

THE CORPORATE
GOVERNANCE
REVIEW

TWELFTH EDITION

Editor
Petra Zijp

THE LAWREVIEWS

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PREFACE

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

In this 12th edition, we are seeing that corporate governance has become an even more vital and all-encompassing topic, especially this second year after the start of the covid-19 pandemic – a year in which we have continued to see climate issues, political instability, technological change, a steady increase in attention to environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. As this Review's previous editor mentioned in his preface, 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, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? And how do corporations report? It has become increasingly relevant that corporations report on not only financial information, but also on reliable and comparable sustainability information – non-financial information that investors and other stakeholders need.

We fortunately continue to see proposals for new laws, regulations and other initiatives for a global framework of sustainability disclosure that is based upon the needs of investors and the financial markets. I should like to highlight two developments in this respect. First, the EU Corporate Sustainability Reporting Directive (CSRD) proposal of April 2021. It forms part of the European Green Deal. This proposal should assist companies in meeting the increasing demands for sustainability information. Companies within the scope of the CSRD proposal would have to report on a whole range of sustainability issues relevant to the company's business. Sustainability information would cover not just environmental factors but also social and governance factors. Governance factors encompass the role of the corporation's administrative, management and supervisory bodies (including with regard to sustainability matters and their composition; business ethics and corporate culture, including anti-corruption and anti-bribery; the corporation's political engagements, including its lobbying activities; the management and quality of relationships with business partners, including payment practices; and the corporation's internal control and risk management systems, including for the reporting process). The EU has indicated that it is clearly in the

interest of the EU and European companies and investors to have standards that are globally aligned, and has indicated that EU standards should aim to incorporate the essential elements of globally accepted standards currently being developed.

This touches upon the second development I want to mention. The trustees of the IFRS Foundation announced the formation of the International Sustainability Standards Board (ISSB) on 3 November 2021 at COP26 in Glasgow. The ISSB will develop – in the public interest – standards that will result in a high-quality, comprehensive global baseline of sustainability disclosures focused on the needs of investors and the financial markets. The aim of the ISSB’s standards is to cover important sustainability topics (environmental, social, governance – ESG) on which investors would like to be informed. Climate-related information will be dealt with first, given the urgency in this field. The ISSB has indicated that it will build on the work of existing investor-focused reporting initiatives to become the global standard-setter for sustainability disclosure for the financial markets. These two initiatives – on a regional and a global scale – may prove to bring about a sea change in the way corporations report and – maybe – conduct their business.

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

My aim as the new editor of this Review will continue to be to achieve a high quality of content so that the 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 would like to thank my partner and wonderful colleague Willem Calkoen for his outstanding work over the past years as editor of this Review. It is an honour to take over from him, and I fully realise that I have some big shoes to fill. For now, I would like to thank all the contributors who have helped with this project. I hope this book will give you food for thought. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Petra Zijp

NautaDutilh

Amsterdam, The Netherlands

March 2022

PORTUGAL

Paulo Olavo Cunha and Cristina Melo Miranda¹

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 among listed companies and medium-sized 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, notably for financial institutions and state-owned companies.

Soft law instruments need also to be considered. The most relevant are 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, as well as the Corporate Governance Code (CGC) issued by the Portuguese Institute of Corporate Governance (last revision dated 2020) and applicable to companies under the supervision of the CMVM, but still on a comply or explain basis.

A significant overhaul of the PSC was enacted at the end of 2021 (entering into force at the end of January 2022) with effects on the Portuguese framework of corporate governance, especially for listed companies, reflecting relevant changes at the European level on matters such as shareholders' rights, related-party transactions and remuneration of board members.

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.

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

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

chartered accountant) or of a supervisory board (with a minimum of three members, one of whom must 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, to the extent that they are not fully dominated by a company adopting a reinforced auditing structure, 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.

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 the CMVM and by the BdP.

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 those 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 foregoing, 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 so 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 greater 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.

Board of directors' structure and practices

A board of directors is responsible for managing the activities of a company. However, members of an audit committee (which is a body within the board of directors) in the Anglo-Saxon model are legally prevented from carrying out executive tasks.

A 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. The CGC further recommends that the number of non-executive directors shall be higher than the number of executive directors.

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 specifically.

Also very common in large public 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 the choice to the shareholders' general meeting, may be entitled to have a 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 the board's meetings and chairing them. Although under the PCC there is no requirement for the roles of chief executive officer 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 a 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 a 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 valid and binding on the company.

ii Directors

Appointment and dismissal

In the classic (Latin) 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 these 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. Directors are now required to formally accept their appointment and to confirm in writing that they are not aware of any circumstances that may prevent them from fulfilling their duties.

Terms of office can run for up to four years, as defined in a company's by-laws and being freely renewed; however, directors remain in office after the lapse of the original 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 latter of its director duties.

Incompatibility and independence requirements of directors are only imposed by the PCC in respect of the audit committee. Members of the audit committee are subject to incompatibility provisions, requiring that, among other things, 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.

