property. The spouse who owes a debt to the jointly owned property must settle that debt.

With regard to debts, priority will be given to the payment of joint debts using the jointly owned property, and it is only after such debts have been paid that the remaining debts will be settled. If one of the spouses owes a debt to the other spouse, he or she must pay that debt using his or her share of the jointly owned property. Where there is no jointly owned property, the spouse must pay the debt using his or her personal property.

Legal effects of divorce

The effects of divorce are set out in Articles 1788 to 1793A of the Civil Code.

As a general rule, divorce dissolves the marriage and has the same consequences as dissolution of the marriage by death.

In terms of succession, in accordance with Article 2133 of the Civil Code, following the divorce judgment the former spouse loses the status of legal heir even where the divorce judgment is delivered after the other spouse's death.

Under Portuguese law, as a rule, the matrimonial property is not partitioned during the divorce proceedings, but only afterwards. However, in the case of divorce by mutual consent before the Civil Registry Office, spouses can immediately agree on how the matrimonial property will be partitioned.

As regards the effects of divorce, the general rule is that:

the divorce takes effect from the date when the divorce judgment becomes final.

The property effects of divorce between spouses are as follows:

The divorce has retroactive property effects between the spouses from the date when the divorce proceedings were brought.

However, at the request of either spouse, the property effects of their divorce can be backdated to the date when the spouses stopped cohabiting, if this date has been verified in the proceedings.

In the partition of property following divorce, neither spouse can receive more than they would have received if the marriage had been celebrated under the community of acquired property regime.

Each spouse loses all the benefits received or to be received as a result of the marriage (e.g. gifts between spouses; gifts made by a third person to the couple with a view to their marriage). In this case, the person making the gift can decide that the benefit will accrue to the couple's children.

The aggrieved spouse has the right to seek compensation for the damage caused by the other spouse, under the general terms of civil liability and in the ordinary courts.

Where the grounds for divorce relate to a mental issue of one of the spouses, the spouse applying for the divorce must compensate the other spouse for the personal injury caused by the dissolution of the marriage. This claim must be made during the divorce proceedings themselves.

Each spouse can ask the court to allow him or her to rent the family home, whether it is jointly owned or owned by the other spouse.

The property effects of divorce on relationships between spouses and third parties are as follows:

The spouses can only invoke the property effects of divorce against third parties after the date when the judgment was registered in the Civil Register.

With regard to maintenance obligations between former spouses, Articles 2016 and 2019 of the Civil Code state that:

as a general rule, after divorce, each former spouse has a duty to support himself or herself;

each former spouse has a right to maintenance, regardless of whether or not the divorce was by mutual consent, but the right to maintenance can be denied for reasons of fairness;

the right to maintenance ends if the beneficiary remarries.

#### Effects of legal separation of spouses and their property

With regard to legal separation, Article 1794 of the Civil Code refers to the provisions on divorce, as set out above, with one exception: legal separation does not dissolve the marriage.

Aside from this one exception, in accordance with Articles 1795A, 2016 and 2133 of the Civil Code, the effects of legal separation on matrimonial property, maintenance obligations and succession are the same as the effects of divorce.

#### Legal effects of annulment

There is a difference between annulment and non-existent marriage.

In the case of non-existent marriage, as provided for by Articles 1628 to 1630 of the Civil Code (e.g. where there is complete absence of a declaration by one or both spouses), the non-existent marriage does not have any effects.

In the case of annulment of a civil marriage, as provided for by Article 1631 of the Civil Code (e.g. in the case of legal impediments or an incorrect declaration), the effects determined by Article 1647 of the Civil Code are as follows:

If both spouses acted in good faith, the marriage has effects between them and against third parties until the annulment judgment becomes final.

If only one spouse acted in good faith, then only that spouse can benefit from the effects of the marriage. In addition, the spouse acting in good faith can invoke the effects of the marriage against third parties, provided that they reflect the relationship between the spouses.

These rules apply to the annulment of Catholic marriages celebrated by ecclesiastical authorities until the judgment has been registered in the Civil Register, provided that the Catholic marriage was likewise registered.

