

## Taking evidence by videoconferencing - Portugal

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#### **1 Is it possible for evidence to be taken by videoconference either with the participation of a court in the requesting Member State or directly by a court of that Member State? If yes, what are the relevant national procedures or laws that apply?**

Under Portuguese law, the judge of the requesting court must take the evidence of persons heard by videoconference directly, without the intervention of the judge from the requested court. This is the rule for internal cases in which there is examination by videoconference. The same procedure applies in cross-border cases where the court of the requesting Member State asks for the examination to take place by videoconference under Article 17 of Regulation (EC) No 1206/2001 of 28 May 2001.

Alternatively, in cross-border cases, the court of the requesting Member State may ask for the examination to take place by videoconference under Articles 10 to 12 of Regulation (EC) No 1206/2001 of 28 May 2001.

The main national procedural rules governing the collection of evidence by videoconference from experts, witnesses and parties are as follows:

#### Experts

*Article 486 of the Code of Civil Procedure (Código de Processo Civil)*

*Appearance of **experts** at the final hearing*

1 - When requested by one of the parties or ordered by the judge, experts shall appear at the final hearing in order to provide, on oath, any clarifications requested of them.

2 - Experts from establishments, laboratories or official services shall be heard by teleconference at their workplace.

### Witnesses

Article 502 of the Code of Civil Procedure

#### *Examination by teleconference*

1 - **Witnesses** residing outside the district or, in the case of the Autonomous Regions, outside the island concerned shall be presented by the parties in accordance with Article 507(2), where they have made a declaration to this effect on offering to be witnesses, or shall be heard by teleconference during a specific hearing and from the district court in the area in which they reside.

2 - The court hearing the case shall set the date of the hearing after consulting the court where the witness is to give evidence and shall summon the witness to appear.

3 - On the date of the examination, witnesses shall identify themselves to the official of the court where the evidence is given, but from that point onwards the examination shall be conducted by the court hearing the case and by the counsel for both parties, via teleconference, without the need for intervention by the judge of the court where the evidence is given.

4 - Witnesses residing overseas shall be examined by teleconference whenever the necessary technical means are available at the place where they reside.

5 - In cases being heard in courts in the metropolitan areas of Lisbon and Porto, there shall be no examination by teleconference if the witness is a resident of the respective district, with the exception of cases provided for in Article 520.

Article 520 of the Code of Civil Procedure

#### *Direct communication between the court and the person giving evidence*

1 - Where it is impossible or extremely difficult for the person who must give evidence to appear in court in good time, the judge may determine, with the agreement of the parties, that any clarification needed in order to make a proper decision on the case be given by telephone or other means of direct communication between the court and the witness, as long as the nature of the facts to be investigated or clarified are compatible with the procedure.

2 - The court must ensure, through the means available to it, that the evidence is given truthfully and freely, in particular by determining that the witness is accompanied by a court official during the giving of evidence and that the content of the evidence and the circumstances in which it was given are placed on record.

3 - The provisions of Article 513 [oath and preliminary questioning by the judge] and the first part of paragraph 4 of the previous article [the judge may order evidence to be given again before him in person] shall apply to cases falling under this article.

### Parties

Article 456 of the Code of Civil Procedure

#### *Time and place of giving evidence*

1 - Evidence must, as a rule, be given in the final hearing, unless it is urgent or the witness is unable to appear in court.

2 - The rules for the giving of evidence by teleconference laid down in Article 502 shall apply to **parties** residing outside the district or, in the case of the Autonomous Regions, outside the island concerned.

3 - Evidence may also be given at the preliminary hearing, in which case the provisions of the previous paragraph shall apply with the necessary adjustments.

**2 Are there any restrictions on the type of person who can be examined by videoconference – for example, is it only witnesses or can others such as experts or parties also be examined in this way?**

No specific restrictions are laid down. Portuguese law allows witnesses, parties and experts to be heard by videoconference, as provided for by the legal rules cited above.

