The Corporate Governance Review

Ninth Edition

Editor
Willem J L Calkoen

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THE CORPORATE GOVERNANCE REVIEW

Ninth Edition

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this ninth edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society, and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and management, and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, more and more shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should non-executive directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust.

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What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have gradually amassed too much power, or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well. Recently, we see that governments want to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in R&D. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management with new risks entering such as a digitalised world and cybercrime is an essential part of directors' responsibilities, as is the tone from the top. How can directors do their important work well without being petrified of attacks from shareholders, regulations and the press?

Each country has its own measures; however, the chapters of this book also show a convergence. Understanding differences leads to harmony. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2019

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Chapter 21

PORTUGAL

Paulo Olavo Cunha and Cristina Melo Miranda[1]

I OVERVIEW OF GOVERNANCE REGIME

This chapter refers only to the regulations concerning *sociedades anónimas*, public companies limited by shares, one of the various forms companies can take under Portuguese law, since this is the most common one among listed companies and medium to large companies.

The Portuguese legal framework regarding corporate governance rules is generally provided for in the Companies Code (PCC) and in the Securities Code (PSC), with sector-specific legislation being also of relevance, namely for financial institutions and state-owned companies.

Alongside these provisions, there are several other soft law instruments, the most relevant ones being the recommendations issued by the Securities Commission (CMVM), which are applicable to listed companies but are also used as best practice guidance for other companies, and the recommendations issued by the Portuguese Central Bank (BdP) concerning governance of financial institutions.

In January 2018, the Corporate Governance Code (CGC) issued by the Portuguese Institute of Corporate Governance became applicable to companies under the supervision of CMVM, in a move towards self-regulation that is being promoted by CMVM and aligned with best international practices on this matter, but still on a comply or explain basis.

Another recent trend in Portugal concerns equal gender representation at board level, namely for listed companies and state-owned companies.

II CORPORATE LEADERSHIP

i Board structure and practices

Shareholders may choose one of three mandatory governance models, depending on the structure adopted for its management and auditing bodies:

Classic model

The classic model (also known as the Latin model) establishes a single management body corresponding to a sole director (only admissible for companies with a share capital not exceeding €200,000) or a board of directors, with a variable number of members (a minimum of two) as freely defined by the by-laws. Therefore, this model is considered a one-tier structure.

1 Paulo Olavo Cunha is a partner, and Cristina Melo Miranda is an associate at Vieira de Almeida (VdA).

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Regarding the auditing body, the PCC foresees the existence of a simple structure or a reinforced structure, depending on the appointment of a sole auditor (which must be a chartered accountant) or of a supervisory board (with a minimum of three members, one of which needs to be a chartered accountant) for the simple structure, or of a supervisory board plus a chartered accountant for the reinforced structure.

The reinforced structure is mandatory for:

a public limited liability companies, if they exceed, for two consecutive years, two of the following thresholds:
- a total balance sheet of €20 million;
- a total net turnover of €40 million; and
- an average of 250 employees during each fiscal year (i.e., large public companies); and

b companies that are issuers of securities admitted to trading on a regulated market.

Anglo-Saxon model

The Anglo-Saxon model establishes a single management body, a board of directors, which includes an audit committee. No sole director is admissible in this model.

Regarding the auditing body, the audit committee is composed of at least three directors with non-executive powers who are responsible for supervising the activities of the executive committee (i.e., the members of the audit committee perform similar functions to the ones exercised by the supervisory board under the classic model described above). In this model, the auditing body also includes an external chartered accountant.

In view of the above, the Anglo-Saxon model has the characteristics of a one-tier structure.

German model

Under the German model, the management of the company is entrusted to a board of directors composed of a variable number of executive directors only, in accordance with the by-laws, or to a sole director (only admissible for companies with a share capital that does not exceed €200,000). The directors may be appointed by the general and supervisory board or by the shareholders' general meeting, if provided by the by-laws.

The general and supervisory board combines typical competences of the supervisory board and of the shareholders' general meeting. Even though it does not have management powers, there are certain categories of management acts to be adopted by the board of directors that can be subject under the by-laws of the company to the prior consent of the general and supervisory board. Therefore, this model is a two-tier structure. The number of members of the general and supervisory board is set out in the by-laws, and shall be higher than the number of directors.

In this model, the auditing body also includes an external chartered accountant.

In the case of listed companies and large public companies, the creation by the general and supervisory board of a committee for financial affairs is mandatory.

Although the classic model is predominant in the Portuguese corporate landscape, listed companies and large public companies are adapting their corporate structures to the Anglo-Saxon model, which is perceived to better address the corporate governance guidelines issued and enforced by CMVM and by the BdP.

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Board of directors structure and practices

The board of directors is responsible for managing the activities of the company. However, and as previously discussed, members of the audit committee in the Anglo-Saxon model are legally prevented from carrying out executive tasks.

The company's by-laws may authorise the board of directors to delegate the day-to-day management of the company to one or more directors (executive directors) or to an executive committee (in the classic model and Anglo-Saxon model only), the latter being recommended under the CGC.

Moreover, the board of directors may also grant powers to a specific director or several directors to deal with certain aspects of the management of the company, unless the by-laws prohibit this scenario.

Also very common, namely in large stock companies and listed companies, and in accordance with the CGC, is the creation of special committees by the management body, with or without the participation of its members, and with duties to assist on specific matters.

The chair of the board of directors, to be appointed by the board of directors unless the by-laws attribute such choice to the shareholders' general meeting, may be entitled with the casting vote whenever the board is composed of an even number of directors or if provided by the by-laws. The chair is also responsible for convening board of directors' meetings and chairing them. Although under the PCC there is no requirement for the roles of CEO and chair to be attributed to different persons, the CGC recommends that, if the chair is an executive director, then mechanisms for the coordination of the non-executive directors are effectively put in place.

Representation of the company is also legally attributed to the board, which can, nonetheless, attribute powers to certain directors to execute specific management decisions. However, powers to bind the company are freely defined in the company's by-laws, rendering any act that is taken by those persons entitled under the by-laws to bind the company without a prior decision of the board of directors to be valid and binding on the company.

ii Directors

Appointment and dismissal

In the classic and Anglo-Saxon models, directors are appointed and dismissed by the shareholders' general meeting, with the supervisory board or the audit committee, respectively, being entitled to suspend directors that are temporarily unable to duly perform their mandate. In the German model, the general and supervisory board is responsible for the appointment, suspension and dismissal of directors, unless the by-laws entrust such powers to the shareholders' general meeting. However, in any case, listed companies are also required to include in their by-laws a mechanism enabling at least one director to be appointed by the minority shareholders under certain conditions.

Terms of office can run for up to four years, as defined in the company's by-laws and being freely renewed; however, directors remain in office after the lapse of such term until the date on which new directors are appointed, or until the end of the month subsequent to the month in which the director delivered his or her resignation to the company, whichever occurs first.

Directors are required to be natural persons. If a legal person is appointed as a director, it is required to appoint a natural person to act as director for its own name and account, with the legal person being jointly responsible with the natural person for the performance by the second of its director duties.

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Independence requirements are only imposed by the PCC in respect of the audit committee. It is required that for listed companies and large public companies, at least one of its members has higher education adequate for the performance of its duties and is knowledgeable in auditing or accounting, and, for listed companies, that most of its members are independent directors (e.g., that they are not associated with any specific set of interests in the company, and that are not in any situation that may hinder the directors' analysis and decision capacity). In addition, the members of the audit committee are subject to incompatibility provisions, requiring that, among others, they are not members of the management bodies of companies that are in a group relationship with the company where they serve as members of the audit committee.

Under the German model, directors are subject to specific incompatibility requirements, namely being required to not be a member of the general and supervisory board.

However, the CGC recommends that each company should include as non-executive directors an adequate number of independent directors.

In addition, Law No. 62/2017, of 1 August imposes a requirement that listed companies shall have in their management (and supervisory) bodies, as from the first elective shareholders' general meeting after 1 January 2018, women representing at least 20 per cent of the total members of such bodies and, as from the first elective shareholders' general meeting after 1 January 2020, women representing at least 33.3 per cent of the total members of such bodies. This was a measure already recommended by the CGC.

Duties

Directors (both executive and non-executive or inside and outside directors) are required to comply with certain legal duties, including a duty of care (availability for the performance of the position, technical skills and knowledge of the company's activity) and a duty of loyalty (performance according to the company's interest, to the shareholders' long-term interests and to the interests of the remaining stakeholders).

Non-executive directors are also subject to a special duty of vigilance in respect of the performance of the executive directors.

As such, all directors (both executive and non-executive) are entitled to the same level of information, at the same time, and can request any information from the company as they deem necessary to the adequate performance of those duties.

Other legal duties of directors include an obligation:

a to preserve the share capital and avoid and react to thin capitalisation (loss of more than half of the company's share capital), upon which directors are legally required to call a shareholders' general meeting;

b to not compete (the director may not pursue, by himself or herself or through entities, activities that are in competition with the activity of the company, unless so authorised by the relevant corporate body);

c to prevent any conflict of interests (a director is required to avoid situations in which he or she has or could have an interest that conflicts with the company's interests, to declare such conflict or potential conflict to the other directors, and is also prohibited from taking part in the relevant decisions that could be affected by such conflict or potential conflict of interests); and

d to ensure conformity between actions and respective records and publications.

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Compliance with these duties implies that the directors shall not accept a mandate in cases where there is a lack of appropriate personal and professional conditions to carry out the mandate in adequate form (e.g., lack of time or necessary knowledge and preparation to take on a position); and that they must be duly informed when making decisions, for which directors shall request all necessary information and endeavour to obtain the same, including expert advice.

Moreover, directors must be always mindful of the confidentiality obligation that they owe to the company as directors, and also of their duty to review board documentation and to raise any points of concern, making sure that any points are duly reflected in the minutes of the meeting and ensuring that they vote against any decisions in breach of their duties.

A special assessment should be exercised in transactions entered into between the company and another director or a shareholder of the company (or persons or entities related with them), and also when the company grants any loans or guarantees to persons or entities related to a director or a shareholder.

Remuneration

The PCC provides that the corporate body responsible for determining the remuneration of directors varies depending on the corporate governance model of the company, as follows:

a one-tier management structure models (classic and Anglo-Saxon models): the remuneration of directors is determined by the shareholders' general meeting or a remuneration committee appointed by the latter; and

b two-tier management structure model (German model): the remuneration of directors is determined by the general and supervisory board or by its remuneration committee, except if the company's by-laws specifically attribute such competence to the shareholders' general meeting or to a remuneration committee appointed by the latter.

In all three governance models, the remuneration of the members of the management body may comprise a fixed and a variable component, the latter including profit-sharing, being the maximum percentage of profits to be attributed to directors, which shall be specifically authorised in the by-laws. However, audit committee members are only entitled to a fixed remuneration (such rule being recommended under the CGC to apply to all non-executive directors).

Law No. 28/2009, 19 June, imposes on public interest entities (as defined in Article 3 of the Annex to Law No. 148/2015, 9 September) disclosure obligations regarding the remuneration policy of the members of the management (and supervisory) body, implementing a say on pay rule.

Under the CGC, further recommendations have been issued with a view to ensure that the remuneration scheme of the company:

a adequately remunerates directors for the responsibilities that they undertake and the competencies they use for the company's benefit; is aligned with the company's long-term interests; and rewards performance;

b is aligned with the company's long-term interests; and

c rewards performance.

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Liability

Breach of their duties by directors gives cause for civil liability, which shall arise from a court's decision, and which cannot be limited or excluded by agreement.

Liability of directors is always joint, the law establishing an assumption of fault by directors that may, nevertheless, be warded off if the directors:

a prove their actions were fault-free;

b prove that their actions were performed on an informed basis, free of any personal interest and according to a business judgement criterion;

c were not part of the resolution, or voted against it, having expressly recorded in the minutes of the meeting their disagreement; or

d based their actions on a shareholders' resolution.

Directors are required to guarantee their liability by delivering a bond or taking on an insurance policy with a minimum coverage of €50,000 (or €250,000 for listed companies and large public companies); however, such guarantee is legally waived for non-executive directors that are not remunerated as such, and may be waived by the shareholders' general meeting to other directors (excepted for listed companies and large public companies).

Directors are also subject to tax-related liability (civil or criminal liability), liability over administrative offences, criminal liability and civil liability within the context of insolvency and environmental affairs.

iii Auditing bodies

Company auditing bodies and their tasks vary from corporate model to corporate model, as previously discussed. However, broadly speaking, auditing bodies are responsible for the ongoing supervision of a company's activity, especially financially and accounting-wise, but this is not absolute: for instance, any agreement to be entered into between the company and its directors, if lawful, must be preceded by an opinion of the company's auditing body.

In addition, the members of the auditing bodies are subject to the same duties of care and diligence as directors in the performance of their mandate, and can likewise be liable towards the company and its stakeholders for breach of such duties.

Considering the tasks vested on the auditing bodies, it is understandable that their members are subject to independence requirements and to incompatibilities (as previously discussed when addressing the audit committee), while the auditors must be certified chartered accountants registered with the Chartered Accountants Association. Such requirements were increased with Law No. 148/2015, of 9 September.

III DISCLOSURE

Directors are required to annually produce and disclose to the shareholders, which approve the same, the accounting documentation of the company, which includes the submission by the board of directors to the shareholders' general meeting of the annual accounts, the attachments to the annual accounts (where the directors are required to disclose, if the company's accounts do not follow IFRS rules, all transactions with related parties) and the annual management report (where the directors are required to disclose, among others, the authorisations granted to transactions between the company and its directors, and the financial risk coverage policy of the company).

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However, directors are also required to disclose to shareholders other situations, such as if the company is under thin capitalisation (loss of more than half of the company's share capital), upon which the directors are legally required to call an shareholders' general meeting. This information needs to be made available to shareholders at the company's head office and website at least 15 days (21 days for listed companies) before the date of the shareholders' general meeting, and afterwards needs to be mailed to the shareholders representing at least 1 per cent of the share capital. During the shareholders' general meeting, the shareholders are also entitled to request information deemed necessary to duly decide.

In addition, shareholders are generally entitled to obtain relevant information concerning the company from the directors if holding, by themselves, at least 1 per cent of the share capital or, together with other shareholders, at least 10 per cent of the share capital. This information is afterwards required to be available to the other shareholders in the company. Failure to provide the information required entitles the shareholders to judicial relief.

For listed companies, further disclosure obligations towards the market are imposed on the company and its directors, including information of an accounting nature (disclosed on a different timely basis) and also any information that may have an impact on the value of the securities being traded (immediately disclosed). There are, however, certain situations that may legitimise a delay in the disclosure of this information to the market.

Notwithstanding CMVM being responsible for organising and making available to the market the information disclosed by the listed companies, such information shall also be included on the company's website and, preferably, also made available in English.

The PSC also requires that listed companies include in their annual management report:

a a chapter concerning the company's corporate governance structure and practices, detailing, among other things, the share capital structure;
b a chapter identifying limitations on transfers and special rights attributed to shareholders;
c a chapter outlining the voting rights limitations (even those arising from shareholders' agreements of which the company is aware);
d a chapter regarding any relevant agreements entered into by the company and its employees or the members of the corporate bodies; and
e a chapter identifying the matters included in the CGC with which the company is not complying (including a justification of such non-compliance).

This comply or explain model is of relevance in the assessment of the implementation of the best practices foreseen in the CGC.

Moreover, under the CGC, companies are also urged to put in place a permanent contact with the shareholders, its investors and other market stakeholders in general, and to implement adequate systems to ensure that the relevant information is produced and disclosed in a timely manner to the relevant stakeholders.

IV CORPORATE RESPONSIBILITY

As already discussed, the directors are responsible for disclosing to the shareholders in the annual accounting documentation the financial risk coverage policy of the company, together with a detailed description in the management report of the risks and uncertainties that the company faces or may face, assessing not only financial risks but also other non-financial

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matters, such as of a labour or environmental nature, which can affect the company's situation. Therefore, albeit indirectly, directors are always responsible and accountable for risk management, with the auditing bodies also being responsible for the supervision of risk.

Sector-specific legislation requires companies to create risk management mechanisms. For instance, risk management committees are mandatory for credit institutions with a significative dimension, internal organisation and nature, and with a significative scope and complexity of their activities, which are composed of non-executive directors with specific knowledge adequate to fully understand and monitor the risk strategy of the company. For other credit institutions, the tasks of the risk management committee are carried out by their auditing bodies.

The CGC also requires that companies undertake adequate risk management and internal auditing systems suitable to the dimension and complexity of the risks associated with their activity.

Furthermore, directors are required to perform their mandate to achieve the company's interest, which results from an assessment of not only the shareholders' interests, but also the interests of other relevant stakeholders, such as the company's creditors and employees.

Moreover, and especially regarding listed companies and other large public companies, there is a move towards the implementation of corporate social responsibility programmes with the aim of involving companies in the social concerns of the community.

In addition, concerns about integrity and ethical behaviour in the workplace led to the enactment of Law No. 73/2017, of 16 August, pursuant to which companies with at least seven employees are required to put in place a code of good practice to prevent and combat harassment in the workplace.

V SHAREHOLDERS

i Shareholder rights and powers

The shareholders' general meeting is composed of all the shareholders with voting rights and to which the more structural decisions concerning the company are attributed (e.g., amendments to the by-laws of the company and distribution of profits). The shareholders' general meeting may adopt resolutions on matters that are specially assigned to it in the law or in the by-laws and that do not fall within the scope of powers of the other corporate bodies. The shareholders' general meeting may also deliberate on matters relating to the management of the company when requested to do so by the board of directors.

Each share carries one vote, unless the by-laws foresee either that one vote is attributed only to a certain number of shares if it encompasses all shares of the company and if at least €1,000 of capital is equivalent to one vote; or votes issued above a certain threshold are not considered when issued by a sole shareholder when acting by itself or as a representative of other shareholders. Nevertheless, in the latter case, the CGC recommends that the by-laws foresee the obligation to review such voting rights limitation at least within every consecutive five-year period.

Multiple-vote shares (i.e., shares that grant more voting rights to their shareholders than other shares that also grant voting rights) are not admissible under the law, although certain authors have recently challenged the applicability of this limitation to listed companies, namely if such limitation was eschewed for loyalty-type securities. There is, however, little market practice in the granting of special rights (including rights to privileged dividends) to long-term shareholders.

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Shareholders are legally required to vote or abstain using all the shares they hold in the company, and cannot split their voting rights to issue different votes in respect of the same issue.

Dissenting shareholders have the right to exit the company against the payment of a monetary consideration in certain legally defined situations, such as:

a when the shareholder votes against the transfer of the corporate seat to another country; or

b if the shareholder voted against a merger, demerger, transformation or return to operation of a company after winding-up proceedings are initiated, and such exit right is provided for in law or in the company by-laws.

The inclusion of other exit rights in the by-laws, for which dissenting shareholders would need to rely on mechanisms agreed in a shareholders' agreement, is not accepted by some scholars.

ii Shareholders' duties and responsibilities

Shareholders are required to not take part in any decision when, among others, it pertains to any:

a waiver of any obligation of the shareholder, whether as a shareholder or a member of other corporate bodies;

b dispute between the company and the shareholder;

c dismissal, for just cause, of a shareholder as member of a corporate body; or

d any relationship between the company and the shareholder outside the corporate relationship.

Other than the foregoing, and without prejudice to a general duty to act in good-faith, shareholders are not subject to any specific duty of loyalty or diligence towards the company or its stakeholders. There is also no code of best practice for shareholders.

Notwithstanding, shareholders are not entitled to influence the board of directors (unless a decision by the shareholders on managerial matters is requested by the board), and any shareholders exerting such influence (i.e., shareholders that by themselves or under a shareholders' agreement have the right to dismiss a director and have determined such person to act or not act in a certain way) will be, with the influenced director, jointly liable towards the company, its shareholders and its creditors for such influence if a decision detrimental to the company's own interests is adopted. This also applies to the influence of the shareholders over members of the auditing bodies.

Shareholders are also subject to joint liability with the persons they appoint (when able to determine such appointment by themselves or under a shareholders' agreement) as directors or members of the auditing bodies when the same are not fit for the performance of such mandate.

iii Shareholder activism

Among other rights, under the PCC shareholders are entitled to bring actions on behalf of the company against those members of the corporate bodies that have breached their duties if the company fails to initiate such actions.

However, possibly because of the existence of controlling shareholders in most Portuguese listed companies and the legal powers attributed to shareholders under Portuguese

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law (namely, having a direct or indirect say on the remuneration of the corporate bodies), shareholder activism is limited, and usually reveals itself only at the annual shareholders' general meeting. As such, proxy battles and shareholder campaigns are not common.

Moreover, as the power to appoint (and dismiss) the directors is with the shareholders, directors are more likely to align themselves with the (controlling) shareholders, or at least to heavily consider the shareholders' interests in the way they manage the company.

iv Takeover defences

Companies usually include defensive mechanisms in their by-laws against takeovers, such as the granting of pre-emption rights to the existing shareholders, the requirement for the company's consent to a transfer of shares and limitations to voting rights.

For listed companies, the PSC provides for a type of board neutrality rule pursuant to which, as from the moment the board of directors is aware of a decision to launch a takeover bid over more than one-third of a specific category of the company's share capital, and until the conclusion or prior to the ending of the takeover process, the board of directors cannot take any decisions outside the normal management of the company that may significantly impact the purposes of the bidder. This rule can, however, be bypassed by a decision of the shareholders' general meeting expressly convened with the purpose to decide on such actions and approved by two-thirds of votes issued. More importantly, this rule is not applicable to Portuguese companies if an offer is made by a company from a foreign country where such board neutrality rule is not in force.

Breakthrough rules of sorts also exist, allowing Portuguese companies to choose to provide in their by-laws that restrictions (whether arising from the by-laws or shareholders' agreements) applicable to the transfer of securities and to the exercise of voting rights in the company are suspended regarding a takeover bid, and that if the bidder acquires more than 75 per cent of the company's share capital with voting rights following the takeover, any of those limitations to the transfer of securities and the exercise of voting rights cease to apply to the bidder. These limitations, if adopted, are valid for an 18-month period and need to be subsequently renewed by a decision of the shareholders' general meeting. Failure to adopt this provision ensures that the by-laws of companies cannot require that any decision to change or eliminate restrictions to the sale of securities or the exercise of voting rights must be approved by a majority of more than 75 per cent of issued votes.

With Decree-Law No. 20/2016, of 20 April, financial institutions (other than savings banks and mutual agricultural credit banks) are required to decide on the maintenance of any voting rights limitations included in their by-laws every five years, the decision to be made by simple majority if proposed by the board of directors. Failure to take that decision until the end of each five-year period renders the limitation null and void.

In addition, the PSC also requires that any shareholder agreement in respect of listed companies that aims to ensure or prevent the success of a takeover bid is disclosed to CMVM – failure to do so renders any decision approved with the votes issued in execution of such agreements null and void.

Moreover, the PSC also requires that the board of directors issues a report (to be made available to the public) upon receiving a takeover bid stating the board of directors' assessment (duly justified and impartial) of such offer, including information about any negative votes in said report, but does not limit the board of directors from searching for another investor (in fact, it expressly acknowledges such).

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Staggered boards (i.e., boards where the directors are appointed to different terms of office) are not common, since the board of directors is generally appointed as whole and, for some scholars, directors cannot be appointed to a term exceeding the term of the board of directors, and shareholders have full control over the possibility to dismiss at all time the members of the board of directors.

v Contact with shareholders

As discussed above, primary contact between the board of directors and the shareholders occurs at the annual shareholders' general meeting, in which directors usually take part. Other formal contact opportunities may arise from the exercise, by the shareholders, of their right to information.

VI OUTLOOK

Corporate governance will continue to be a significant concern for companies and their stakeholders in the future, both for listed and non-listed companies, especially regarding risk management, transparency and remuneration schemes. It is foreseeable that the impact of entities such as CMVM and the BdP will continue to be of significance in the setting of new roads ahead on corporate governance in Portugal.

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Appendix 1

ABOUT THE AUTHORS

PAULO OLAVO CUNHA

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Paulo Olavo Cunha joined VdA in 2005 and is the head partner of the corporate and governance practice. Specialised in company law, he has been responsible for major projects, transactions and group restructuring operations. Paulo has been actively providing advice to corporate bodies of some of the major Portuguese companies in strategic and complex corporate-related aspects and has been providing highly specialised legal assistance to (listed) public companies in dealing with their shareholder relations and disputes.

In his advisory role to large companies, Paulo was a member of their corporate governance and corporate sustainability and ethics committees as an expert, and prepared several legal opinions for management and supervisory bodies. Paulo is also a member of the corporate bodies of several Portuguese companies.

Paulo has concomitantly maintained a strong academic career, achieving his PhD in commercial law in 1986 and being professor of law at the Portuguese Catholic University of Lisbon, responsible for lecturing in and coordinating courses on commercial and corporate law, mainly at the Catholic University of Portugal (Lisbon and Oporto). Paulo is also an author of a vast bibliography on commercial, insolvency and corporate law, and has been a participant in numerous conferences, seminars and round tables in his areas of expertise.

Paulo is admitted to the Portuguese Bar Association and the International Bar Association.

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Cristina Melo Miranda joined VdA in 2013 and is an associate in the corporate and governance practice, actively participating in several transactions and group restructuring operations. With professional experience in telecommunications, project finance and natural resources law, Cristina has been actively advising companies in complex corporate-related aspects.

Cristina has a master in judicial sciences (specialising in business law) from the Faculty of Law of the Catholic University of Portugal, Lisbon. Cristina attended several courses and post-graduation courses in commercial law, intellectual property, taxation and sports law, having attended the doctoral programme (teaching sessions) at the Faculty of Law of the Catholic University of Portugal, Lisbon.

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