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Private Wealth

Portugal

Law & Practice
and
Trends & Developments

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PORTUGAL

Law and Practice

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1. Tax

1.1 Tax Regimes

Personal Income Tax (PIT)

Tax-resident individuals are taxed on their worldwide income.

Employment and pension income is subject to progressive tax rates up to 53%.

Capital investment income and net worth increases (including capital gains) are usually subject to a 28% tax rate.

The Portuguese special tax regime to attract high and ultra-high net worth individuals (HNWIs) sets out a wide range of PIT exemptions or low tax rates. The Portuguese double-tax treaties network is particularly relevant to the optimisation of the Portuguese non-habitual tax resident (non-dom) regime. In general, the Portuguese non-dom regime grants the following benefits.

Portuguese-source income

- employment and professional income derived from high-value-added activities: 20% PIT flat rate; and
- other income: general PIT rules are applicable to each income category.

Foreign-source income

- employment income: exempt if effectively taxed in the source state; otherwise, if employment income derives from high-value-added activities that do not qualify for the applicable exemptions then it will benefit from the 20% PIT flat rate, other employment income is subject to the general progressive PIT rates;
- professional income: exempt if income is taxable (does not effectively need to be taxed) in the source state and results from high-value-added activities; otherwise, if professional income derives from high-value-added activities that do not qualify for the applicable exemptions then it will benefit from the 20% PIT flat rate, other professional income is subject to the general progressive PIT rates;
- pensions: since 1 April 2020, these have been subject to a 10% PIT flat rate. However, the previous (exemption) regime still applies to:
 - (a) holders of non-habitual tax resident status, granted before 1 April 2020;
 - (b) those whose application for non-habitual tax status had already been submitted on 1 April 2020;
 - (c) new Portuguese tax residents on 1 April 2020 who apply for non-habitual tax status by 31 March 2021; and
- financial (eg, dividends, interest, capital gains, income from funds), royalties and other income: exempt if income

is taxable (does not effectively need to be taxed) in the source state, other income is subject to the general PIT rates (usually 28%).

There is a special taxation rate on the disposal of shares for small enterprises – capital gains obtained from the disposal (including the redemption) of shares of small companies are subject to an effective tax rate of 14%.

Gift and Inheritance Taxation

Although donations and inheritances are generally subject to a 10% tax rate, significant exclusions or exemptions apply:

- in accordance with the territorial scope applicable, only events taking place in Portugal are subject to tax (such exclusion is particularly relevant for transnational succession tax planning purposes);
- donations and inheritances are, in any case, tax exempted between:
 - (a) spouses or members of unmarried couples living under de facto relationships;
 - (b) descendants; and
 - (c) ascendants.

Even when exclusions or exemptions apply, a step-up in the assets' value may occur.

Wealth and Real Estate Tax

Portugal has no wealth tax.

The transfer for consideration of real estate property located in Portugal is subject to Real Estate Property Transfer Tax (up to 6.5%) and Stamp Tax (0.8%). Real estate transferred through the sale of shareholdings in public limited companies (*sociedade anónima*) does not trigger these taxes.

The holding of real estate property is subject to Real Estate Municipal Property Tax, between 0.3% and 0.8%, levied annually on the tax value of the property.

An additional tax of up to 1.5% on the global real estate property value (with a tax value higher than EUR600,000) is levied in the case of individuals. For companies, the applicable tax rate is 0.4% (without the exclusion of this EUR600,000).

Corporate Income Tax

The general CIT rate applicable is set at 21% (municipal and state surcharges may apply). The following regimes should be mentioned in regard to family-owned companies (in a domestic and transnational perspective):

- inbound and outbound participation exemption regimes are applicable to dividends and capital gains, under certain conditions;
- tax neutrality regimes apply to restructuring operations;
- a special CIT regime is applicable to companies structured under the Madeira International Business Centre tax framework (5% CIT rate); and
- exemptions under special tax regimes are applicable to funds or corporations that carry out real estate and financial investments.

Trusts and Transparent Entities

With the exception of Madeira trusts, trusts are not foreseen under Portuguese civil law. Trusts are therefore usually considered in multi-jurisdiction family and tax planning situations.

