# The Corporate Governance Review

Fifth Edition

Editor
Willem J L Calkoen

Law Business Research

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# The Corporate Governance Review

Fifth Edition

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Willem J L Calkoen

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# EDITOR'S PREFACE

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

In this fifth 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 vital staff members. Do they show commitment to all stakeholders and to long-term shareholders only, 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, 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getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated.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 outside 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 outside directors understand the business? How much time should they spend on the function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders?

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.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, wise boards have 'selected engagements' with stewardship shareholders to create trust. 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 gradually amassed too much power or companies have not developed new strategies and have fallen into bad results – and sometimes even failure. More are failing in the financial crisis than in other times, 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.

This all implies that executive and non-executive directors should work harder and more as a team on policy, strategy and entrepreneurship. It remains a fact that more money is lost through lax directorship than through mistakes. On the other hand, corporate risk management is an essential part of directors' responsibilities, and sets the tone from the top.

Each country has its own measures; however, the chapters of this book also show a convergence. 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, in time, 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 by reading about the laws 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 2015

# Chapter 22

# PORTUGAL

*Francisco Brito e Abreu and Joana Torres Ereio*[1]

## I OVERVIEW OF GOVERNANCE REGIME

### i Sources and recent developments

The corporate governance rules applicable to Portuguese listed companies – like those in EU Member States in general – derive from various sources: laws and regulations binding on companies and corporate governance codes establishing a set of recommendations and best practices.

The main legal source of corporate governance rules in Portugal is the Portuguese Commercial Companies Code, enacted by Decree-Law No. 262/86, of 2 September, as amended (CSC), which sets out the general legal framework governing companies, including, in particular, rules applicable to corporate bodies, shareholders' general meetings, shareholders' rights and obligations, and the Portuguese Securities Code, enacted by Decree-Law No. 486/99, of 13 November, as amended (CVMob), which is applicable to companies with capital open to investment by the public (among others, listed companies), setting out, in particular, specific information rules and transparency duties, attribution of voting rights and shareholders' general meetings, as well as, in certain matters, to companies in general.

Significant changes took place in corporate governance soft law in 2013. The Portuguese Securities Market Commission (CMVM)[2] approved a new Corporate

1 Francisco Brito e Abreu is a partner and Joana Torres Ereio is a senior associate at Uría Menéndez – Proença de Carvalho.

2 The CMVM was established in April 1991 and entrusted with the task of supervising and regulating securities and other financial instruments markets, as well as the activities of those operating in those markets. The CMVM is an independent public institution, with administrative and financial autonomy.

Governance Code (the 2013 CMVM Code), replacing the code in force since 2010.[3] The first private-initiative corporate governance code was also approved in 2013: the Code of the Portuguese Corporate Governance Institute (IPCG), a private association engaged in the investigation and promotion of corporate governance principles (this private-initiative code was updated in early 2014).[4]

Despite their non-binding nature, listed companies are obliged to adopt one of the codes and declare, in their annual corporate governance report,[5] to what extent the chosen corporate governance code is observed and, if that is the case, the reasons for not complying with any of its provisions (statement of compliance)[6] – the 'comply or explain' rule. As for non-listed companies, which are not bound to these rules, these codes serve, to some extent, as guidelines of the best corporate governance practices and therefore have a significant role at the decision-making level of directors and shareholders.

Regarding regulations about corporate governance, it is worth mentioning that CMVM Regulation No. 4/2013, which revoked Regulation No. 1/2010 and governs (and includes a draft of) the annual report on corporate governance, entered into force on 1 January 2014. This recent Regulation of the CMVM introduced more flexibility in terms of the choice of a corporate governance code by listed companies. In fact, it establishes that listed companies shall adopt the CMVM corporate governance code or another corporate governance code produced by a competent entity and states that such a choice shall be justified in the annual corporate governance report (while Regulation No. 1/2010 established several requisites that other corporate governance codes had to comply with). On the other hand, and even though the number of recommendations was reduced, information duties increased under Regulation No. 4/2013.

Specific types of companies are also subject to sectoral corporate governance rules – for instance, the corporate governance framework of state-sector companies is established in Decree-Law No. 133/2013, of 3 October (as amended), which enacted the State-Sector Companies Legal Framework.

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3 An English version of this code is available at www.cmvm.pt/EN/Recomendacao/Documents/Final.trad.Cod.Gov.Soc.09.10.2013.MM.pdf. The first Portuguese corporate governance set of recommendations was produced by the CMVM in 1999. Since this date, the recommendations of the CMVM have been modified approximately every two years, which shows how corporate governance has been constantly evolving.

4 A Portuguese version of this code is available at www.ecgi.org/codes/documents/code_portugal_jan2014_pt.pdf.

5 The annual report on corporate governance matters forms part of companies' annual accounts and is prepared pursuant to article 245-A of the CVMob and CMVM Regulation No. 4/2013. This report is made available to investors and public in general, both at the CMVM's website (www.cmvm.pt) and on the website of each listed company.

6 This results from article 1 of CMVM Regulation No. 4/2013. The falsity, incorrectness or incompleteness of this declaration may lead to administrative and civil liability of the company or of its directors.

In addition to the above, some Portuguese listed companies have their own corporate governance codes or manuals, which set out internal corporate governance guidelines.[7]

### ii Enforcement

Portuguese listed companies' compliance with corporate governance rules is confirmed through each company's annual corporate governance report at a double level.

