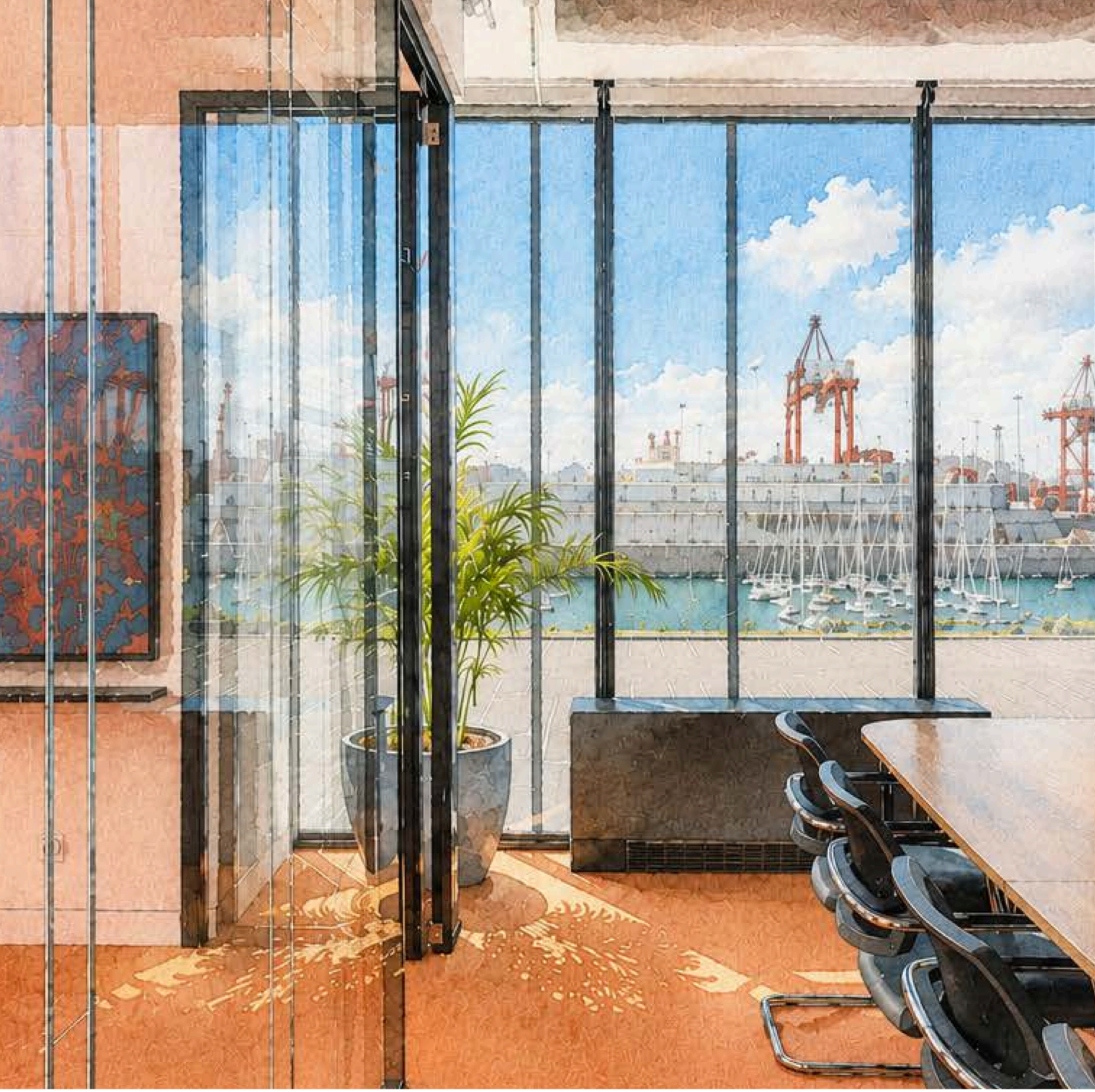


Family protocol

A 3-Part Guide

PART 1	What is a family protocol and why does it matter?
PART 2	What does a family protocol cover and what is binding?
PART 3	How and when should you put a family protocol in place?

PART 1

What is a family protocol and why does it matter?