The taxation of transparent entities raises technical difficulties (mismatches) and may, in some cases, generate disadvantageous tax treatment. Therefore, structures such as tax transparent entities are usually not recommended (although exceptions may apply).

Other Relevant Tax-Related Matters

Investment through family holding companies, unit-linked insurance policies, private investment funds or similar vehicles are usually considered.

Some general tax principles may be singled out:

- deferral mechanisms: structures implemented consider deferral mechanisms to avoid unnecessary realisation (investment funds, unit-linked insurance, holding companies);
- offset mechanisms: with the aim to maximise the offset mechanism, structures such as companies, funds or other collective investment undertakings may be considered;
- double-tax treaties network and Portuguese non-dom regime: the Portuguese non-dom may be substantially optimised with careful co-ordination with the applicable double-tax treaties network;
- tax havens avoidance: Portugal regards a wide range of jurisdictions as blacklisted, applying aggravated taxes to income obtained on or through said jurisdictions; therefore, re-domiciling or extinguishing structures with connections to tax havens are matters of significant interest, which is highly relevant for immigrant families whose previous investment structures were planned in accordance with different jurisdictions (particularly USA, UK non-doms and Latin America tax residents);
- compliance and exchange of financial information (particularly, CRS/FATCA) rules; and

- multi-jurisdictional approach: multi-layer protection of taxpayers considering international protection instruments (eg, EU law, double tax treaties, bilateral investment treaties).

1.2 Stability of the Estate and Transfer Tax Laws

In the last decade, Portuguese estate and transfer tax laws has been relatively stable. The gift and inheritance taxation framework, as well as special tax regimes such as the Portuguese non-dom, have put Portugal on the map as a serious jurisdiction for high and ultra-high net worth individuals.

1.3 Transparency and Increased Global Reporting

For almost two decades, Portugal has enacted a general anti-avoidance rule and specific anti-avoidance tax rules (eg, CFC rules, transfer pricing or restructuring rules).

In 2019, relevant legislative measures were taken to transpose the so-called “BEPS Directive”.

Portuguese legislation aligned the concept of “abuse” with the EU concept of “valid commercial reasons” as established in the BEPS Directive (resulting from CJEU case law).

CFC rules have also been adapted and are applied when controlled foreign companies settled outside the EU or the EEA are subject to an effective tax lower than 50% of the tax value that would be owed under Portuguese law, or if they are located in a tax haven.

Since 2017, Portugal has been integrated into the CRS/FATCA worldwide reporting system. In addition, the Portuguese legislator has extended the reporting regime to bank accounts above EUR50,000 held by Portuguese tax residents.

2. Succession

2.1 Cultural Considerations in Succession Planning

Although each family has its own characteristics, some trends are still recognisable in the Portuguese market:

- resistance to succession: in a significant number of family-owned businesses, the founder is still a member of the board and demands to take part in the current decision-making process; some resistance to innovation or alternative financing sources may, consequently, be identified;
- first real generation crisis: a significant number of family-owned businesses in Portugal were founded in the 1980s; thus, families are now facing the challenge of turning over the firm to the third generation;

- lack of succession planning: although there has been a shift in recent years, a significant number of families still do not invest in preparation for the succession process;
- informality: most families do not constitute family councils or family business agreements to discuss the management of the family businesses or assets; although this is beginning to change, there is still a certain degree of informality that threatens the stability and rationality of decision-making processes.

2.2 International Planning

The transnational dimension of succession planning implies additional concerns regarding the applicable laws, the coherence of the succession process and the tax implications in the different jurisdictions.

International succession planning is simultaneously a challenge and an opportunity to choose the applicable law in accordance with the best interests of the testator. Determining the applicable law (when possible) is therefore part of the succession planning process.

As different jurisdictions may be involved, avoiding clashes is of the utmost importance, particularly in ensuring the smooth transition of the assets. If possible, submitting the regulation of the succession to the same jurisdiction is preferable. That goal may justify the modification of the assets detention structure or its location. Other areas of law should also be considered in this context, particularly family law and company law.

Regarding tax concerns, see **1. Tax**.