At an internal level, the company's supervisory corporate body must certify the completeness of that report, in light of the provisions of the CVMob and CMVM Regulation No. 4/2013.

At a regulatory level, the content of the annual corporate governance reports is monitored by the CMVM, which, in its capacity as the securities market regulator, often asks listed companies for clarifications and additional information in connection with the reports.

In addition to this, the CMVM prepares an annual report regarding compliance with corporate governance rules by a significant number of listed companies (the CMVM Report),[8] both at market-wide and individual levels. According to a 2009 study prepared by Riskmetrics, the CMVM's corporate governance report is one of the most complete amongst those prepared by the authorities of the EU Member States. The same study considered the Portuguese monitoring system as one of the two most developed in the EU.[9]

## II CORPORATE LEADERSHIP

### i Board structure and practices

***Alternative corporate governance structures***

Following a major legislative reform to the CSC implemented in 2006,[10] Portuguese companies may now adopt one of three corporate governance structures (with the possibility of changing to another structure following incorporation).

First, companies may adopt the 'Latin model', which is the corporate governance structure most commonly used in Portugal and implemented by the majority of both unlisted and listed public limited companies (*sociedades anónimas*),[11] including some

7 This is the case of EDP, whose corporate governance manual is available at www.edp.pt/en/aedp/governosocietario/ManualdeGovernoSocietário/Corporate%20Governance%20Manual/Manual_Governo_Societário_EN_Out12.pdf.

8 The last CMVM Report is for 2012 and is available at www.cmvm.pt/CMVM/Estudos/Em%20Arquivo/Documents/Relatório%20Anual%20Governo%20Societário%202012_GESCOR2_Final.pdf (2012 CMVM Report).

9 Study on Monitoring and Enforcement in Corporate Governance in the Member States (page 63), available at http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf.

10 This legal reform was enacted by Decree-Law No. 76-A/2006, of 29 March.

11 According to the 2012 CMVM Report, approximately 72 per cent of the 43 companies analysed adopted this model (page 15).

of those listed in the Portuguese Stock Index,[12] for example, Galp Energia (oil and gas sector), Sonae SGPS (food industry and distribution sectors), Portucel (pulp and paper sector), BPI (banking sector), Mota Engil (construction sector) and Semapa (pulp and paper, concrete and aggregates sectors). Espírito Santo Saúde (health sector), which was publicly listed in February 2014, also uses the Latin model.

Companies that adopt this model have a board of directors (or a sole director)[13] and a supervisory body (a sole auditor or a supervisory board).[14]

Second, companies may adopt the so-called 'German model', where they will have three corporate bodies: an executive board of directors (or an executive sole director)[15] responsible, in general, for managing and representing the company (though with fewer powers than the board of directors under the Latin model) and a general and supervisory board, the main function of which is to supervise the directors' activity, although it also has powers that would typically be exercised by the shareholders' general meeting, such as deciding on the appointment and dismissal of directors (unless these functions are attributed to the shareholders' general meeting in the articles of association), and may even have to authorise directors to carry out certain acts, if so is established in the company's articles of association.

In addition, in listed companies and those meeting the criteria pointed out in footnote No. 14, the general and supervisory board must include a financial committee with significant powers in the supervision of financial and accounting matters.

This model is also used by some Portuguese listed companies, for instance, EDP (energy sector), which is included in the PSI-20.

Third, companies may choose to implement the 'Anglo-Saxon model', in which case they will have a board of directors and a chartered accountant. Under this model, the board of directors is divided into an executive committee, composed of at least one or two members and responsible for managing the company, and an audit committee composed of at least three members and in charge of, in particular, supervising the activity of the company's management and chartered accountant, and the compliance with the law and with the company's articles of association. The audit committee may not exercise executive functions.

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12 That is, the PSI-20, which comprehends the 20 companies with largest market capitalisation trading on Euronext, Portugal's main stock exchange.

13 Sole directors are permitted in companies whose share capital does not exceed €200,000.

14 Companies are in general allowed to choose between a sole auditor and a supervisory board. However, listed companies and companies that exceed two of the three following thresholds in two subsequent years and that are not fully held by other companies that adopted this model are obliged to have a supervisory board and a chartered accountant: (1) balance sheet: €100 million; (2) total net assets and other income: €150 million and (3) average number of employees during the fiscal year: 150.

15 Sole executive directors are also allowed if the company's share capital does not exceed €200,000.

This corporate governance structure is usually adopted by larger companies, as is the case for a significant number of PSI-20 companies,[16] such as Portugal Telecom (telecommunications sector), REN (energy grid sector), BCP (banking sector), Altri (paper and pulp sector), CTT (one of the recently privatised companies, which is engaged in the postal services sector) and Jerónimo Martins (food industry and distribution sector).

***Composition of the board***

Boards of directors (including executive boards of directors under the German model) must be composed of at least two members (there is no maximum number of members), as established in the respective articles of association.[17]

Each board of directors shall have a chairman, who may either be appointed by the shareholders' general meeting at which the directors are appointed, or elected by the directors themselves. The chairman holds the casting vote whenever the board is composed of an even number of members and in all other cases set forth in the company's articles of association.

***Representation and authority to bind the company***

Boards of directors have full and exclusive powers to represent the companies for which they are appointed (without prejudice to the appointment of attorneys for a specific act or category of acts and to the authority of the general and supervisory board to represent the company in its relations with the directors under the German model).

These representation powers are exercised jointly by the directors, meaning that a company is bound by the acts carried out (or ratified) by the majority of its directors (or, pursuant to the CSC, by fewer directors, as established in the articles of association), provided that they sign the relevant documentation (when applicable) and indicate their capacity as directors.

Regarding certain matters, representation powers may also be exercised by one or more managing directors (please refer to the following section).

In some cases, the execution of a managerial act must be preceded by a resolution of the board of directors approving such act. However, acts following under the scope of the company's corporate purpose do not require a prior resolution of the board, unless the articles of association establish otherwise.

***Delegation***

The CSC allows the board of directors both to delegate certain management matters to one or some of its members, provided that the company's articles of association do not prohibit delegation, and to delegate the ordinary management of the company to one or

---

16 According to the 2012 CMVM Report (pages 15 and 16), companies adopting the Anglo-Saxon model represented 45.3 per cent (against 41.6 per cent in 2011) of the total market capitalisation (even though the Latin model is used by more listed companies).

17 Since 2006 companies are no longer required to have an odd number of members in their boards of directors.

more directors (managing directors) or to an executive committee, provided that such delegation is permitted under the company's articles of association.

In both cases, the board of directors must approve the delegation of powers, which may not relate to certain matters listed in the CSC (for instance, the granting of guarantees by the company and share capital increases). Also, this delegation does not exclude the authority of the board of directors to decide on the delegated matters, nor does it annul the liability of the remaining directors for acts carried out by the managing directors or executive committee.

The delegation of board powers is expressly permitted in companies that have implemented the Latin and the Anglo-Saxon corporate governance models but is not referred to in the legal provisions governing the German model. Hence, scholars tend to sustain that delegation of management powers is not permitted under this structure.

The delegation of management matters to an executive committee in companies following the Latin corporate governance model (which, as referred to above, is the most frequent) is used in most of the Portuguese listed companies.[18]

*CEO and chairman*

It is possible, both for companies following the Latin model and that have an executive committee and for companies that follow the Anglo-Saxon model, to have a chairman and a CEO – the chairman corresponds to the chairman of the board of directors and the CEO to the chairman of the executive committee.

No legal or regulatory provision prevents the same person from performing both offices and a significant number of listed companies do indeed combine the two positions in the same person,[19] including some PSI-20 companies.[20]

*Remuneration*

Pursuant to the CSC, the remuneration of directors in companies following the Latin and Anglo-Saxon governance models is determined either by the shareholders' general meeting or by a remuneration committee appointed by it. Under the German model, directors' remuneration is decided either by the general and supervisory board or by a committee appointed by it or, if the articles of association so establish, by the shareholders' general meeting or by a remuneration committee appointed by it.

The CSC further establishes that, in either case, directors' remuneration must be determined taking into consideration the functions performed by each director and the company's financial situation and that it may either be fixed or partially variable, depending on the company's annual distributable profits. However, the maximum

18 According to the 2012 CMVM Report, 20 of the 31 analysed listed companies following the Latin model had an executive committee (page 16).

19 According to the 2012 CMVM Report, in 50 per cent of the listed companies following the Latin Model the chairman and CEO posts were held by the same person (page 22).

20 This is the case, for instance, of CTT.

percentage of annual profits used for this purpose must be specified in the company's articles of association.[21]

In this respect, the 2013 CMVM Code recommends, in particular, that (1) all members of the remuneration committee (or its equivalent) be independent from management and that at least one of its members has knowledge and experience in remuneration matters; (2) the remuneration committee not comprise any person or entity that has rendered, in the previous three years, services to any structure under the management or to the management itself or that has any relationship with the company or with any of the company's consultants; (3) the remuneration of non-executive directors not include any variable component subject to the company's performance or value; (4) a significant part of the variable remuneration be deferred for at least three years and received only if the company maintains a good performance throughout that period; (5) directors not enter into any agreements with the company or with third parties aimed at mitigating the risk of their variable remuneration.

In smaller companies remuneration of corporate bodies is usually determined by the shareholders' general meeting, while in larger companies this is normally decided by a committee appointed specifically for that purpose.

*Say on pay*

Pursuant to Law No. 28/2009 of 19 June (as amended), the management body (or the remuneration committee, if one exists) of public interest companies[22] shall submit to the annual shareholders' general meeting a declaration regarding the remuneration of the members of its management and supervisory corporate bodies.[23]

This declaration shall include information regarding, in particular, (1) the mechanism enabling the alignment of directors' interests with the company's interests; (2) the criteria for defining the variable component of their remuneration; (3) the possibility of the variable part of the remuneration, if any, being paid, fully or partially, after the clearance of the accounts regarding the entire term of office; and (4) the mechanisms to limit the variable remuneration if the annual results show a significant deterioration in the company's performance over the previous financial year or the same is expected in the ongoing financial year.

21 According to the 2012 CMVM Report, fixed remunerations represented 63.8 per cent of the total remuneration of listed companies' directors, while variable remuneration represented 27.8 per cent. Pension plans and pension funds were the other most relevant form of remuneration, representing 3 per cent of their total remuneration (page 31).