**3 What restrictions, if any, are there on the type of evidence that can be obtained by videoconference?**

See the reply given to the previous question.

#### **4 Are there any restrictions on where the person should be examined by videoconference – i.e. does it have to be in a court?**

The general rule is that the person must be heard by videoconference in court. However, experts from official services may be heard by videoconference at their workplace. Exceptionally, in the circumstances provided for in Article 520 of the Code of Civil Procedure (cited in the reply to question 1), the court may hear a person by videoconference who is in a place other than the court.

#### **5 Is it permitted to record videoconference hearings and, if so, is the facility available?**

Yes, hearings by videoconference are always recorded by the court's audio recording system, in accordance with the provisions of Article 155 of the Portuguese Code of Civil Procedure

#### **6 In what language should the hearing be conducted: (a) where requests are made under Articles 10 to 12; and (b) where there is direct taking of evidence under Article 17?**

When Portugal is the requested Member State, the language of the hearing will vary, depending on the circumstances:

(a) When requests are made pursuant to Articles 10 to 12 of Regulation (EC) No 1206/2001 of 28 May 2001, the Portuguese language is used. If foreign nationals need to be heard, they may speak in a different language if they do not speak Portuguese. In this instance the requesting court must inform the requested court of the fact, so that the latter can call an interpreter to be present at the requested court.

(b) When requests are made pursuant to Article 17 of Regulation (EC) No 1206/2001 of 28 May 2001, the language used is that provided for in the national legislation of the Member State to which the requesting court belongs. If persons who do not speak that language need to be heard, the requesting court may, in accordance with its national legislation, call an interpreter to be present at the requesting court. Alternatively, the requesting court may ask the (requested) Portuguese court to call an interpreter to be present at the requested court.

In any of the cases mentioned at (a) and (b) in which there is a need to call an interpreter to be present at the court of the requested Member State, the requested court will ask the court of the requesting Member State to pay the fee due to the interpreter, as provided for in Article 18(2) of Regulation (EC) No 1206/2001 of 28 May 2001.

#### **7 If interpreters are required, who is responsible for providing them under both types of hearing and where should they be located?**

This information has already been given in the answer to question 6.

#### **8 What procedure applies to the arrangements for the hearing and to notify the person to be examined about the time and place? How much time should be allowed when arranging the date of the hearing to enable the person to receive sufficient notification?**

In Portuguese law, the procedure applicable to the process of hearing and summoning a person to appear in court is essentially laid down in Articles 7(3), 172(5) and (6), 220, 247(2), 251(1), 417, 507, 508 and 603 of the Portuguese Code of Civil Procedure.

In general, it is the responsibility of the court registry to notify, on its own initiative, witnesses, experts, parties and their representatives when they are required to appear in judicial proceedings pursuant to a court order. Specifically, when the party requires the examination of a witness by videoconference, the court registry is responsible for summoning the witness.

Notifications for the purpose of summoning witnesses, experts and other incidental persons (e.g. an interpreter or a technical advisor) to court are sent by registered post, stating the date, place and the purpose of the appearance at court. Notifications are deemed to have been served even if the recipient refuses to accept the letter; the distributor of the postal service must keep a record to that effect.

Notifications for the purpose of summoning a party to appear in judicial proceedings or to give evidence are sent by registered post and addressed to the party concerned, stating the date, place and the purpose of the appearance at court. In this case, if the party has appointed a barrister, or if it is represented simultaneously by a barrister and a solicitor, both the barrister and the solicitor also have to be notified.

Representatives of the parties are notified electronically, pursuant to Article 25 of Ministerial Implementing Order (*Portaria*) No 280 /2013 of 26 August 2013. The IT system certifies the date on which the notification is issued.

The law does not expressly lay down how far in advance of the hearing the notification must be given. In any of the above cases, the notification is deemed to have been served on the third day after its registration or of it having been issued electronically. If the third day is not a working day, the notification will be deemed to have been served on the first subsequent working day. For practical reasons, it is therefore necessary to comply at least with this period of notice in relation to the hearing date, so that the notification can be deemed to have been duly served.

In urgent cases, witnesses, experts, other incidental persons, the parties or their representatives can be summoned (or their summons cancelled) by telegram, telephone or other similar means of telecommunication. Contact by telephone is always documented in the case record and is followed by confirmation in writing of some form.

If a person who should have been present fails to appear, that person must justify his or her absence in the hearing itself or within a period of five days (calendar days, but if the last day is not a working day, the deadline is extended to the next working day).

Portuguese law lays down the following coercive measures for cases of non-appearance. Where a witness fails to appear, having been duly notified and having failed to justify his or her absence within the legal deadline, he or she is sentenced to a fine and the judge may order his or her appearance under custody. These penalties do not apply if the trial is adjourned for reasons other than the non-appearance by the witness. Where an expert or another incidental person fails to appear, having been duly notified and having failed to justify his or her absence within the legal deadline, he or she is sentenced to a fine. Where one of the parties fails to appear, having been duly notified and having failed to justify his or her absence within the legal deadline, he or she is sentenced to a fine and his or her refusal may be freely interpreted by the court for evidential purposes. In addition, if the court deems that the party's refusal to appear makes it impossible to discharge the burden of proof, it may invert the burden of proof.

## **9 What costs apply to the use of videoconferencing and how should they be paid?**

No costs are charged for the use of videoconferencing.

## **10 What requirements, if any, are there for ensuring that the person examined directly by the requesting court has been informed that the performance shall take place on a voluntary basis?**

When a Portuguese court is the requesting party of a request pursuant to Article 17 of Regulation (EC) No 1206/2001 of 28 May 2001, it summons the person to be heard to appear in the named court in the other (requested) Member State by post, using one of the methods mentioned in response to question 8, depending on the case. This possibility of notification by post is provided for in Article 14 of Regulation (EC) No 1393/2007 of 13 November 2007. The person to be heard is informed in the notification that his or her appearance is on a voluntary basis.

When the Portuguese court is the requested party, it is the responsibility of the requesting court to notify the persons to be heard and to inform them that appearance is on a voluntary basis.

By mutual agreement between the requesting and requested courts, notification of the person to be heard and the information that this is on a voluntary basis can be carried out by the court of the requested Member State. This can happen in practice regardless of whether the Portuguese court is the requesting or the requested party.

## **11 What procedure exists for verifying the identity of the person to be examined?**

At the appointed time for the examination, the court official checks that the person to be examined is present and informs the judge who will conduct the examination or the requesting court if the latter is conducting the examination directly.

Where the examination is conducted by a Portuguese judge, once proceedings have started and before the person starts giving evidence as such, the following steps are taken: (i) the person giving evidence, witness or expert takes an oath before the judge; (ii) the judge asks preliminary questions to identify the person being heard.

It is up to the judge to conduct the preliminary questioning, in order to identify the person being heard, by asking his or her name, profession, address, marital status and other details the judge may deem necessary for identification purposes.

The judge also asks the person being heard whether he or she is a relative, friend or enemy of any of the parties and whether he or she has a direct or indirect interest in the case, in order to assess the credibility of the evidence.

If, during the preliminary questioning, the judge establishes that a witness is unfit or is not the right person to be examined, he or she will not allow them to give evidence. A witness is unfit if, despite not being hindered by a psychological anomaly, he or she does not have a natural capacity (physical or mental aptitude) to give evidence.

The preliminary questioning also allows the judge to check for the following cases in which, according to the Portuguese Code of Civil Procedure, the witnesses or parties may refuse to give evidence.

The following persons may refuse to give evidence as witnesses (except in actions intended to verify the birth or death of children):

- a) Relatives in the ascending line in cases involving their descendants, adoptive parents in cases involving their adopted children and *vice versa*;
- b) A father-in-law or mother-in-law in a case involving their son-in-law or daughter-in-law and *vice versa*;

- c) Spouses or ex-spouses in cases involving the other spouse or ex-spouse;
- d) Anyone who is cohabiting, or has cohabited in a similar way to married couples, with any of the parties to the case.

It is the judge's duty to advise the persons mentioned in the above points that they are entitled to refuse to give evidence.

Persons who are bound by professional secrecy, secrecy as public officials or State secrets must be excused from giving evidence in relation to facts covered by such secrecy. In those instances, the judge will verify the legitimacy of the excuse and, should he or she deem it necessary, waive their duty to secrecy.

Parties may only give evidence in relation to personal facts. In a civil action it is not admissible for the evidence of a party to focus on criminal or wrongful acts in respect of which the party is a defendant in a criminal case.

## **12 What requirements for taking oaths apply and what information is needed from the requesting court when an oath is required during direct taking of evidence under Article 17?**

Under Portuguese law:

- Before evidence is taken, the judge warns the person being examined of the moral importance of the oath that he or she is about to take, of the duty to be faithful to the truth and of the penalties for making false statements.
- The judge then asks the witness to take the following oath: *"I swear on my honour that I will speak the whole truth and nothing but the truth."*
- Refusing to take the oath is equivalent to a refusal to give evidence; both are punishable as contempt of court unless justified, should the judge charge the person accordingly.

Where a court in another Member State is taking evidence directly from Portugal by videoconference in accordance with Article 17 of Regulation (EC) No 1206/2001 of 28 May 2001, the court of the requesting Member State must inform the (requested) Portuguese court of the following identification details of the person who will give evidence: name, profession, address, marital status and other information it deems necessary for the purposes of identification, as well as the capacity in which the person will be heard (e.g. as party, witness, expert, technical advisor), the language the person speaks and whether it is necessary to call an interpreter to the requested court.

These details are necessary so that the (requested) Portuguese court can, on the one hand, take steps to call an interpreter and, on the other hand, verify the presence of the person to be examined at the appointed time for the videoconference.

However, as the Portuguese judge does not intervene in the proceedings, the oath must be taken by videoconference before the judge of the court of the requesting Member State. The same applies to the preliminary questioning, if this takes place, and to matters of fitness or refusal to give evidence or the excusing of witnesses from giving evidence, which are dealt with under the authority of the judge of the requesting court, in accordance with the civil procedural law of the requesting Member State, as provided for in Article 17(6) of Regulation (EC) No 1206/2001 of 28 May 2001.

## **13 What arrangements are there for ensuring that there is a contact person at the place of the videoconference with whom the requesting court can liaise and a person who is available on the day of the hearing to operate the videoconferencing facilities and deal with any technical problems?**

The requesting and the requested courts (once the latter has been identified by the central authority) should establish direct contact with each other to schedule a videoconference and should also arrange a date for a prior test.

For practical reasons, whenever possible, it is preferable to undertake the test before the witness has been notified; to that end, the date of the test should be scheduled far enough in advance to allow the witness to be notified in time.

On the day of the test and on the date of the videoconference hearing, an IT technician, a telecommunications technician or a court official with appropriate knowledge should be present in each of the courts.

In Portugal, the Institute of Financial Management and Justice Infrastructure (*Instituto de Gestão Financeira e Estruturas da Justiça* or 'IGFEJ') has a dedicated team available for videoconferencing in courts.

For organisational reasons, whenever possible, the IGFEJ should be notified of the date of the test and of the hearing with three days' notice. This allows the IGFEJ to check that the necessary technical conditions for videoconferencing are in place, to intervene immediately in the event of any communication difficulties between the courts and to monitor the videoconference tests.

### **Scheduling of a videoconference in another Member State at the request of a Portuguese court**

The (requesting) Portuguese court must first ask the IGFEJ to create the necessary technical conditions for the videoconference, to intervene to overcome any communication difficulties between the courts and to monitor the videoconference tests.