2.3 Forced Heirship Laws

Descendants and spouses (notwithstanding the marital property regime) and – in the absence of descendants – ascendants, are forced heirs. The percentage of the value of the assets they are entitled to varies between one third and two thirds. Nevertheless, since August 2018, it has been possible for grooms to enter into a prenuptial agreement waiving their right to inherit. The effectiveness of this agreement depends on the choice of separation of property between spouses regime. In any case, this agreement will not restrict the surviving spouse's right to use the family residence for at least five years.

2.4 Marital Property

The Portuguese civil code establishes three regimes to regulate marital property:

- general community of estate: all combined property is considered joint;

- estate subsequent to marriage: only property earned during the marriage is considered joint property (framework applicable by default); and
- separation of property between spouses.

If the separation-of-property regime does not apply, consent of the other spouse is particularly relevant in the transfer of immovable property.

2.5 Transfer of Property

From a tax perspective, the transfer of property may imply a step-up of the asset value.

2.6 Transfer of Assets: Vehicle and Planning Mechanisms

See **1.1 Tax Regimes**, particularly in terms of exclusions and exemptions on Stamp Tax, applicable to donations and succession.

2.7 Transfer of Assets: Digital Assets

No special rules apply to the transfer of digital assets. There is no relevant case law concerning digital assets.

3. Trusts, Foundations and Similar Entities

3.1 Types of Trusts, Foundations or Similar Entities

In general, domestic trusts and foundations are not used in Portugal for planning purposes. However, under international structures, such entities are used in certain cases.

3.2 Recognition of Trusts

See **1.1 Tax Regimes**.

3.3 Tax Considerations: Fiduciary or Beneficiary Designation

Payments made by fiduciary entities to beneficiaries who are tax resident in Portugal are taxed at a 28% rate (or 35% if paid by an entity located in a tax haven). Payments occurring as a result of the termination of fiduciary entities may be taxed at a rate of 28% if payments are made to the settlor. Otherwise, if the beneficiary is not the settlor, payments should be tax excluded.

CFC rules may apply if the fiduciary entity is located in a tax haven.

3.4 Exercising Control over Irrevocable Planning Vehicles

See **3.1 Types of Trusts, Foundations or Similar Entities**.

4. Family Business Planning

4.1 Asset Protection

Asset protection planning in Portugal usually considers:

- implementing family business structures with transnational elements in order to benefit from multi-layer protections (eg, national law, EU law, bilateral investment treaties, etc);
- unit-linked insurance policies, especially in jurisdictions such as Luxembourg and Ireland; and
- choosing the separation-of-property marital framework to avoid communication of debts.

4.2 Succession Planning

Generally, business succession planning comprises the following elements:

- incorporation of family holding companies in accordance with the different branches of the family;
- elaboration of wills of the different family members;
- elaboration of a family business agreement;
- setting up of a family council and family assembly;
- corporate law instruments:
 - (a) establishing rules to nominate the family members who may integrate the family business and the applicable requirements (age, academic scores, etc);
 - (b) establishing rules to determine the company's value;
 - (c) establishing (automatic) redemption mechanisms in case some heirs become shareholders of the company;
 - (d) shareholder agreements establishing limitations to the free transfer of assets, establishing pre-emption rights;
 - (e) establishing drag-along and tag-along clauses; and
 - (f) establishing penalty clauses;
- adjustments to the memorandum of association considering the need for aggravated majorities for certain strategic options; remuneration principles; restricting the areas of free decision of the board members;
- use of life insurance (unit-linked) policies and other similar instruments; and
- designation of heirs by third parties (within the admissible legal limits) in order to cover different wills or circumstances (dynamic clauses).

Optimal tax results derive from the tax exclusion or exemption regimes mentioned in **1.1 Tax Regimes**.

4.3 Transfer of Partial Interest

When a partial interest in an entity is transferred, during lifetime or at death, the fair market value of the interest for transfer tax purposes is not adjusted to reflect a discount for lack of marketability and control.

5. Wealth Disputes

5.1 Trends Driving Disputes

Disputes regarding estates usually result from lack of succession planning.

Division procedures are time consuming and it may be several years until a final decision is taken. However, the parties do typically tend to conclude agreements.

Regarding payments by life insurance policies, the Portuguese Supreme Court has confirmed that such payments are not subject to succession laws (although an insurance premium should be considered a donation for succession purposes).

The use of arbitration for wealth disputes is increasing.