A family protocol is a written agreement between the members of a business family that sets out the rules governing the relationship between the family, the ownership and the management of the company. It is not specifically regulated under Portuguese law, but it has become one of the main governance tools for family businesses and for succession planning. Its purpose is above all preventive: to decide in good time, and by consensus, matters that would otherwise become a source of conflict later on.

In Portugal, it is estimated that only 50% of family businesses make it to the second generation and only 20% to the third (AEP, 2011). Picture a founder with three children: only one works in the company, the other two will inherit shareholdings, and there is not a single written rule on who is in charge, who receives what and who may sell to whom.

What exactly is a family protocol?

It is an agreement entered into by the members of the family (shareholders or future shareholders and, in some cases, family members who hold no stake in the company) that governs the relationship between the family and the business: decision-making bodies, access to positions, dividend policy, transfer of shareholdings and dispute resolution. It is described as the set of agreements governing family ties in relation to a business or company, and in practice it is often referred to as the business family's "constitution".

It is a legal transaction based on the principle of freedom of contract (Article 405 of the Portuguese Civil Code), whose effectiveness depends largely on how it is aligned with legally defined instruments: the articles of association, shareholders' agreements and succession instruments, notably wills.

Why is it so relevant in Portugal?

According to figures published by the Associação das Empresas Familiares (Portuguese Family Business Association), an estimated 70% to 80% of Portuguese companies are family-owned, accounting for around half of GDP and 60% of employment. Most are SMEs with informal governance structures that rely heavily on the founder. Generational transition is the critical moment: the company moves from a single decision-maker to several "siblings" and then to a "confederation of cousins", whose interests become increasingly diverse.

What problems does it solve in practice?

The protocol anticipates the issues that most often divide families: who may work in the company and on what terms; how family members who manage the business are paid compared with those who do not; what dividends are distributed; who succeeds the founder and when; and what happens if a family branch wishes to exit.

In practice, protocols are often built on identifying the family branches (typically one for each of the founder's children) and on defining who belongs to the "blood family", concepts that form the basis for the rules on access to ownership, representation in the companies and management succession. By answering these questions in good time, the protocol separates family discussions from business decisions.

When should you start thinking about one?

Ideally, before any conflict arises and before succession becomes imminent. The most common trigger is the second generation joining the company or the shareholder structure, but a protocol is also useful when spouses and descendants have different expectations, when bringing in outside managers or investors is being considered, or when the founder begins planning their exit.

Checklist | Signs that your company needs a family protocol

- ☐ The founder makes all the decisions and no successor has been identified.
- ☐ Some family shareholders work in the company and others do not.
- ☐ There are no written rules on family members joining the company, positions or remuneration.
- ☐ Dividend policy is decided case by case, with no known criteria.
- ☐ The articles of association are the standard incorporation template and have never been reviewed.
- ☐ There is no provision for what happens to shareholdings on death, divorce or the exit of a shareholder.
- ☐ Tensions over the company have already arisen between siblings, cousins or spouses.
- ☐ The family branches, and who belongs to the "blood family" for the purposes of access to ownership and management, have not been defined.
- ☐ The rules on signing authority, powers of attorney and succession in management positions have not been defined.
- ☐ An investor or an outside professional manager may be joining the company.

PART 2

What does a family protocol cover and what is binding?

A family protocol may cover values, family governance, access to the company, dividends, transfer of shareholdings and succession. In Portugal, it is essentially contractual in nature: it binds those who sign it, but it cannot be enforced against third parties or against the company. The key rules must therefore be "translated" into the articles of association, shareholders' agreements and succession instruments.

> The protocol was signed with enthusiasm five years ago. Today, one of the children wants to sell their shareholding to a third party and argues that the protocol "is just a family agreement". The question is simple: what can the family actually enforce?

What should a family protocol contain?

There is no legal minimum content, but the most robust protocols generally cover:

- Values: the family's mission, values and vision for the company.
- Family governance: family assembly or council, its composition (including or excluding family members without shareholdings), powers, frequency of meetings and programmes to prepare the next generation.

- Corporate governance: composition of the management or board of directors, requirements for holding office, minimum number of meetings, delegation of powers, granting of powers of attorney (possibly excluding banking transactions), how the company is bound in major and day-to-day transactions (for example, requiring the signatures of managers from different family branches) and succession in office in the event of death or incapacity.