Articles 1649 and 1650 of the Civil Code provide for special property penalties in the event of a marriage between minors or a marriage infringing legal impediments, such as the following:

A minor who marries without the necessary authorisation is regarded as a minor until the age of majority with regard to the administration of property that he or she owned at the time of the marriage and that he or she acquires after the marriage by gift. However, the maintenance needed according to his or her status will be taken from the income from this property.

The parents or legal representative of the minor, and not the other spouse, will administer this property until the minor reaches the age of majority.

This property cannot be used, either during the marriage or after its dissolution, to settle the debts of either spouse incurred before the minor reached the age of majority.

In the event of marriage before the end of the inter-nuptial period, the spouse infringing this impediment loses all the property received by gift or will from the first spouse in the previous marriage.

If the impediments laid down in Article 1604(c) and (d) of the Civil Code are infringed (e.g. there is an impediment resulting from a blood relationship), the spouse committing the infringement cannot receive any benefit by gift or will from the other spouse.

### **5 What are the effects of death of one of the spouses on the matrimonial property regime?**

The matrimonial property regime ends with death, as set out in Article 1788 of the Civil Code.

Jointly owned property must be partitioned. The deceased's property includes his or her personal property and, as applicable, his or her share of the jointly owned property of the spouses, in accordance with Article 2024 of the Civil Code.

As a general rule, the surviving spouse is the legal heir and benefits from a reserved portion in the succession, regardless of the existence of a will (Articles 2131 and 2133 or 2158 and 2159 of the Civil Code, as applicable).

In addition, under the conditions of Article 2103A of the Civil Code, when the property is partitioned, the surviving spouse has the right to be granted use of the family home, its contents and its furniture. Where this exceeds his or her portion in terms of both the succession and the jointly owned property, the surviving spouse must compensate the other heirs.

However, in accordance with Articles 1698 and 1700(3) of the Civil Code, where the matrimonial property regime is the separate property regime, the spouses can waive their status as heir in the prenuptial agreement.

### **6 Which authority has the competence to decide in a case relating to a matrimonial property regime?**

As a rule, issues relating to matrimonial property regimes are raised in the partition proceedings following divorce, legal separation or annulment of the marriage.

In such cases, the authorities with competence to handle the partition of matrimonial property are as follows:

The Civil Registry Office (Conservatória do Registo Civil) in the case of divorce or legal separation, provided that the parties agree to the partition. Two situations can arise: in the case of divorce or legal separation by mutual consent, the Civil Register services are competent with regard to the divorce or legal separation and, within these proceedings, can approve the partition agreement, handle the payment of tax obligations and make changes to the Property Register as a result of the partition. In the case of contested divorce or legal separation, for which the Family and Minors Courts (*Tribunais de Família e Menores*) are competent, if the parties agree to the partition after the divorce or separation, then the Civil Register services are competent to handle the partition, tax obligations and changes to the Property Register as a result of this partition. This legal framework is set out in Articles 272A and 272B of the Civil Register Code (*Código de Registo Civil*).

Practical information on this service and its costs is available from <https://justica.gov.pt/Servicos/Balcao-Divorcio-com-Partilha>.

Notaries in cases of divorce and legal separation where the spouses do not agree on the partition and, as a rule, in all cases of annulment. In such cases, one of the parties must submit an inventory request to the notary. The notary handles the case using the case management system <https://www.inventarios.pt/>. During the inventory procedure, any decisions will be made by the Family and Minors Courts. This procedure is laid down in Law No 23/2013 on the inventory procedure. After the final decision becomes enforceable, the notary will issue a certificate allowing the parties to meet their tax obligations and register any changes to immovable property as a result of the partition (Article 20 of Law No 23/2013).

If, after the divorce or legal separation, the parties reach agreement on the partition of property, they can grant a public deed before a notary. In this case, the notary is responsible for registering the immovable property within two months and the parties must meet their tax obligations within the same time-limit (Articles 8B and 8C of the Property Register Code (*Código do Registo Predial*)).