5.2 Mechanism for Compensation

The calculation of damages follows general Portuguese civil law rules, essentially oriented to repair the damages suffered by the parties.

No aggravated damages or punitive damages rules apply.

Penalty clauses included in succession planning instruments are very important.

6. Roles and Responsibilities of Fiduciaries

6.1 Prevalence of Corporate Fiduciaries

The use of corporate fiduciaries is not prevalent in Portugal.

6.2 Fiduciary Liabilities

This is not applicable in Portugal.

6.3 Fiduciary Regulation

This is not applicable in Portugal.

6.4 Fiduciary Investment

This is not applicable in Portugal.

7. Citizenship

7.1 Requirements for Domicile, Residency and Citizenship

Residency Permit

Any EU national may obtain a residence permit in Portugal if:

- he or she has a professional activity as a worker or is self-employed in Portugal; or
- he or she has sufficient funds and is covered by health insurance when the same applies to Portuguese citizens in his or her country of origin.

Regarding third-country nationals, a residence permit is granted for:

- exercise of professional independent activities;
- exercise of professional activities under employment contract;
- investment activity;
- exercise of highly qualified activity or teaching activity;
- students in secondary or higher education;
- interns or trainees;
- volunteers;
- researchers; and
- family reunification.

In 2009, Portugal enacted a special permit (expeditious and simplified) for investment activities (the so-called “Golden Visa”). Under the said regime, the qualifying investment activities (carried out directly or through a single-member company incorporated in Portugal or in any other EU member state, as long as it has a permanent establishment in Portugal) entitle the applicant to a temporary residence permit. Furthermore, the investor’s family members may also benefit from a family reunification permit.

The Golden Visa grants the investor the right to remain in Portuguese territory and the right to free movement in the Schengen area. Moreover, after five years the beneficiaries of the Golden Visa may apply for a permanent visa or for Portuguese (and European) citizenship.

Portuguese Domicile Nationality

As a rule, if an adult:

- legally resides in Portugal for at least five years;
- demonstrates minimum Portuguese language knowledge;
- has not been convicted of a crime punishable under Portuguese law by three or more years’ imprisonment; and
- does not constitute a threat to national security because of his or her involvement in terrorist activities;

then said person may be granted Portuguese nationality.

It should be mentioned that despite the impact of COVID-19, the Portuguese public services – namely the immigration and border services – have not interrupted their assistance. New

remote practices have been approved to speed up the relevant procedures.

7.2 Expeditious Citizenship

There are expeditious means to obtain Portuguese citizenship through the Jewish law of return for Sephardic Jews.

Under this mechanism, descendants of Portuguese Sephardic Jews may acquire Portuguese citizenship if they can demonstrate that they belong to a Sephardic community of Portuguese origin. Requirements include:

- demonstration of belonging to a Sephardic family of Portuguese origin and traditional roots;
- a Portuguese Sephardic name;
- familiarity with the Portuguese language; and
- direct or collateral descent.

These requirements must be proved through a certificate issued by a Portuguese Jewish community. In this case, it is not legally required that the individuals should have legally resided in Portuguese territory for at least five years or have adequate knowledge of the Portuguese language.

8. Planning for Minors, Adults with Disabilities and Elders

8.1 Special Planning Mechanisms

The laws protecting vulnerable adults in Portugal were profoundly revised in 2018.

The new regime is characterised by the need to respect the individual’s autonomy as much as possible and, therefore, the protective measures applied by the court should be specifically designed for each individual in accordance with the individual’s wishes and disabilities.

The powers of the guardian will be specifically established by the court and limited to what is strictly necessary to guarantee the vulnerable adult’s safety and, as far as possible, their autonomy. Some management decisions, such as the sale of property, depend on court approval and the guardian must show accountability when requested by the court and on the termination of their guardianship. The protective measures applied must be periodically revised.

In addition, the law provides an incapacity mandate which allows the individual to anticipate the selection of the person or persons in charge of their assistance in personal and financial matters.

Finally, general instruments must be adapted to meet any particular needs of the person with disabilities (eg, power of attorney, insurance instruments, other succession-planning instruments such as appointing a trustee or *fideicomisario*, or other person responsible for the administration of the vulnerable adult).