For listed companies and large public companies, it is further required that at least one of the audit committee members has achieved a level of higher education that is adequate for the performance of his or her duties, is knowledgeable in auditing or accounting, and is independent (i.e., he or she is not associated with any specific set of interests in the company, and is not in any situation that may hinder the analysis and decision capacity of a director). Listed companies are required to have audit committees with a majority of independent members.

Under the German model, directors are subject to specific incompatibility requirements, namely being prevented from being a member of the general and supervisory board.

However, the CGC recommends that each company – irrespective of its governance model – should include at least one-third of non-executive directors that are independent directors (offering a specific concept of independence for this purpose, which also incorporates a cooling-off period).

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 2020, different genders representing at least 33.3 per cent of the total members of those bodies. This means that if the board is composed of seven members, at least three should be of a different gender from the others. Note, however, that diversity (notably, gender diversity) is a recommendation of the CGC for all corporate bodies.

Duties

Directors (both executive and non-executive) 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 activities) 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 notably include an obligation to:

- a* 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 (unless, as from April 2022, the company is subject to a restructuring process under the Insolvency Code);

- b* 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* 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 that conflict or potential conflict to the other directors, and is prohibited from taking part in the relevant decisions that could be affected by that conflict or potential conflict of interests); and
- d* ensure conformity between actions and respective records and publications.

Compliance with these duties implies that the directors shall not accept a mandate if there is a lack of appropriate personal and professional conditions to carry out the mandate in an 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* in a one-tier management structure models (classic (Latin) 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* in a 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 this 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 entitled only to a fixed remuneration (this rule being recommended under the CGC to apply to all non-executive directors).

The PSC now requires listed companies to put in place a remuneration policy for members of corporate bodies that includes, as a minimum, certain legally mandatory content (e.g., details of variable components and other bonuses attributed and stock options), the derogation of which can only take place on an extraordinary basis to address long-term

sustainability of the company or the company's viability. The remuneration policy must be available for public access on the company's website and must be approved by the shareholders' general meeting at least every four years.

In addition to the remuneration policy, the board of directors of listed companies is also required to issue annually, for assessment by the shareholders' general meeting, a clear and comprehensive report (or chapter in the annual management report to be submitted with the annual accounts) providing a comprehensive view of remuneration, including all benefits allocated or due during the previous financial year to each member of the administrative and supervisory bodies, in accordance with the remuneration policy in place, including newly appointed members and former members.

Law No. 28/2009, of 19 June, imposes on public interest entities (as defined in Article 3 of the Annex to Law No. 148/2015, of 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 ensuring 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;
- b* is aligned with the company's long-term interests; and
- c* rewards performance.

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 in an informed manner, 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, this guarantee is legally waived for non-executive directors who are not remunerated as such, and may be waived by the shareholders' general meeting for other directors (excepted for listed companies and large public companies).

Directors are also subject to tax-related liability (civil or criminal liability), liability for administrative offences, criminal liability and civil liability within the context of insolvency and environmental affairs. The legal framework of specific corporate crimes and misdemeanours has been reinforced, with changes entering into force in March 2022. In this regard, there is significant stiffening of the penalties applicable to corporate crimes.

iii Auditing bodies

Company auditing bodies and their tasks vary from corporate model to corporate model. However, in broad terms, auditing bodies are responsible for the continuing supervision of a company's activity, especially financially and on accounting matters, but this is not absolute: for instance, any agreement to be entered into between a company and its directors, if lawful, must be preceded by an opinion of the company's auditing body.

In addition, the members of an auditing body 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 those duties.

Considering the tasks vested in the auditing bodies, it is understandable that members are subject to independence requirements and to incompatibilities (as previously discussed in respect of the audit committee), and auditors must be certified chartered accountants registered with the Chartered Accountants Association. These requirements were extended by Law No. 148/2015, of 9 September.

III DISCLOSURE

Directors are required to produce and disclose annually to the shareholders, who approve the same, the accounting documentation of the company, which includes submission by the board of directors to the shareholders' general meeting of the annual accounts, the attachments to the annual accounts (in which the directors are required to disclose, if the company's accounts do not adhere to International Financial Reporting Standards, all transactions with related parties) and the annual management report (in which the directors are required to disclose, among other things, the authorisations granted to transactions between the company and its directors, and the company's financial risk coverage policy). 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), as described above.

This information needs to be made available to shareholders at the company's head office and on its 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 all 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 make a decision.

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, 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 a company and its directors, including the remuneration policy in force from time to time (as discussed above in respect of directors' remuneration), any transactions with related parties outside the company's day-to-day activity, on conditions other than market standard or that do not follow the approval procedure legally required for that effect, information of an accounting nature (disclosed on a different timely basis) and any information that may have affect the value of the securities being traded (immediately disclosed). However, there are certain situations that may legitimise a delay in the disclosure of this information to the market.

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

The PSC also requires that a listed company include in its annual management report a chapter:

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

As discussed, company directors are responsible for disclosing to the shareholders in the annual accounting documentation the financial risk coverage policy of the company, 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 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; further, the auditing bodies are also 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 significant dimension, internal organisation and nature, and with a significant 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 scale and complexity of the risks associated with their activity.