22 Pursuant to Decree-Law No. 225/2008 of 20 November (as amended), listed companies, credit institutions subject to statutory audit, investment funds, pension funds, venture capital companies and funds, insurance and reinsurance companies, among others, are considered public interest companies.

23 CMVM Regulation No. 4/2013 extends this obligation, establishing that the annual corporate governance report shall also include a reference to remuneration received by the directors from companies controlled or fully owned by or that control or fully own the company or that are controlled by the same entity controlling the company.

In addition, these companies must disclose their remuneration policies in their annual accounts – in the case of listed companies, this shall be included in their annual corporate governance report.

### ii Directors

***Legal duties***

Under the CSC, there are two general duties that must be observed by directors in the performance of their management activities: the duty of care and the duty of loyalty.

Pursuant to their duty of care, directors must carry out the company's management with the diligence, dedication, skill and knowledge of the company's business considered appropriate to their functions in the company. In this regard, the law defines a standard: a director must act as a diligent and responsible businessman (prudent businessman).

Although the CSC does not clarify what this general duty includes, it is understood that it includes specific duties such as the duties to (1) monitor the company's activity and economic performance and to control the activities of its employees and officers; (2) remain fully informed, at all times, of the company's status; (3) adequately and promptly execute the necessary management acts, based on proper information; and (4) make reasonable and rational decisions avoiding unmeasured risks that could jeopardise the company's assets.

Directors are also bound to a duty of loyalty, according to which they must act to the exclusive benefit of the company, considering the interests of shareholders and other stakeholders (in particular, employees, clients and creditors) without acting with the intent to obtain benefits for themselves or for third parties while performing their management duties.

It is understood that this general duty entails that directors, in particular, (1) may only enter into agreements with the company where permitted by law and certain requirements have been met (for instance, there are certain agreements that the company is prevented from entering into with its directors, such as the granting of credit or guarantees to secure the directors' obligations; as regards the permitted agreements, the same must, as a general rule, be previously approved by the company's board of directors); (2) may not carry out any activity that conflicts with the company's activity without authorisation obtained at the shareholders' general meeting; (3) may not vote on resolutions of the board of directors when they are affected by a conflict of interest with the company; and (4) may not use the company's assets or know-how to their own benefit and must maintain the confidentiality of all information relating to the company.

In addition to these general duties, the CSC subjects directors to specific duties, such as the duty to carry out the company's activities within its corporate purpose (as set forth in the company's articles of association), the duty to convene the shareholders' meeting when so required by the law and the duty not to execute decisions taken by the board of directors that are null and void.

Further to these duties, sectoral laws and regulations also set forth duties to be complied with by directors while performing their management functions.

In addition, both the company's articles of association and management agreements entered into between the company and the directors may also establish additional duties to be observed by directors.

***Liability***

In the event of a breach of any of their duties, directors may be held civilly, administratively and criminally liable for damage they cause, and they may also be dismissed with just cause by the company.

Directors are civilly liable (joint and severally) towards the company for damage suffered by the latter as a result of any action or omission in breach of their duties, unless they prove that they acted or omitted to act without fault.

Pursuant to the CSC, directors' liability towards the company may be excluded in the following cases:

*a* if the director proves that he or she:
- acted in a duly informed manner;
- free from any personal interest; and
- according to business rationality criteria (the business judgement rule);

*b* if the damage results from a decision of the board of directors and the relevant director has not taken part in the relevant meeting or voted against the winning proposal; and

*c* if the director's relevant act or omission was carried out pursuant to a shareholders' decision (even if such decision is not valid).

Directors are also liable towards the company's creditors if the company's assets become insufficient to fully satisfy the latter's credits as a result of an act or omission carried out by the director with fault. In that event, (1) directors are only liable in case of breach of those specific provisions in law or in the company's articles of association aimed at protecting the company's creditors; (2) directors' fault is not presumed and hence creditors bear the respective burden of proof; and (3) liability is not excluded if the directors' behaviour is based on an invalid shareholders' decision.

Directors are also directly liable towards the company's shareholders (as individuals) and third parties for any damage directly caused to them as a result of their actions or omissions in breach of their duties. The exceptions to directors' liability towards the company also apply in this event.

Moreover, the breach of duties by directors may entail their criminal liability (if the offences at stake are expressly set out in the Portuguese criminal legislation) as well as their liability under the applicable tax, labour and insolvency legal provisions.

Furthermore, in case of a serious breach of their duties, directors may also be dismissed with just cause by the company's shareholders' general meeting.

***Appointment formalities***

Directors may be appointed either in the company's articles of incorporation (as regards the initial term of office) or by the shareholders' general meeting – in which case, the

formalities of shareholders' general meetings need to be complied with, in particular, summoning[24] and information[25] formalities.

As a general rule, no special requirements are needed for an individual to be appointed as a director.

In particular, directors do not have to be shareholders and may either be Portuguese or foreign natural persons[26] – it is possible to appoint a legal person as director, but in such cases that legal person shall indicate a natural person to perform the office in his or her own name (even though the appointed legal person remains jointly and severally liable for any damage caused by the designated natural person).

Despite this general rule, the CSC provides specific requirements regarding directors of listed companies that follow the Anglo-Saxon model (and of companies that meet the criteria indicated above – see footnote 14, *supra*).[27] In this regard, the CSC requires that at least one member of the audit committee hold a degree compatible with his or her functions, expertise in audit or accounting and be independent. In listed companies that trade shares on regulated markets and that follow this model, the majority of the members of the audit committee need to be independent.

The 2013 CMVM Code establishes general recommendations in this regard, recommending that every listed company has an adequate number of independent directors among the non-executive directors (bearing in mind the adopted corporate governance model, its dimension, shareholding structure and free float).[28]

According to the CSC, a director is considered independent if he or she is not linked to any group of specific interests in the company and is not affected by any

24 As a general rule and pursuant to the CSC, shareholders' general meetings need to be summoned with a prior notice of at least one month (in listed companies, the CVMob establishes minimum prior notice of 21 days), even though shareholders may adopt resolutions without any prior formalities provided that some requisites are met (in particular, provided that all shareholders are present or duly represented, which is not feasible for listed companies but is quite common for small-medium unlisted companies).

25 Certain elements need to be provided to the shareholders at the company's registered office in the 15-day period prior to each shareholders' general meeting. For instance, if the agenda of the meeting includes the appointment of corporate bodies, the company shall make available, in particular, the personal identification of the persons proposed to be appointed, their professional qualifications, the list of the activities carried out in the last five years and the number of shares held by them in the company's share capital.

26 To be registered as a director of a Portuguese company, foreign persons need to previously obtain a Portuguese taxpayer number. In some cases, they also have to appoint a tax representative.

27 The CSC also requires that the members of supervisory corporate bodies and the chairman and secretary of the shareholders' general meeting comply with certain independency, incompatibility and knowledge requirements.

28 Once more, this corporate governance code is more flexible than the one approved by the CMVM in 2010, which required that, in all cases, at least a quarter of the non-executive directors was independent.

situation that may affect his or her capacity for unbiased analysis and decision-making, in particular, but not limited to, due to: (1) being a holder of or acting in the name or on behalf of a holder of qualified shareholdings of at least 2 per cent of the company's share capital; or (2) having been reappointed for three or more terms of office, either on a consecutive or intermittent basis.

The 2013 CMVM Code adds the following as situations that may impair one's independence:

*a* having been an employee at the company or at a company controlled or fully owned by or that controls or fully owns it, within the previous three years;

*b* having, within the previous three years, provided services or established a significant commercial relationship with the company or with a company controlled or fully owned by or that controls or fully owns it, either directly or as a shareholder, director or officer;

*c* being paid by the company or by a company controlled or fully owned by or that controls or fully owns it in excess of the remuneration arising from the exercise of his or her functions as a director;

*d* cohabiting or being married to, a relative or related in direct line or in indirect line up to the third degree (inclusive) of directors or natural persons who directly or indirectly hold a qualifying holding in the company; or

*e* being or representing a qualifying shareholder.

The two main specificities under the CSC regarding independent members of corporate bodies are that they may only be dismissed with just cause and their remuneration is mandatorily fixed.

Even though compliance with guidelines on directors' independence is increasing, independence remains one of the areas where fewer companies comply with the CMVM's recommendations.[29]

29 According to the 2012 CMVM Report, 22.2 per cent of listed companies' directors (against 29.1 per cent in 2011) were independent (page 21). Also, according to a report prepared by Católica Lisbon Business & Economics and the Association of Portuguese Listed Companies (AEM) in 2014, with reference to the annual corporate governance reports submitted in 2013 (available at www.cgov.pt/images/stories/ficheiros/relatorio_catolica_lisbon_aem_governo_das_sociedades_em_portugal_2014.pdf – the 2013 Católica/AEM Report), the recommendations on directors' incompatibility and independence are still some of the least followed among Portuguese listed companies – in particular, only 59 per cent (against 38.1 per cent in 2012) of these companies followed the recommendation that establishes that, among the non-executive directors, there shall be an adequate number of independent directors (page 24). The remaining recommendations on these matters were observed by most of the Portuguese listed companies.

*Term of office*

The articles of association must establish the duration of the directors' term of office, which shall not exceed four calendar years and may be renewed.[30]

Once their term of office expires, and unless they resign or are dismissed or a new member of the board is judicially appointed, directors remain in office until their substitutes are appointed.

*Conflicts of interest*

Based on the general duty of loyalty under the CSC (please see above), directors are required to abstain from voting on resolutions regarding matters in which they have, directly or indirectly, a conflict of interest with the company, as well as to disclose to the chairman of the board any potential conflict of interest or other reasons of incompatibility pertaining to their office.

As regards transactions between companies (and companies controlled or fully owned by or that control or fully own them) and directors, the CSC prevents companies from granting loans to directors, granting guarantees as security of their obligations, making payments on their behalf and making remuneration advancements exceeding one month of remuneration.

The CSC requires that all other agreements between companies and their directors be previously approved by the board of directors (in which the director at stake is prevented from voting) and subject to a favourable opinion from the supervision body. These rules do not apply if the transaction falls under the scope of the normal business of the company and does not attribute any special benefit to the director.

## III DISCLOSURE

### i Financial reporting and accountability

Directors of Portuguese companies are required to annually prepare and submit to the shareholders' general meeting for approval the company's annual accounts,[31] the annual management report and other related documents.