- Shareholder resolutions: frequency of general meetings, rules on representation, reserved matters (amendments to the articles of association, structural transactions, borrowing or litigation above certain thresholds, dividends, appointment and remuneration of board members) and the right to information of shareholders who do not manage the company.

- Family members joining the company: education and experience requirements, prior external experience, market-rate remuneration and the position of spouses.

- Ownership: dividend policy, restrictions on transfers inter vivos and on death (notably keeping shareholdings within the blood family and excluding spouses), company consent, pre-emption rights, exit mechanisms and valuation criteria.

- Succession: leadership succession plan and the shareholders' undertaking to make wills consistent with the protocol (for example, bequeathing shareholdings out of the disposable portion, a clause excluding them from community property and the destination of shareholdings in the absence of descendants), including the obligation for minors to do so upon reaching the age of majority.

- Breach, disputes and term: prior family mediation, arbitration or the courts, consequences of breach (compensation, suspension of rights, penalty clause and a possible grace period), confidentiality, entry into force, duration and rules for amendment or termination.

What legal force does it have in Portugal?

In the absence of a specific legal framework, the protocol is likened to the shareholders' agreements provided for in Article 17 of the Portuguese Companies Code (CSC), insofar as it is entered into between shareholders (and non-shareholders) and concerns their conduct as shareholders and the continuity of the company. Two important consequences follow: shareholders' agreements only take effect between the parties, and they cannot be used as grounds to challenge acts of the company or acts of the shareholders towards the company (paragraph 1); and clauses relating to the conduct of the parties in the exercise of management or supervisory functions are null and void (paragraph 2).

Insofar as it cannot be treated as a shareholders' agreement (for example, undertakings given by family members who are not shareholders, or statements of values), the protocol is an atypical contract with purely contractual effect, or even a commitment with merely moral force. A breach generally gives rise to contractual liability, which may be reinforced by penalty clauses, but does not in itself allow a sale of shares to a third party or a shareholder resolution to be set aside.

This has practical consequences for drafting. For example, a rule that a shareholder may only be represented at the general meeting by a direct blood descendant may be included in the articles of association, provided it does not exclude the forms of representation required by law for certain types of company, and should also be set out in the protocol. Conversely, rules on how the company is bound, such as requiring the signatures of managers from different family branches, must be included in the articles of association to be enforceable against third parties.

What limits does Portuguese law impose?

The most significant is the prohibition of succession agreements: under Articles 946(1) and 2028(2) of the Civil Code, contracts by which a person waives their right to succeed a living person, or disposes of their own estate or of a third party's estate not yet opened, are as a rule null and void. The protocol therefore cannot determine who inherits the shareholdings; it can only set out guidelines and the shareholders' undertaking to plan their succession (wills, lifetime gifts, lifetime division of the estate), while respecting the reserved portion of the forced heirs.

Since Law No. 48/2018 of 14 August, spouses may mutually waive their status as forced heirs in a prenuptial agreement where the matrimonial property regime is separation of property (Articles 1700(1)(c) and 1707-A of the Civil Code), which may be relevant for some families.

How are the protocol's rules given full legal effect?

The articles of association may provide for company consent to transfers of shareholdings, rules on the transfer of shareholdings on death, redemption clauses in the event of divorce, insolvency or unauthorised transfer, special rights and qualified majorities. These clauses are registered and enforceable against third parties. The shareholders' agreement sets out voting undertakings, pre-emption rights and exit mechanisms between shareholders. Wills and gifts deal with each individual's succession planning.

PART 3

How and when should you put a family protocol in place?

The best time to act is before succession and before any conflict, typically when the second generation joins the company. The process unfolds in stages: assessment, family dialogue, drafting, legal implementation and roll-out. The participatory process leading to the final document matters as much as the document itself.

The founder is 68, the eldest daughter runs the sales department and the youngest son lives abroad. Everyone agrees that “some day” the rules will need to be put in writing. Experience shows that this day rarely comes on its own: it is usually forced by an illness, a divorce or a takeover offer.

When is the right time to act?

The clearest signs are members of the next generation joining the company or its capital, planning for the founder’s exit, significant family changes (marriages, divorces, deaths) and corporate transactions such as the entry of investors or a group reorganisation. Acting at a calm moment allows negotiations to take place without time pressure and without entrenched positions.

Who should take part in the process?