Furthermore, directors are required to perform their mandate to achieve the company's interests, 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 and ESG assessment and reporting. This will be strengthened notably by EU legislative developments on corporate sustainability reporting.

This will be in addition to the existing reporting requirements in the PCC, pursuant to which, together with the annual accounts, the management of large companies that are public interest entities (e.g., listed companies), which at the end of their financial year exceed an average number of 500 employees during the annual financial year, must issue a non-financial statement containing enough information to understand the evolution, performance, position and impact of its activities, referring at least to environmental, social and employee issues, equality between women and men, non-discrimination, respect for human rights, the fight against corruption and bribery attempts.

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

A shareholders' general meeting is attended by all shareholders with voting rights and to whom the more structural decisions concerning a 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 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 this voting rights limitation at least once within every consecutive five years.

With the entry into force of the last amendments to the PSC at the end of January 2022, multiple-vote shares (i.e., shares that grant more voting rights to their shareholders than other shares that also grant voting rights) become admissible for listed companies (or for companies that subject the implementation of multiple-vote shares to the listing of the company), up to a limit of 5 votes per share. However, in respect of decisions of the shareholders' general meeting concerning the voluntary delisting of the company (or any other decisions foreseen in the company's by-laws), those multiple-vote shares shall have votes only in accordance with the rules applicable to ordinary shares.

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 a shareholder votes against the transfer of the corporate seat to another country; or
- b* if a shareholder votes against a merger, demerger, transformation or return to operation of a company after winding-up proceedings are initiated, and this 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 Shareholder duties and responsibilities

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

- a* waiver of any obligation of the shareholder, whether as a shareholder or a member of another corporate body;
- b* dispute between the company and the shareholder;
- c* dismissal, for just cause, of a shareholder as a 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.

Nevertheless, 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 who by themselves or under a shareholders' agreement have the right to dismiss a director and have determined that the person should or should 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 the appointment by themselves or under a shareholders' agreement) as directors or members of the auditing bodies when they are not fit for the performance of such a mandate.

However, the foregoing is without prejudice to the duties and liabilities that arise to institutions' investors in respect of their actions as shareholders of listed companies (notably a duty to divulge to the public the way in which it votes on relevant matters at the shareholders' general meeting), currently imposed by the PSC.

iii Shareholder activism

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

However, possibly because of the existence of controlling shareholders in most Portuguese listed companies and the legal powers attributed to shareholders under Portuguese 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) 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 against takeovers in their by-laws, such as the granting of pre-emption rights to 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 of 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 make any decisions outside the normal management of the company that may significantly affect the purposes of the bidder. This rule can be bypassed, however, by a decision of the shareholders' general meeting expressly convened for the purpose of deciding 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 the 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 18 months and need to be renewed subsequently by a decision of the shareholders' general meeting. Failure to adopt this provision ensures that the by-laws of a company 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.

Pursuant to 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. This decision can be made by a simple majority if proposed by the board of directors. Failure to make this decision until the end of each five-year period renders the limitation null and void.

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 the CMVM. Failure to do so renders any decision approved with the votes issued in execution of such agreements null and void.

Moreover, the PSC requires that the board of directors issues a report (to be made available to the public) on receiving a takeover bid stating the board's assessment (duly justified and impartial) of the offer, including information about the votes expressed in the resolution of the board that approved it and whether conflicts of interest between the company's directors and the recipients of the offer exist, but does not limit the board of directors from searching for another investor (in fact, it expressly acknowledges this).

Staggered boards (i.e., when directors are appointed for different terms of office) are not common, since the board of directors is generally appointed as a whole. 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 the members of the board of directors at any time.

v Contact with shareholders

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 by reason of the continuing proliferation of non-statutory rules and regulations issued under the powers of regulatory entities.

The changes to the PSC will, of course, have an impact on the governance of listed companies (and non-listed companies, by way of best practice), notably on matters concerning remuneration policies and the relationship with shareholders – changes that would have more of a practical impact if Portuguese listed companies had in effect a more dispersed share capital than what is usual.

The strengthening of the legal framework of specific corporate crimes and misdemeanours, entering into force in March 2022, may also bring about an effectiveness to those rules that has not been seen since those rules were first enacted in the late 1980s (by Decree-Law No. 184/87, of 21 April), six months after the approval of the PCC and subsequently affect the way in which members of the corporate bodies go about the discharge of their duties.

Moreover, with the enactment of Decree-Law No. 11/2022, of 12 January, a specific regime has been approved regarding 'participatory loans' (i.e., onerous loans or debt-representing securities, the remuneration and repayment or amortisation of which depend, even partially, on the result of the borrower's activity and whose outstanding value may be converted into the borrower's share capital), despite this regime not addressing governance matters directly, the rules now enacted will reshape the relationship between the companies and these investors.

Finally, it is anticipated that the developments at EU level on ESG reporting matters (especially for listed companies) will also have an impact on the way those companies – and by spill-over the entities in their supply chains – carry out their business and the information they disclose to the market and their shareholders and investors.

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