In 2009, additional requirements were implemented in the CSC regarding transparency and disclosure, as companies were required to indicate in their annual accounts the nature, commercial purpose and financial impact of any transactions not reflected in their balance sheets whenever the risks or benefits resulting from those transactions are relevant and the disclosure of such risks or benefits is necessary to assess the company's financial situation. In addition, it became necessary to disclose the total amounts of professional fees invoiced by the chartered accountant regarding the

30 Pursuant to the 2012 CMVM Report, in 2012 directors' average term of office was of 3.3 years and directors had been performing their post for an average of 6.1 years. This report also shows that a relevant number of directors of listed companies had been serving as directors for 15 to 20 years (pages 16 and 22).

31 Companies' annual accounts are publicly accessible at www.portaldaempresa.pt/CVE/IES/ServicosIES.aspx.

annual statutory audit and the professional fees invoiced by it in regard of reliability guarantee, tax consulting and other services. Besides, it also became necessary to identify all related-party transactions, indicating the respective amounts, the nature of the related party and other details necessary to assess the company's financial situation, whenever those transactions are considered relevant and have not been carried out in normal market conditions.

Likewise, the 2013 CMVM Code recommends that transactions between the company and shareholders with qualifying holdings (or entities related to the same) are carried out in normal market conditions.[32]

Also, pursuant to the CSC, the management annual report shall contain a faithful and clear description of the performance and situation of the company and indicate the main risks and difficulties it is facing. This report shall also identify the authorisations given by the board for transactions between the company and its directors and the variation of shareholdings held by its main shareholders and members of its corporate bodies.

Lastly, the 2013 CMVM Code establishes recommendations according to which all information necessary for one to be informed of the evolution and economic, financial and governance situation of listed companies shall be made available (both in Portuguese and English) on their respective websites and that each company shall have an investor relations office, which shall be in permanent contact with the market.

### ii Auditors' role and incompatibilities

Auditors are required to be present in all listed companies, regardless of the corporate governance model adopted, and their main role is to verify that the company's financial statements present fairly in all material respects its financial position. In light of this analysis, they prepare a report with their main findings and conclusions.

Auditors are also responsible for verifying, in particular, whether the company's books and accounting records are in good order and if the accounting principles and criteria used by the company lead to a correct evaluation of its assets and results.[33]

Auditors must be chartered accountants or chartered accountant companies, a profession supervised by the Chartered Accountants Association (OROC), which exercises some functions considered by law to be of public interest.

The Chartered Accountants Act[34] sets forth certain requisites to access the profession, for example, it is necessary to have a degree in auditing, accounting, law, economics or management, and to have passed the admission examination to the OROC.

Furthermore, the CSC establishes a list of incompatibilities that, if verified, prevent auditors from holding a post in a given company – for instance, persons receiving

32 The 2010 Code approved by the CMVM included identical recommendations on this matter.

33 Pursuant to the CMVM 2013 Code, auditors shall verify the application of the systems and policies regarding remunerations of corporate bodies, the effectiveness and functioning of internal control mechanisms and communicate any irregularities to the supervision body (the same recommendation was also set forth in the 2010 Code).

34 An English version of this document is available at www.oroc.pt/fotos/editor2/Tecnico/2010/estatutosEN.pdf.

private benefits from the company or who perform functions in a competing company cannot be appointed as auditors (similarly, their posts will be automatically terminated if any of the incompatibilities set forth in the CSC is subsequently verified).

## IV CORPORATE RESPONSIBILITY

### i Risk management

Pursuant to the 2013 CMVM Code, the board of directors or the general and supervisory board, depending on the adopted structure, shall set goals regarding risk management and create risk control systems to guarantee that the risks effectively borne by the company are consistent with those goals. This code also sets out that the supervisory body shall evaluate the functioning of the internal control and risk management systems and propose the necessary adjustments.[35]

Additionally, sectoral legislation and regulations require certain companies to create risk management mechanisms (for instance, the CVMob sets out such requisites regarding financial intermediaries).

In line with this, most of the Portuguese listed companies have internal risk control systems and internal audit units.[36]

### ii Compliance policies and whistle-blowing

According to the 2013 CMVM Code, the audit committee, the general and supervisory board and the supervisory board (depending on the adopted corporate governance structure) shall assess the internal compliance systems and receive the reports prepared by the compliance services at least when these reports concern the company's annual financial statements, the identification and resolving of conflicts of interest, and the detection of possible illegalities.

The 2010 CMVM Corporate Governance Code also recommended that listed companies adopt whistle-blowing policies and indicate the main aspects of those policies in their annual corporate governance reports. These recommendations were not maintained in the 2013 CMVM Code. However, it would be hasty to conclude that such recommendations could or should simply be disregarded by companies.[37]

Also, sectoral legislation and regulations specifically require certain companies to implement compliance or whistle-blowing mechanisms.

35 Similar recommendations were established in the CMVM 2010 Code.

36 According to the 2012 Católica/AEM Report, 95.3 per cent of the Portuguese listed companies (and 100 per cent of the PSI-20 companies) had created such internal systems (the 2013 Católica/AEM Report does not specify the percentage of companies with internal risk control systems). Pursuant to the 2012 CMVM Report, 69.7 per cent of the Portuguese listed companies had internal audit units, formed by an average of 12.7 persons (page 30).

37 According to the 2012 CMVM Report, 65.1 per cent of the Portuguese listed companies had approved codes of conduct and 39.5 per cent had formal mechanisms to evaluate compliance with said codes. Furthermore, 83.7 per cent of those companies had implemented whistle-blowing policies (page 30).

Regarding whistle-blowing policies, it is essential to bear in mind data protection issues. The Portuguese Data Protection Agency (CNPD) has strict requirements that must be observed by companies while implementing whistle-blowing mechanisms.[38]

## V SHAREHOLDERS

### i Shareholder rights and powers

*Equality of voting rights*

The general rule in Portuguese corporate law is that each share corresponds to one vote and that all shares attribute equal voting rights to their shareholders.

Nevertheless, the CSC allows companies to establish two departures from this principle (not to mention the possibility of issuing preferred shares with no voting rights, which are also expressly permitted under the CSC and confer no voting rights at all on their holders). On the one hand, a company's articles of association may establish that a certain number of votes only entitle the respective shareholder to one vote, which is common in large companies.[39] On the other, the articles of association may establish that shareholders may have a maximum number of votes (meaning that the votes above the fixed threshold would not be taken into consideration).

This notwithstanding, the current trend, consistent with the recommendations of the 2013 CMVM Code, is to abolish these limits.[40]

In any case, there are differences between the CMVM 2010 and 2013 recommendations in this regard. In particular, the CMVM 2010 established that companies should ensure the proportionality between the voting rights and the percentage of share capital held by each shareholder, preferentially, by means of provisions in their articles of association attributing one vote to each share held. The CMVM 2010 Code further set forth that proportionality would not be met in companies that established any of the two deviations referred to above and that no restrictions should be created for postal votes and, when permitted, electronic votes.

The 2013 Code seems more permissive, as it merely establishes that companies should urge their shareholders to participate and vote in the shareholders' general meetings,[41] in particular, by not setting an unreasonable minimum number of shares necessary to have one vote and by implementing the necessary mechanisms allowing the shareholders to vote by correspondence and by electronic means.

38 Please refer to Resolution No. 765/2009 of the CNPD.

39 In any case and pursuant to the CSC, shareholders may form groups to jointly have the minimum number of shares necessary to vote, in which case they shall appoint a common representative to participate in the shareholders' general meeting in their name.

40 Pursuant to the 2012 CMVM Report, there were 12 companies where more than one share was necessary to have one vote, one more than in 2011, which was the year that had confirmed a decreasing tendency in this regard (in 2010 there were 13, in 2009 there were 15 and in 2008 there were 25 companies with this regime (page 40)).

41 Pursuant to the 2012 CMVM Report, the average percentage of share capital present at the shareholders' general meetings taking place in 2012 was 75.7 per cent (page 41).

***Decisions reserved to shareholders***

The CSC sets a clear distinction between the powers of shareholders and directors.

In public limited companies,[42] shareholders are specifically competent to pass resolutions on the matters attributed to them by law and the company's articles of association. Moreover, they have both a residual competence and an extraordinary competence.

Within the competence specifically attributed to them by law, shareholders are the body responsible for deciding, for instance, on the approval of the company's annual accounts, the distribution of dividends,[43] any modification to the company's articles of association,[44] the merger, demerger or conversion into a different type of company, the winding-up of the company and the appointment and dismissal of directors.[45]

Under their residual competence, shareholders have authority to decide on matters not entrusted to other corporate bodies.

Finally, shareholders' extraordinary competence entitles them to decide on management matters, provided that their intervention is required by the management body.

In fact, management decisions in public limited companies are, as a general rule, taken by the board of directors. For instance, directors have authority to prepare the company's annual accounts (which are subsequently submitted to the shareholders' general meeting) and to decide on the acquisition, transfer and creation of encumbrances over real estate assets and shares in other companies' share capital, the granting of guarantees by the company, important modifications to the company's organisation, etc.

***Rights of dissenting shareholders***

In the event that specific important resolutions are approved at the shareholders' general meeting and one or more shareholders vote against the winning proposal, the dissenting shareholders have the right to withdraw from the company and receive the price of their shares.

This is the case, for instance, if the other shareholders approve a change of the company's registered office to another country, a merger with another company (in some mergers, provided that such withdrawal right is set forth in the company's articles of

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42 *Sociedades anónimas* – as opposed to private limited companies, *sociedades por quotas*, which are traditionally used for smaller and family companies. Listed companies are usually *sociedades anónimas*.

43 Except for any advancement of profits resolved by the board, as allowed under the CSC provided that certain specific requisites are met.

44 Except for the change of the company's registered office and share capital increases (and other matters set forth in the articles of association), which may be approved by the board provided that such possibility is established in the company's articles of association and also, regarding share capital increases, if certain requisites set out in the CSC are met.

45 Directors may however, in case of a definitive absence of a director, co-opt a new director in order to replace the absent one, by means of a resolution of the board of directors. Such co-optation needs nevertheless to be ratified by the first shareholders general meeting taking place after that resolution of the board.

association) and the conversion into another company type (provided that this right is established in the company's articles of association).

*Shareholding structure*

Ownership of Portuguese listed companies is usually very concentrated, with several cases of block holders and family shareholders.

In fact, according to the most recent available data, 58.1 per cent of the listed companies had controlling shareholders, which held an average of 65 per cent of their share capital. Most of the qualifying holdings were held by qualifying investors.[46]

### ii Shareholders' duties and responsibilities

In addition to the general obligations to which all shareholders are bound (in particular, the obligations to pay up the shares subscribed in the company's incorporation and share capital increases), shareholders that control[47] listed companies are subject to additional information obligations according to which they must inform both the company and the CMVM if they reach or fall below the shareholding thresholds established in the CVMob.[48]

Also, if a controlling shareholder reaches a shareholding of 90 per cent in a company, it must inform the company of such fact (as well as the CMVM in the case of listed companies) and may be obliged to acquire the shares held by the remaining shareholders.