All family members with an interest in the company, including shareholders who do not work in it and, depending on the family’s culture, spouses and the next generation. An external facilitator (consultant or lawyer) helps to run the meetings and the family council neutrally. On the legal side, a team combining corporate, succession and tax law is essential.

What are the stages of the process?

1. Assessment	Review of the shareholder structure, articles of association, existing agreements, wills and financial position; individual questionnaire for each member (family branches, objectives, management rules, succession), document collection and individual interviews.
2. Family dialogue	Family council meetings to discuss values, expectations and rules.
3. Drafting	Drafting of the protocol and discussion of drafts with all parties.
4. Legal implementation	Amendment of the articles of association, shareholders' agreement, wills and gifts; tax analysis of the transfer.
5. Roll-out and review	Operation of the family bodies, communication to the next generation and periodic review.

What tax issues should be considered?

The transfer of shareholdings between generations has tax implications that should be analysed alongside the process, not afterwards. Among other things, consideration should be given to the Stamp Duty regime for gratuitous transfers, including the exemption for spouses or de facto partners, descendants and ascendants, the taxation of capital gains for Personal Income Tax (IRS) purposes in the event of a sale and the tax impact of any prior corporate reorganisation, including the possible application of the tax neutrality regime. Given how often the legislation changes, the applicable regime should be confirmed at the time of each transaction.

How can compliance with the protocol be ensured?

By combining three layers: incorporating the key rules into the articles of association (effective against everyone), penalty clauses and dispute resolution mechanisms in the protocol itself (effective between the parties) and family bodies that genuinely function, with regular meetings and a review of the document every three to five years or whenever a significant event occurs.

Protocols commonly provide for a prior attempt at family mediation, a grace period (for example, 10 business days) for the defaulting member to remedy the situation, suspension of their rights until it is remedied and a penalty payable within a short period, together with a confidentiality obligation, the breach of which likewise constitutes non-compliance.

IN SUMMARY

Key points

Part 1 | What it is and why it matters

- A family protocol is a written agreement that organises the relationship between family, ownership and management.
- It is not specifically regulated under Portuguese law: it is based on freedom of contract and works alongside the articles of association and shareholders' agreements.
- Its main purpose is preventive, and the ideal time to put one in place is before the generational transition.
- In a country where most companies are family-owned and only half make it to the second generation, it is a tool for continuity.

Part 2 | What it covers and what is binding

- The content is flexible, but it should cover family governance, access, ownership, succession and disputes.
- In Portugal, the protocol has contractual effect only and cannot be enforced against third parties or the company.
- The prohibition of succession agreements is the main limit.
- Critical rules must be incorporated into the articles of association, the shareholders' agreement and succession planning.

Part 3 | How and when to act

- Act before any conflict and before succession, ideally when the second generation joins the company.
- The process should be participatory and, ideally, led by a neutral third party.
- The five stages run from assessment to roll-out and periodic review.
- Legal implementation and tax planning are part of the process, not a later step.

FAQ

Frequently asked questions

Is a family protocol mandatory?

No. It is a voluntary instrument; Portuguese law neither requires nor specifically regulates it.

Is it only for large groups?

No. It is particularly useful for family-owned SMEs, where informal rules tend to prevail.

Who should sign it?

As a rule, all family shareholders and, depending on its content, future shareholders and other family members it covers. It is common to require the signatures of all adult members of each family branch.

Can the protocol alone prevent a family member from selling shares to a third party?

Not with effect against third parties. This requires a clause in the articles of association.

Can the protocol determine who inherits the company?

No. Succession agreements are generally prohibited; succession must be planned through wills or gifts, while respecting the reserved portion.

Does the protocol have to be made public?

No. It is generally confidential; only the rules incorporated into the articles of association are subject to registration.

How long does it take?

It depends on the size and complexity of the family. A typical process takes around six months on average, mainly because of the family dialogue stage.

What if a family member refuses to sign?

The protocol only binds those who sign it; the absence of a key shareholder reduces its effectiveness and should be addressed during the family dialogue.

How often should it be reviewed?

A periodic review every three to five years is recommended, as well as whenever there are significant family or corporate changes.

Thinking about the future of your family business?

CCA Law Firm's team supports business families at every stage, from the initial assessment to corporate, succession and tax implementation. Get in touch to arrange an initial meeting: