

The International Comparative Legal Guide to:
Corporate Governance 2009

A practical insight to cross-border corporate governance



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1 Setting the Scene - Sources and Overview

1.1 What are the main corporate entities to be discussed?

We refer to Public Companies Limited by Shares ("*Sociedades Anónimas*"/"Public Companies"), i.e., those whose share capital is available for investment by the public ("*sociedade aberta*"/"open company") such as:

- (a) companies incorporated through an initial public offering for subscription specifically addressed to individuals or entities resident or established in Portugal;
- (b) companies that issue shares or other securities that grant the right to subscribe or acquire shares that have been the object of a public offer for subscription specifically addressed to individuals or entities resident or established in Portugal;
- (c) companies that issue shares or other securities that grant the right to their subscription or acquisition and are, or have been, listed on a regulated market situated or operating in Portugal ("Listed Companies");
- (d) companies that issue shares that have been sold by public offer for sale or exchange in a quantity greater than 10% of the company's capital directed specifically at individuals or entities resident or established in Portugal; or
- (e) companies created as a result of the demerger of a public company or a company that incorporates, through merger, all or part of its net equity.

Among such "Open Companies" we shall distinguish the Listed Companies from the others, once, as explained below, they are subject to specific regulations.

1.2 What are the main legislative, regulatory and other corporate governance sources?

The main corporate governance sources are the Portuguese Commercial Companies Code ("PCC", approved by Decree-Law n° 262/86, Sept. 2, as amended), the Portuguese Securities Code ("PSC", approved by Decree-Law n° 486/99, Nov. 13, as amended), the CMVM [Portuguese Securities Market Supervisory Authority ("CMVM")] Regulation 01/2007 (Sept. 21) in force since January 1st 2009 and the CMVM Recommendation under the form of the Corporate Governance Code ("CGC").

The PCC regulates the incorporation and operation of companies established in Portugal setting three different models of management and auditing bodies and the principles for corporate governance structure in general.

With regards to corporate governance, the PSC regulates securities and information regarding securities issuer companies listed on a

regulated market situated or operating in Portugal. Most importantly it sets out important corporate governance rules such as the Annual Governance Report to be disclosed by issuers of such securities and annual, half-annual and quarterly information to be disclosed.

The Regulation 1/2007, in force since January 1st 2009, establishes the model for the Annual Governance Report to be followed by the Portuguese Public Companies which are listed on a regulated market situated or operating in Portugal which provides that such companies must either comply with the CGC or explain why such Code is not followed.

The CGC was published in 2007 and is a recommendation of the rules of conduct for corporate governance for Listed Companies but may also be adopted by other types of companies. Although the compliance with such code is not mandatory, the companies listed on a regulated market situated or operating in Portugal must explain if they decide not to follow any of its provisions (the rule is "to comply or explain").

Despite the fact that we are not concerned with the public undertakings we would like to point out that a resolution of the Portuguese Council of Ministers (Resolution 49/2007, March 27) sets out the corporate governance rules for public undertakings (State-owned enterprises).

Finally, we refer that the Portuguese Corporate Governance Institute - a non-profit private law association - that has recently approved a preliminary version of a Good Practices of Corporate Governance Code ("hereinafter "GPCCC").

The main purpose of the Institute is the investigation and disclosure of Corporate Governance principals and may therefore promote all the appropriate activities.

This document is intended to be a reference of good practices for companies that wish to adhere to its principles. The submission/adhesion to the document is optional although its principals become mandatory to companies that wish to adhere.

The GPCCC foresees several recommendations regarding: (i) the companies' mission and purposes; (ii) the companies' corporate bodies' structure and duties; (iii) the companies' financial statements; (iv) internal risk management; (v) the internal and external audits; and (vi) the shareholders and institutional investors.

The GPCCC, like the CGC, proposes a control mechanism for the companies based on a "comply or explain" model. The companies have to publish a yearly report in which they must set out the policies of such code have been adopted, and which have not and why.

1.3 What are the current topical issues, developments and trends in corporate governance?

With the entry into force of CMVM's Regulation 1/2007, Portuguese Public Companies are subject to a control based on a "comply or explain" model. The CMVM has published the Recommendations of the CGC and Public Companies have to publish a report (the Annual Corporate Governance Report) yearly in which they must set out which policies of such code have been adopted, and which have not and why.

The CGC has recommended some important practices of corporate governance such as: (i) the limitation of the shares blockage period imposed for the participation in Shareholders' Meetings; (ii) one voting right per share; (iii) the disclosure obligation on corporate information regarding Shareholders' Meetings and resolutions; (iv) the avoidance of measures to prevent successful takeover bids (like the limitation of the number of votes that each shareholder may hold or use); (v) the creation of internal control systems; (vi) the adoption and observation of a remuneration policy; and (vii) the information that should be available on the company's website.

Moreover, let us consider some of the best practices recommended regarding:

The General Meeting:

- (a) The chairman of the GM should have the adequate human and logistic backup resources facing the company's needs and its economical situation, and his remuneration should be included in the company's annual report.
- (b) The articles of association should not establish a quorum (constitution or deliberation quorum) superior to the foreseen by law.
- (c) The correspondence vote should not have any restrictions and the deadline to receive it should not be no more than 3 days prior to the Meeting.

And regarding the Board of Directors:

- (a) The Board of Directors must comprise a sufficient number of non-executive members, in order to ensure the effective supervision, oversight and evaluation of its executive members.
- (b) A certain number of non-executive board members, depending on the size and shareholding structure of the company, equal to no less than a quarter of the total number of directors, must be independent.

2 Shareholders

2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

The main powers and rights held by shareholders are: (i) the power to appoint and remove the corporate bodies; (ii) the right to approve the company management's annual report and accounts; (iii) the right to approve the profit allocation; and (iv) the right to be informed on the financial situation of the company and to question the board.

2.2 Can shareholders be liable for acts or omissions of the corporate entity/entities?

Public Companies are incorporated as limited liability companies. As such, the liability of the shareholders is limited to the capital that they have subscribed. Only the corporate bodies' members and the company itself may be held responsible for acts or omissions of the company.

2.3 Can shareholders be disenfranchised?

According to Portuguese law, a shareholder of a Public Company may only be disenfranchised in a scenario of a compulsory takeover that follows the launch takeover bid that achieves or exceeds 90% of the voting rights of a specific company.

2.4 Can shareholders seek enforcement action against members of the management body?

Shareholders may, in certain circumstances and based in civil responsibility rules, seek an enforcement action against the members of the management body for damages they have suffered by acts or omissions (see art. 79 of PCC).

The law also provides that shareholders may resolve in a Shareholders' Meeting that the company will file a claim against the management body for damages caused by their acts or omissions. If no resolution is approved, shareholders holding 2% or more of a Public Company may file a claim against the management body for damages caused to the company (see art. 77 of PCC).

The management bodies have the duty to disclose information on the company's status. In this context, shareholders have the right to request information on the annual reports, accounts and other financial statements. If such information is refused or not properly disclosed, the shareholder may petition the court to have direct access to such information.

2.5 Are there any limitations on, and disclosures required, in relation to interests in securities by shareholders?

Regardless of the mandatory takeover rules, Portuguese law does not provide any limitations on the securities to be held by a shareholder. In any case, some companies establish in their articles of association a limitation of the exercise of voting rights whilst establishing a maximum number of votes per shareholder. The CGC sets forth that the maintenance of such policies must be voted on at a Shareholders' Meeting every five years and if such measure is not adopted, the Annual Governance Report must explain the reasons for not complying with such recommendation.

As to disclosure notification duties, in general terms, there is a duty to disclose the holdings in a Portuguese Public Company that reach, exceed or fall below 10%, 20%, 1/3, 1/2, 2/3 and 90% of such Portuguese Public Company's voting rights.

If the relevant company is the issuer of any securities which are admitted to trading on a Portuguese Regulated Market (Listed Company) the notification requirements will apply not only to the above-mentioned thresholds but also if the relevant holding reaches, exceeds or falls below 2%, 5%, 15% and 25% of such company's voting rights.

2.6 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

The law provides that the shareholders must convene at least on a yearly basis, within five or three months from the end of business year (depending on whether they are required to present consolidated accounts or not), for the purpose of approving the annual report and account documents, approving the distribution proposal of year-end results and general analysis of the management and auditing of the company.

Also, the shareholder meetings convene to appoint corporate bodies, change the articles of association, and to discuss all other issues that are listed in the articles of association.

The CGC provides that the Shareholders' Meetings should resolve on: (i) maintaining a limitation of the number of votes by shareholder; (ii) the remuneration policy to be adopted; and (iii) the attribution of shares or stock options to corporate bodies.

Meetings are called by the Chairman of the General Shareholders' Meeting.

Shareholders that, alone or jointly, hold at least 5% of the share capital are entitled to request to the Chairman of the Shareholders' Meeting that a meeting is called upon and may also request the inclusion of items in the agenda.

Any shareholders with a voting right are allowed to present proposals of resolutions to the Shareholders' Meeting.

Electronic communication to shareholders is possible regarding the Shareholders' Meeting call notice (i) if all the company's shares are nominative and (ii) if the shareholders have previously given their consent for using such form of communication.

In any case we would like to point out that the law provides that any call notice to the shareholders must be published (on the Justice Department's website and, in some cases, on the company's website).

It is not usual to grant and recognise direct rights to indirect shareholders in relation to the corporate entity according to Portuguese law.

Portuguese law provides that the registration of the securities in individual accounts raises the presumption that the exercise of rights arising from securities (including voting rights) belong to the account holder as recorded in respective registrations (PSC, art. 74/1). Although it has been largely discussed, the law only allows for such presumption to be refuted for purposes of compliance with information duties and takeover bids (PSC, art. 74/3). This means that in these circumstances there is some relevance in being an indirect shareholder.

In any case, beneficial owners cannot exercise any voting right (i.e., the one that theoretically would correspond to its holdings) which prevents them from having direct rights in relation to the corporate entities.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The management of Public Companies may be structured according to one of the following three models:

- (i) the Classic model (also called "Latin") composed by a Board of Directors, a Board of Auditors and a Certified Accounts Auditor;
- (ii) the Anglo-Saxon model composed by a Board of Directors, integrating an Audit Committee, and by a Chartered Accountant; or
- (iii) the German model composed by an Executive Board of Directors, a General and Supervisory Council and a Chartered Accountant.

As to the Classic model, the management is carried out by the Board of Directors which, unless otherwise provided by the articles of association, the board may empower one or more directors to deal with certain aspects of the management of the company. The articles of association may also allow that the Board of Directors delegate the day-to-day management on an Executive Committee.

In the Anglo-Saxon model, the management is carried out by the executive members of the Board which are monitored by the Audit Committee, composed by non-executive members of the Board.

As to the management structure of the German model, the Executive Board of Directors is responsible for the management of the company although it must report its activity to the General and Supervisory Council which controls its activity without having current executive powers.

The management body should establish its own rules and have them published on the company's website. If it does not, it must, in its yearly management report, explain why.

Regarding the number of non-executive members, see question 1.3 above.

3.2 How are members of the management body appointed and removed?

The management body is either designated in the articles of association (regarding the first mandate) or appointed in the Shareholders' Meeting.

The law also provides special rules for appointment of the management body such as the possibility of the articles of association establishing that for a number of directors not exceeding a third of the corporate body, isolated appointments may be chosen from lists presented by groups of shareholders representing not more than 20% and not less than 10% of the share capital. The articles of association may also establish that a minority of shareholders having voted against the appointment of directors shall have the right to appoint at least one director provided that such minority represents at least 10% of the share capital. This rule is applicable to Public Companies in the absence of any rule providing the appointment of board members by a shareholders' minority.

As to the removal of management bodies, it may take place upon the resolution of the Shareholders' Meeting, at any time with or without fair cause.

In the German model, the Supervisory Board is entitled to dismiss any member of the Executive Board unless otherwise stated in the articles of association.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

According to Portuguese laws, directors cannot carry out their duties if they have a work contract, i.e. if they are appointed whilst having a contractual relationship with the company (that is, being one of its employees) their work contract will be suspended.

However, directors may enter into a management contract with the shareholders concerning their remuneration' and fringe benefits concerning the term they are appointed for. They may even execute a written contract, including a golden parachute clause.

In any case the board cannot negotiate or execute a contract with one of its directors concerning their management.

Other contracts made by and between the company and its directors, in their own interest, should in general be previously approved by the Audit Committee or Board of Auditors without the participation of the interested board member.

The duration of each term is usually established in the articles of association of the company and may not exceed four years. This term will be applicable in the absence of a rule in the articles of association.

As to the remuneration, the CGC establishes that the remuneration of the members of the Board of Directors shall be aligned with the interests of the shareholders. In such context the remuneration should include a part based on the performance of the director and

a part based in its achievement, and the non-executive members of the management body should have a fixed remuneration.

The CGC also establishes that the Remuneration Committee and the Management Body of Listed Companies must submit to the annual Shareholders' Meeting a declaration on the remuneration policy and the eventual allotment of shares and/or options for share purchase.

As to the remuneration of each director, the CGC establishes that it should be disclosed on a yearly basis.

If a Listed Company chooses not to follow these recommendations it must explain why.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body?

There are no limitations on the number of interests to be held by management body members although they must disclose the number of securities held in their own name or behalf and in the name of their direct family members or by companies owned by them if they are unlimited liability companies.

3.5 What is the process for meetings of members of the management body?

The board of directors shall meet whenever convened by its chairman or by two directors which shall occur at least once a month unless otherwise stated in the articles of association.

The board cannot adopt resolutions if the majority of its members are not present or duly represented.

Whenever a matter is discussed in which a director has a conflict of interests he/she must not vote and such resolutions are taken by the majority of votes.

3.6 What are the principal general legal duties and liabilities of members of the management body?

The directors' fundamental duties are the duty of care towards the organisation, revealing availability, technical capacity and knowledge of the company's business adequate to its responsibilities and the duty of acting with the proper diligence of an organised manager.

The members of the management body also have a duty of loyalty to the interests of the company serving the long term interests of the shareholders and considering the interests of other relevant parties for the sustainability of the company such as employees, clients and creditors.

As to the liabilities of the members of the management body, they may be jointly and severally liable for damages caused by acts or omissions resulting from a breach of their legal or contractual duties.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body?

The companies listed on a regulated market situated or operating in Portugal must present every year, as an annex to the management's annual report, an Annual Governance Report.

Such report must include the shareholder structure, any restrictions to the transmissibility of the shares, a list of qualified holdings, the identification of shareholders who were attributed special rights, internal control mechanisms, stock options plans for employees,

voting rights' restrictions, shareholders' agreements, rules for the appointment of corporate bodies and alteration to the articles of association, management bodies' powers, relevant agreements in which the company entered into, agreements between the company and members of the corporate bodies that provide rules for indemnities for termination of their contracts and internal policies on the reporting of irregularities.

Also, if they choose not to comply with any rules set forth in the CGC they must present a justification for such refusal.

3.8 What public disclosures concerning management body practices are required?

Please see our reply to questions 3.7 and 5.2.

Other than the Annual Governance Report, the Board of Directors' rules and the Supervisory Board rules must be disclosed.

3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

The liability of the members of corporate bodies of companies listed on a regulated market situated or operating in Portugal must be guaranteed in a legally acceptable manner up to a minimum of €250,000 per director or member of the audit committee.

Such guarantee may be substituted by an insurance contract (D&O) which cannot be paid for by the company.

4 Corporate Social Responsibility

4.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

Other than tax benefits, there are no corporate social responsibility laws, regulations or practices.

4.2 What, if any, is the role of employees in corporate governance?

Portuguese law does not provide the employees any rights concerning corporate governance.

5 Transparency

5.1 Who is responsible for disclosure and transparency?

The corporate body responsible for complying with disclosure and transparency is the Board of Directors. Also, in some cases, the Board of Auditors or the Supervisory Board may be responsible for the execution of such duties.

5.2 What corporate governance related disclosures are required?

There are several disclosure obligations regarding corporate governance. The main obligation is to disclose the financial statements and annual reports.

As mentioned above, the companies listed on a regulated market situated or operating in Portugal must present every year, as an annex to the management's annual report, an Annual Governance Report which must include the items mentioned in question 3.7.

Also, such companies must provide a half-yearly financial report.

Some companies must disclose the information quarterly. This obligation applies to those that for two consecutive years cross at least two of the following limits: (i) a balance sheet total of €100,000,000; (ii) total net sales and other profits of €150,000,000; and/or (iii) an average number of employees of 150.

5.3 What is the role of audit and auditors in such disclosures?

The auditors must audit yearly the financial statements and present (i) a legal account certification in which they establish their well founded opinion on certain financial issues, and (ii) their opinion concerning the approval of the annual accounts.

5.4 What corporate governance information should be published on websites?

The Public Companies must provide on their website, in Portuguese and English, information on, at least:

- (a) The company's name, its public company quality, type, headquarters, registry office and number.
- (b) By-laws.
- (c) Identification of its corporate bodies and responsible market relations.
- (d) Investors Relations Department.
- (e) Accounts Documents and Reports.
- (f) Calendar of corporate events.
- (g) Proposals presented in/for Shareholders' Meetings.
- (h) Notice of Shareholders' Meetings to take place.



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