IN-DEPTH

Corporate Governance

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In-Depth: Corporate Governance (formerly The Corporate Governance Review) is a useful overview of the corporate governance regimes in key jurisdictions worldwide. Through the lens of recent trends and developments, it examines the most consequential rules relating to board composition and practices; director duties; reporting and disclosure requirements; corporate responsibility; shareholder rights and duties; and much more.

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Portugal

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Summary

Introduction

The Portuguese legal framework regarding corporate governance of listed companies 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 listed financial institutions, state-owned companies and sports companies.

Soft law instruments need also to be considered. The most relevant are the recommendations issued by the Securities Commission (CMVM), which are mandatory to listed 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 (latest revision dated 2023) and applicable to companies under the supervision of the CMVM, but still on a comply or explain basis.

Corporate governance of listed companies in Portugal is somewhat hindered by poor share capital dispersion, compared to other jurisdictions, and by a market that has seen very few listings in recent years.

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Year in review

In 2023, as with recent years, the socioeconomic framework that Portuguese listed companies had to navigate in 2023 brought practical impacts on their internal governance. Existing and new military conflicts and climate phenomena have cause disruptions to supply chains, to sources and costs of funding, and have overall impacted the way in which listed companies are managed.

In addition, 2023 (and 2024 to some extent) has seen the approval or implementation of new rules on corporate governance matters in Portugal. In this context, it is particularly noteworthy the significant overhaul of the CGC enacted in March 2023 (that will apply to the reporting done by listed companies in 2024 in respect of the 2023 exercise), reflecting previous relevant changes on European and Portuguese rules on matters such as shareholders' rights, related-party transactions and remuneration of board members, but also including for the first time a chapter on sustainability and rules on artificial intelligence in the context of corporate governance, in line with current international trends and concerns on corporate governance.

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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 (admissible only 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 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, among others, listed companies.

Although the classic model is predominant in the Portuguese corporate landscape, listed companies have been 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 (admissible only 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, 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 listed companies, and recommended by 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, is 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 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 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 and should accept their nomination. 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 his or her director duties.

Incompatibility and independence requirements of directors are imposed by the PCC only 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, 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, with the chair also being independent.

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 who are independent directors (offering a specific concept of independence for this purpose, which also incorporates a cooling-off period). This provision (Recommendation IV.2.4) is only applicable to the classic and Anglo-Saxon models since all members of the board are executive.

Nevertheless, from a legal perspective, independent directors share the same status as non-independent directors, in the sense that they are entitled to receive all information and take all initiatives they deem relevant or necessary to discharge their duties as directors of the company. This is not to say that, in practice, independent directors tend to adopt a less hands-on approach to the involvement with the management of the company.

In addition, listed companies must 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. Pursuant to changes at the EU level, listed companies will be required to ensure that, by June 2026, board members of the under-represented gender hold either at least 40 per cent of the non-executive director positions or at least 33 per cent of all director positions, including both executive and non-executive directors.

Duties

Directors (both executive and non-executive, independent or non-independent) 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:

1. 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 the company is subject to a restructuring process under the Insolvency Code);
2. 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);
3. 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
4. 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:

1. in 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
2. 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 take place only 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.

Financial institutions are also required to operate a gender-neutral remuneration policy (i.e., a remuneration policy based on equal pay for male and female workers for equal work or work of equal value).

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

1. adequately remunerates directors for the responsibilities they undertake and the competencies they use for the company's benefit;
2. is aligned with the company's long-term interests; and
3. 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:

1. prove that their actions were fault-free;
2. prove that their actions were performed in an informed manner, free of any personal interest and according to a business judgement criterion;
3. were not part of the resolution, or voted against it, having expressly recorded in the minutes of the meeting their disagreement; or
4. 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 €250,000 for listed companies; however, this guarantee is legally waived for non-executive directors who are not remunerated as such.

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 recently with 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.

Corporate 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 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, 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:

1. concerning the company's corporate governance structure and practices, detailing, among other things, the share capital structure;
2. identifying limitations on transfers and special rights attributed to shareholders;
3. outlining the voting rights limitations (even those arising from shareholders' agreements of which the company is aware);
4. regarding any relevant agreements entered into by the company and its employees or the members of the corporate bodies; and
5. 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.

Furthermore, listed companies are entitled to be provided with information as to the identity of their shareholders by the central securities depository or by any financial intermediary.

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.

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Environmental, social and governance

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.