More importantly, the CSC sets out a specific liability framework applicable, in particular, to companies that fully own other companies (or in some cases, own 90 per cent of their share capital). Pursuant to this framework, a parent company may be held liable for the obligations of its subsidiary if the latter does not comply with them in the 30-day period granted by the relevant creditor for that purpose. Also, the parent company may be obliged to compensate the annual losses of its subsidiaries once their relationship terminates or if the subsidiaries are declared insolvent.

46 Information included in the 2012 CMVM Report (page 12). Pursuant to the CVMob, a holding is considered qualifying whenever it reaches 5 per cent or more of the voting rights corresponding to the company's share capital. Among others, credit institutions, insurance companies, investment funds, pension funds, private equity companies and funds, as well as legal entities that, according to their last individual financial statements, have a dimension considered significant (which will be the case if they meet two of the following thresholds: (1) equity of €2 million; (2) total assets of €20 million; and (3) gross turnover of €40 million) are considered qualifying investors.

47 Pursuant to the CVMob, one company is deemed to control another whenever it is able to directly or indirectly exercise a dominant influence over it. In any case, control exists when (1) a company holds the majority of the voting rights; (2) it is able to exercise the majority of the voting rights, pursuant to a shareholders' agreement; or (3) it may appoint or dismiss the majority of the members of the management or supervisory corporate bodies.

48 According to the study prepared by Riskmetrics mentioned above, Portugal was the first Member State to implement disclosure duties for qualifying investors in 2003.

The CSC also establishes a general framework under which the parent company of a company declared insolvent may be held liable on an unlimited basis for the obligations assumed in the period after it became the sole shareholder, provided that it is evidenced that during that period there was no adequate separation between the company and the shareholders' assets.

## VI OUTLOOK

In 2013 not only did the CMVM approve a new corporate governance code, but also the first private initiative corporate governance code, produced by the IPCG, was approved.

As a consequence, in 2014 companies had, for the first time, the opportunity to choose between two different corporate governance codes.

However, adherence to the IPCG Code was not significant, at least in the biggest companies, as none of the PSI-20 companies adopted this Code (even though some of these companies pointed out, in their 2013 annual reports on corporate governance, that they did comply with most of the IPCG recommendations).

Now that one year has passed since the two codes were introduced, 2015 may be key to understanding whether companies consider the IPCG Code as a real alternative.

On the basis of the latest reports on the adoption of corporate governance practices by Portuguese companies, levels of compliance have been increasing significantly in recent years,[49] which suggests that Portuguese companies are on the right track as far as corporate governance is concerned.

Notwithstanding the above, continued improvements to corporate governance rules are expected, from both the CMVM and private players such as the IPCG, taking into consideration both legislative changes and market needs.

49 Pursuant to the 2012 CMVM Report, the average compliance with the set of recommendations was 90.7 per cent. In particular, the average compliance with the recommendations on shareholders' general meetings and information increased to 98 per cent (page 48). The recommendations regarding the board of directors were complied with by an average of 89 per cent of the companies, while in 2010 the compliance rate was 72 per cent and in 2011 it was 88 per cent (page 53). The recommendations on remuneration matters had a clearly inferior compliance rate (79.2 per cent), even though with a significant improvement of 24.2 per cent in comparison with 2010 (page 61). The average level of compliance with the recommendations regarding auditors was 87 per cent representing a 3 per cent increase compared with 2011 (page 64).
The 2013 Católica/AEM Report also emphasised the good performance of Portuguese listed companies as regards compliance with the 2013 CMVM Code (with an average compliance score for listed companies of 9,124/10,000 points) (page 40). This last report also highlights that PSI-20 companies register higher compliance levels than other listed companies, meaning that greater exposure to the market leads to a greater implementation of corporate governance recommendations.

## Appendix 1

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Mr Paredes is a lecturer on business and corporate law in several universities and masters programmes at various prestigious Spanish institutions and has published several articles on different topics within his practice areas.

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Joana Torres Ereio joined Uría Menéndez as a trainee lawyer in September 2007 and became a senior associate in September 2012. Prior to joining Uría Menéndez, Joana

completed a summer traineeship in another major Portuguese law firm and worked at the Portuguese Association for Consumer Protection.

She spent the period from October 2011 to February 2012 on secondment to the Uría Menéndez offices in Madrid.

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Joana has a postgraduate qualification in commercial law from the Universidade Católica and also completed an intensive course on corporate finance at the Universidade de Lisboa.

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Francisco Brito e Abreu joined Uría Menéndez in 2001 after working as in-house counsel in the Portuguese subsidiary of a multinational corporation, a privately owned holding company and a listed Portuguese company and as a lawyer in another prestigious Portuguese law firm. He was made partner of Uría Menéndez in January 2005.

He focuses his practice on commercial and corporate law issues and has extensive experience in corporate restructuring, M&A and private equity transactions.

He is recognised by major publications (*Chambers Global*, *IFLR 1000*, *PLC Which Lawyer?*, etc.) for his work in M&A and private equity.

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