8.2 Appointment of Guardian

The guardian must always be appointed by the court. In any case, the court must consider (where possible) the wishes of the minor or vulnerable adult.

8.3 Elder Law

From a financial point of view, different alternatives are considered and sometimes combined:

- pension funds;
- insurance policies; or
- constitution of surface rights or usufruct.

In addition, Portuguese law recognises advanced healthcare directives or mandates, in order to ensure that the correct medical actions are taken in case of illness or incapacity.

9. Planning for Non-traditional Families

9.1 Children

Children born out of wedlock and adopted children may not be discriminated against for succession purposes. They are forced heirs.

Artificial insemination is permitted to infertile married (or under domestic partnership) different-sex couples and to any woman or female couple, regardless of their fertility.

Portugal recognises surrogacy arrangements only if a woman's medical condition precludes her from getting pregnant naturally. The process must be authorised and supervised by the National Medically Assisted Procreation Council and must be free of any charge for the intended parents (except for medical expenses).

9.2 Same-Sex Marriage

Portugal recognises same-sex marriage.

10. Charitable Planning

10.1 Charitable Giving

Foundations are the most commonly used structures for charitable planning. Foundations that qualify as “public utility foundations” may benefit from a wide range of tax benefits. In particular, public utility foundations may be CIT-exempt and donations made to said foundations may be considered a deductible cost-plus for CIT purposes or as a tax allowance for PIT purposes. Furthermore, donations to said foundations may also be exempt.

10.2 Common Charitable Structures

See 10.1 Charitable Giving.

PORTUGAL LAW AND PRACTICE

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Durham Agrellos was founded in 2017 out of the aspiration to create a differentiated legal advice service in Portugal. The firm specialises in tax law and private clients, and its partners have the experience required to provide solid, innovative and creative legal solutions to particularly sensitive and complex matters. Durham Agrellos has adopted an institutional model of low leverage and high specialisation to ensure rigorous and personalised monitoring, guaranteeing that all hours dedicated

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DURHAM AGRELLOS
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Trends and Developments

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Portugal as a Preferential Jurisdiction for Global Families

Portugal has an exceptional set of attributes that, together with major legislative and business environment changes over the last decade, have made the country a safe haven for global families.

What Portugal offers

Portugal is one of the safest countries in the world. According to the most recent editions of the Global Peace Index, Portugal has consistently been ranked in the top three most peaceful countries in the world and is No 1 in the European Union. Moreover, the country has high-quality infrastructure and health services; excellent national and international schools, and top-ranked universities; a privileged location and diversified geography; and a highly innovative and competitive services industry.

The country is politically stable, investment-friendly and is a reputed EU jurisdiction that meets the best practices concerning compliance and transparency.

Moves to attract HNWIs

More than a decade ago, Portugal approved legislation specifically designed to attract HNWIs. To be highlighted are (i) the creation of the “Golden Visa” programme under which, through certain investments, investors are granted a legal permit allowing them to reside in Portugal and access the Schengen area, with the possibility of applying for Portuguese/EU citizenship after five years (the Portuguese passport is among the top five most valuable passports in the world as it provides entrance into 190 countries without any visa requirements); (ii) the Portuguese Non-Habitual Tax Regime (also known as the Portuguese “non-dom” regime), which establishes significant exemptions and tax reductions on income obtained abroad and in Portugal; (iii) the non-existence of wealth tax and, in the majority of situations, of gift and inheritance tax. In view of all these factors, Portugal has emerged as a preferential jurisdiction for global HNW families.

The move of global HNW families to Portugal has taken the private clients market by storm. Private banking and family offices have significantly increased their activity in Portugal. Some of the world’s most prestigious private banking institutions (in particular, Swiss, Brazilian, Spanish and Chinese banks) have established themselves in Portugal. In this regard, financial products structured to benefit from certain programmes such as the Golden Visa (eg, private equity funds or venture capital

funds directed by Portuguese companies), which also benefit from favourable tax regimes, are of growing importance.