In this respect, the current CGC went further and expressly acknowledged that the purpose of corporate governance was to ensure and promote the sustainable performance and development of the company, further contributing to the sustainable development of the community where the companies are involved. In particular, the CGC requires that: (1) 'in their organisation, operation and definition of their strategy, companies contribute to the pursuit of the Sustainable Development Goals defined within the framework of the organisation, in terms that are adjusted to the nature of their activity and their size, nature of their activity and their size'; (2) 'the company periodically identifies, measures and endeavours to prevent negative effects related to the environmental and social impact arising from the exercise of its activity, in terms adjusted to the nature, the respective nature and size of the company'; and (3) 'in its decision-making processes, the board of directors weighs up the interests of shareholders and other investors, employees, suppliers and other stakeholders in the company's business'.

Shareholders, directors and members of the auditing bodies who report breaches of EU law are granted special protection pursuant to the Whistleblowing Law (Law No. 93/2021, of 20 December). Moreover, and especially regarding listed 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 environmental, social and governance (ESG) assessment and reporting. This will be strengthened notably by EU legislative developments on corporate sustainability reporting.

In particular, we note that, as from January 2024, EU-level regulation shall tackle ESG concerns and impose several sustainability reporting obligations on large EU companies, whether listed or not (the Corporate Sustainability Reporting Directive sets out the criteria for a company to be held as a large company), and, by spillover, the other entities in their supply chains. Reporting obligations will include matters such as:

1. business strategy, targets, and risks and opportunities relating to sustainability matters (companies will also be obligated to communicate their time frame for achieving their sustainability goals as well as their progress in reaching these targets);
2. the role of board and management in sustainability matters; and
3. the primary actual and potential adverse impacts on the ESG factors connected to the activities of the company and its value chain (companies will also be obligated to report on the results from the implementation of due diligence processes throughout the value chain).

Violations of the sustainability reporting obligations entail a risk of penalties and fines, as well as the publication of the name of the person responsible for the violation.

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) that 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 requirement that companies with at least seven employees must put in place a code of good practice to prevent and combat harassment in the workplace.

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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 that 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.

If shareholders cannot attend a shareholders' general meeting, they may assign their voting rights to a proxy. The proxy authorisation must be addressed to the chair of the shareholders' general meeting.

Listed companies (as well as companies that subject the implementation of multiple vote shares to the prior listing of the company) are allowed to issue multiple vote shares (i.e., shares that grant more voting rights to their shareholders than other shares that also grant voting rights), up to a limit of five 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:

1. when a shareholder votes against the transfer of the corporate seat to another country; or
2. 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 Shareholders' duties and responsibilities

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

1. waiver of any obligation of the shareholder, whether as a shareholder or a member of another corporate body;
2. dispute between the company and the shareholder;
3. dismissal, for just cause, of a shareholder as a member of a corporate body; or
4. 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) that are 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 requires that, as of the moment the board of directors of a company becomes aware of a decision to launch a takeover bid over more than one-third of a specific class of shares, and until the conclusion or the ending of the takeover process, the board of directors cannot make any decisions outside of 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 these 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 Engagement 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.

Listed companies are required to designate a company secretary who is responsible for providing shareholders with the information they have requested in exercise of their right to information as described above.

Outlook and conclusions

Corporate governance will continue to be a significant concern for companies and their stakeholders in the future, for both 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, notably in line of the significant changes that ESG concerns, and adjacent regulation will bring about in the way management is carried out – notably for listed companies.

In addition, AI in the context of how business is done and decision-making takes place at company level will trigger important changes on how traditional corporate and governance standards and rules evolve – notably on how to adequately manage new risks that AI brings into the business (how to properly manage the interests of all stakeholders, privacy and discriminatory concerns, liability and transparency over decision-making involving AI, among others), but also on how to harness the power of AI to promote solutions that allow for more effective solutions being put in place to ensure that proper corporate governance is implemented.

As such, relevant changes are expected in the way companies carry out their business (aligned with values and interests linked not only to shareholders and dividend maximisation) and in the way companies interact with (and inform) the market and their investors that could propel developments in corporate governance matters.

At the Portugal level, it is also important to highlight that corporate governance of listed companies in Portugal is somewhat hindered by poor share capital dispersion, compared to other jurisdictions, and by a market that has seen very few listings in recent years. It is expected that at least this second consideration may be bypassed, with several companies engaged with the manager of the securities market with a view to launch public offers in the coming months, but also by reason of the expected changes that the EU Listing Act may bring about in facilitating the administrative burden associated with the launch of public offers.

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Endnotes

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