In order to overcome technical difficulties, the Portuguese court asks the court of the requested Member State also to appoint someone responsible in their videoconferencing service to monitor the test and/or to provide the necessary technical assistance in collaboration with the Portuguese technicians.

When the Portuguese courts are the requesting party, they often seek the assistance of the EJM-civil (European Judicial Network in civil and commercial matters) contact point in Portugal, which gets in touch with the requested courts directly in order to schedule the test and videoconference. When technical difficulties are brought to its attention, the contact point liaises directly with the teams responsible for the videoconference in each one of the Member States involved, requesting the necessary connections, information or technical adjustments and informing the courts involved accordingly. This allows the language barrier to be overcome and the videoconference to be conducted successfully.

#### **Scheduling of a videoconference in a Portuguese court on request from another Member State**

In Portugal, the Directorate-General for the Administration of Justice (*Direcção-Geral da Administração da Justiça*, or DGAJ) is the central authority responsible for receiving and accepting requests from another Member State pursuant to Article 17 of Regulation (EC) No 1206/2001 of 28 May 2001. Once the request has been accepted, the DGAJ indicates to the court of the requesting Member State the (requested) Portuguese court where the videoconference will take place. Once this has been done, the requesting and requested courts must agree with each other directly on the dates for conducting first the test and then the videoconference hearing.

The DGAJ, as a central authority, facilitates the direct contact between the requesting and requested courts, as well as contact with the IGFEJ videoconferencing support team, so as to overcome any technical difficulties. In addition, the EJM-civil contact point in Portugal can also facilitate the necessary contacts, should it be asked to do so.

Through direct contacts the courts book the videoconference room and appoint the staff to set up the technical connections and monitor the videoconference at the requesting and requested courts, respectively. In Portugal, as a rule, a court official with appropriate knowledge is chosen, preferably accompanied by the IT technician of the Portuguese court.

When the videoconference is conducted by IP, it must necessarily be done from Portugal. To that end, the Portuguese court asks the IGFEJ in advance for the opening of an external connection.

Where videoconferences are conducted via a telephone line (ISDN), the connection to the Portuguese courts can be made from courts in other Member States.

Whenever there are technical difficulties, the IT technician of the Portuguese court or an IGFEJ technician can provide the necessary assistance.

#### **14 What, if any, additional information is required from the requesting court?**

When making a videoconferencing request, the following details must be entered in field 12 of form I in the annex to Regulation No 1206/2001 of 28 May 2001, or as an annex to that form.

1. Technical details of the videoconferencing equipment used by the requesting court, namely:

- Communication protocol used (e.g. H.323, H.320)
- Video protocols (e.g. H.261, H.263 and H.264)
- Audio protocols (e.g. G.711a, G.711u, G.722, G.729)
- Content sharing protocol, if necessary [e.g. H.239 or BFCP (SIP)]
- Security: H.235 and the respective encryption supported
- Maximum bandwidth supported
- Standalone, MCU or Gateway equipment
- In the case of MCU or Gateway, whether it has IVR.

2. ISDN and/or public IP connection details of the court.

3. Request for scheduling of a videoconference test before the giving of evidence.

4. Name and direct contact details (telephone, fax and email) of the person who will provide support for the videoconference (preferably a court official together with an IT or telecommunications technician that provides support for the court).

5. If the court wishes to hold a videoconference using Skype (for Business), it is necessary to create a contact. There are no communication restrictions with the standard protocol used by Skype.

In any event, a connection test should always be requested in advance to ascertain whether technical intervention is required.

The technical details for the videoconference are as follows:

- Communication protocol used: H.323
- Security: H.235 AES
- Maximum bandwidth supported: 256kbps

**NB:**

The information contained in this form is not binding on the EJM-civil contact point, the courts or other entities and authorities. Nor does it dispense with the need to consult the applicable legal texts. The information is subject to regular updating and to the evolving nature of case law.

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