Private client investment

A wide range of investments in Portugal are increasingly considered by private clients. The real estate market is still very significant and includes housing, office blocks and the health and tourism sector (tourism awards consistently granted to Portugal in the last decade have transformed the country into a leading international destination), particularly in the vibrant cosmopolitan cities of Lisbon and Porto or on the west and south coasts. The textile, footwear, cork, IT (the transfer some years ago of the Web Summit to Portugal confirms the international importance of the Portuguese IT sector) and chemical sectors are very important too. Reference should also be made to the vineyard and wine sector where transactions involving highly considered *quintas* and *herdades* are occurring more and more frequently. It is worth noting in this regard that the Douro Valley is currently considered one of the top wine regions in the world. Furthermore, Portuguese golf and leisure activities are top ranked in Europe. Also worthy of mention is the special tax regime of the International Business Centre of Madeira, particularly designed for trading activities.

Legal services required by private clients

As a result of the described environment, the demand for legal services to private clients has increased significantly, in particular in the areas of family immigration and access to Portuguese/European Union citizenship, international asset restructuring for families relocating to Portugal/the EU, legal advisory services concerning families’ investments in Portugal or abroad, and family governance.

It should be mentioned that substance and compliance are of supreme importance in international asset restructuring. In fact, special attention must be drawn to the post-BEPS legal framework, soft-law initiatives, and ancillary controlling instruments such as the developments in the EU Directive on Administrative Cooperation (DAC), as amended. In structuring family holding structures in accordance with the EU and domestic tax law framework, preference is generally given to EU jurisdictions due to the legal shield provided by EU legal instruments. However, other jurisdictions, such as the US, may prove to be a good alternative. The immigration of families whose assets structure has an Anglo-Saxon bias has created considerable opportunities concerning the adaptation

PORTUGAL TRENDS AND DEVELOPMENTS

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and optimisation of trust structures in the Portuguese legal and tax context.

Transnational legal advice

In view of the above, adequate planning for families relocating to Portugal is vital to avoid triggering any legal or tax difficulties both in Portugal and other related jurisdictions (ie, jurisdictions where members of the family reside or relevant assets are located). As such, families and their advisers find they increasingly require comprehensive transnational legal advice and co-ordination between the jurisdictions involved. Notwithstanding the growing demands for transparency, confidentiality needs to be preserved. In this regard and given that Portugal does not have a Wealth Tax, it should be mentioned that no assets declaration is required.

Family governance

Family governance has experienced significant growth in Portugal. Strategies implemented in the jurisdiction from which an individual or a family is relocating should be adapted to the Portuguese and EU legal framework. In this context, three main pillars are to be considered:

- regulation of the family property;
- succession planning; and
- regulation of the family members' participation and decision-making in the operational businesses.

In this regard, Portuguese law recognises the original marital property regime applied to spouses. Regarding non-marital relationships, the applicable framework protects, in general, the wealthier member of the couple. In this context, planning for non-traditional families plays an increasingly important role. In fact, Portugal was one of the first European countries to recognise same-sex marriage. In addition, Portugal recognises singular adoptions and authorises recourse to artificial insemination by single women.

Transnational succession planning

A recognised trend for global families is transnational succession planning. Foreign citizens residing in Portugal may designate the law of nationality to regulate their succession (as opposed to Portuguese law). This may be particularly relevant to prevent the applicability of forced heirs' legal framework (despite the possibility under Portuguese law of spouses excluding themselves as heirs). In a transnational context, the unity-of-succession procedure is critical to avoid uncertainty and ensure fast procedures. It is therefore generally advisable to have assets located in multiple jurisdictions (including digital assets) structured through a single jurisdiction. In addition, the increasing use of alternative succession instruments, such as unit-linked insurances and certain fiduciary structures (eg, trusts), is a well-known market trend.

Progressively, succession planning is including transition programmes with particular impact on the decision-making process within the family, particularly at the operational business level. Recent developments in Portuguese law ensure an innovative and competitive framework regarding incapacities, which allow adequate anticipation of instructions to apply in case of incapacity and prior designation of trustees (despite this, however, accurately designed proxies are still used). From a healthcare standpoint, the establishment of advance healthcare directives is also a trend.

Preserving family unity and the continuity of the estate requires careful design of a specific institutional background based on family agreements (family protocols) which, at least, include business agreements and entering and exiting rights; the right to vote and the applicable majorities; rights and obligations concerning the disclosure of information; marital property regimes to be adopted by family members (with preference to total separation regimes, including for succession purposes); or allowed and forbidden competition within family businesses.

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