#### **7 What are the effects of the matrimonial property regime on legal relationships between a spouse and a third party?**

Articles 1682 and 1683 of the Civil Code provide that, in some cases, a spouse must have the other spouse's consent to enter into certain contracts with a third party. This depends on the matrimonial property regime (e.g. separate property or community of property regimes), the powers of administration resulting from that regime (e.g. joint administration of certain property), the nature of the property (e.g. family home; joint property) or the nature of the contract (e.g. contract of sale and purchase; acceptance of gifts).

Under Article 1687 of the Civil Code, lack of consent from the other spouse has the following consequences for third parties:

If one of the spouses enters into a contract that infringes the provisions of Article 1682(1) and (3) (e.g. transfer of ownership of certain movable property), Article 1682A (e.g. transfer of ownership of immovable property under community of property regimes; transfer of ownership of the family home under any matrimonial property regime), Article 1682B (e.g. cancellation of the lease for the family home) or Article 1683(2) (waiver of a succession or legacy) of the Civil Code, the other spouse or his or her heir can request the cancellation of that contract.

If a spouse transfers ownership of unregistered movable property or enters into a contract that creates a charge over that property, without the other spouse's consent where necessary, the cancellation referred to above cannot be invoked against a third party who acted in good faith.

If one of the spouses unlawfully transfers ownership of a property belonging solely to the other spouse or enters into a contract that creates a charge over that property, the contract will be null and void and the price must be repaid under Articles 892 to 904 of the Civil Code in particular, which set out the consequences of the seller's unlawful action.

#### **8 A short description of the procedure for the division, including partition, distribution and liquidation, of matrimonial property in this Member State.**

Where no agreement can be reached on the partition (in the case of divorce or legal separation) or where the marriage is annulled, the inventory procedure to be followed is set out in Law No 23/2013.

The inventory procedure involves the following stages:

##### Stage 1 - Application

The procedure starts with the submission of an application to the notary by any party interested in the partition. As a general rule, the application is submitted electronically via <https://www.inventarios.pt/>.

One of the spouses (the oldest) is appointed to submit the list of property, including debts and claims.

The interested parties are notified so that they can raise any objections.

##### Stage 2 - Preparatory meeting

A preparatory meeting is held during which the partition can be decided by agreement. In this case, the procedure can end at the preparatory meeting stage.

The case is then referred to the Family and Minors Court for approval by the judge.

##### Stage 3 - Meeting

If no agreement is reached at the preparatory meeting stage, the parties are summoned to a property valuation and auction meeting, if necessary.

The notary makes a decision on the partition and liquidation and draws up the partition deed.

Finally, the case is referred to the Family and Minors Court for the partition to be approved by the judge.

Article 79 of Law No 23/2013 contains special provisions, in particular on mediation, which are applicable in the event of partition resulting from divorce, legal separation or annulment.

#### **9 What is the procedure and documents or information typically required for the purpose of registration of immovable property?**

The applicant for registration of immovable property must submit a registration application to the Property Registry Office, enclosing documents proving the facts set out in the Property Register. The documents normally required are as follows: public deed; property certificate; evidence of payment of stamp duty and municipal property tax; mortgage cancellation document, where applicable. If these documents are already registered with the Property Registry Office, only their references need to be indicated.

In addition, if the application is submitted by a representative of the applicant, their power of attorney must be included with the application. However, under Article 39 of the Property Register Code, lawyers, notaries and solicitors do not need to include a power of attorney in order to apply for registration.

Applicants who have a digital certificate (citizens with a Portuguese citizen's card, lawyers, notaries and solicitors duly registered with the respective professional associations) can submit an application to register immovable property and add the necessary documents via the internet. Applicants without a digital certificate can submit the application in person at the Property Registry Office or send it by post.

Information on the registration procedure and its costs is available at:

<https://justica.gov.pt/Servicos/Pedir-registo-predial>.

The current versions of the Civil Code and other legislation referred to above can be consulted, in Portuguese, via the following link:

[http://www.pgdlisboa.pt/leis/lei\\_main.php](http://www.pgdlisboa.pt/leis/lei_main.php).

Final Note:

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