The Corporate Governance Review

Third Edition

Editor
Willem J L Calkoen

Law Business Research

The Corporate Governance Review

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The Corporate Governance Review

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Willem J L Calkoen

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EDITOR'S PREFACE

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

In this third edition, we can see that corporate governance is becoming a more prominent topic with each year. We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the SEC, the OECD, the UN (as demonstrated in its 'protect, respect and remedy' framework), 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getting more complex and overregulated, and there are more black swans, while good strategies can become quite quickly outdated. Most directors are working diligently; nevertheless, there have been failures in some sectors and this means that trust has to be regained. How can directors carry out 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 imperious CEOs? Can lead or senior directors create sufficient balance? Should outside directors understand the business? How much time should they spend on the function? How independent must they be? Should their pay be lower? What about diversity?

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 practices 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 in order to create trust. What more can they do to show stakeholders that they are improving the enterprises other than by setting a better 'tone from the top'. Should they put big signs on the 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 codes along the model of the Cadbury 'comply-or-explain' method. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have gradually amassed too much power, or companies have not developed new strategies and have 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.

This all implies that executive and non-executive directors should work harder and increasingly as a team on strategy and innovation. It is still a fact that more money is lost due to lax directorship than to 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 various chapters of this book show a convergence. The concept underlying this book is to achieve a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that will permit convenient comparisons, where a quick 'first look' at key issues is 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, and 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
April 2013

Chapter 18

PORTUGAL

Bernardo Abreu Mota and Mariana Veiga Montez[1]

I OVERVIEW OF GOVERNANCE REGIME

i Legal framework: sources of law and enforcement

Portuguese listed companies with securities admitted to negotiation on the Euronext Lisbon stock exchange are, in general, governed by the Companies Code, the Securities Code, by mandatory regulations and instructions issued by the Securities Commission ('the CMVM') and, in particular, by their articles of association. Further, listed companies that are also classified as credit institutions or financial companies are subject to the provisions of the Legal Framework of Credit Institutions and Financial Companies.

The Companies Code lays down the companies' core legal regime, setting out aspects that apply to all types of corporate entities, from their incorporation to governance structures and the functioning of corporate bodies, as well as, *inter alia*, merger, demerger and winding-up processes.

The Securities Code is applicable to companies whose share capital is open to investment by the public, such as listed companies, and includes rules for the functioning of shareholders' meetings, provides for information disclosure obligations, and regulates procedures for securities issuance and registration, qualified holdings, securities negotiation and investor protection rules, as well as takeover offers.

In addition to the foregoing sources of law, the corporate governance system in Portugal is still significantly based on soft law, self-regulation by companies and market control. In recent years we have witnessed the development of certain entities created by agents in the market for the purpose of investigating and divulging corporate governance principles, of which the Corporate Governance Institute ('the IPCG') is the chief example.

1 Bernardo Abreu Mota is a partner and Mariana Veiga Montez is an associate at Campos Ferreira, Sá Carneiro & Associados.

The 2010 model of the Corporate Governance Code issued by the CMVM ('the Governance Code'), under the form of a series of recommendations, has, for the past few years, been the relevant governance code adopted by listed companies. CMVM Regulation No. 1/2010 requires listed companies to either adopt the Governance Code or an equivalent, provided that the latter covers at least the same matters regulated in the Governance Code and is issued by a reputable and independent entity. Companies must inform the CMVM in advance and justify their decision in adopting such other code. In this respect, the recent publication, on 30 January 2013, of a (long-awaited) corporate governance code by the IPCG ('the IPCG Code') constitutes an important landmark. As better detailed below, it represents an alternative model of code for companies to follow, this time created by private agents.[2]

Although the recommendations of both the Governance Code and the IPCG Code are not mandatory, listed companies are legally required to annually issue reports detailing their corporate governance structure and practices and stating their levels of compliance with the relevant principles on a comply-or-explain basis. The CMVM, after analysing such information, issues a public report on the general compliance of listed companies with the corporate governance principles. The latest report was published in 2012 in respect of the 2011 financial year ('the CMVM Report').

Finally, regarding enforcement, the CMVM is the supervisory authority with powers to oversee the compliance by listed companies, as well as to instruct the procedures for any offences committed and apply the relevant sanctions, such as administrative fines or ancillary penalties.[3] Notwithstanding the CMVM's wide range of powers to conduct investigations and to inspect and apprehend documents, the criminal authorities and courts of law are responsible for instructing procedures concerning offences of a criminal nature. As a rule, there is a right to appeal a CMVM decision to a court of law.

ii Recent developments in corporate governance

The publication by the IPCG of its code may be considered the most relevant recent development in corporate governance in Portugal. On the one hand, it grants companies an alternative to the Governance Code.[4] On the other hand, it represents an instrument of private initiative that, if welcomed by its natural addressees, may lead to a new balance between the creation of good governance principles and the supervision of their effective application. In particular, if listed companies are receptive to the new code, this may lead to a repositioning of the roles of private and public agents, with civil society embracing (self-)regulatory functions, leaving the supervision of compliance to public entities (the CMVM).

2 However, given the recent nature of the IPCG Code, this chapter focuses mainly on the Governance Code. At the time of writing, there is yet no official information regarding both the CMVM's and the market's reaction to this new code.

3 Credit institutions and financial companies are also subject to the supervision and sanctioning powers of the Bank of Portugal.

4 As per the CMVM Report, in 2011 the Governance Code was adopted by all the 44 listed companies analysed by the CMVM.

In general terms, the IPCG Code also follows the comply-or-explain model and has been drafted with a dual structure: it sets out a series of 20 principles, which are then developed in a set of recommendations (49 in total).[5] According to its preamble, the principles aim to set out a basis for the interpretation and application of the recommendations, and also to provide qualitatively relevant grounds for explanation, meaning that a company that does not follow a recommendation may still be considered compliant if it justifies the use of a different solution to achieve the same task.

According to the CMVM Report, the average compliance with the Governance Code by listed companies in 2011 is of 89 per cent, reflecting a trend of growing levels of compliance with corporate governance recommendations.

II CORPORATE LEADERSHIP

i Governance structures and practices

Listed companies must choose one of three governance models:

a the one-tier Latin model, entailing a board of directors, a supervisory board and an auditor;

b the one-tier Anglo-Saxon model, comprising a board of directors, including an audit committee, and an auditor; or

c the German model, which is the only two-tier structure available, with an executive board of directors, a general and supervisory board and an auditor.

The Latin model is by far the most popular among listed companies, followed by the Anglo-Saxon model. Only one of the companies listed on Euronext Lisbon currently adopts the two-tier structure.

ii Board of directors

Composition

The articles of association must indicate the number of members (two minimum)[6] that shall compose the board or executive board of directors. The chairperson has a mandatory casting vote when the number of directors is even.

In single-tier structures, the board of directors is generally composed of executive and non-executive members, the latter being persons who do not form part of the executive committee and do not have delegated management powers. In the Anglo-Saxon model, there must be at least three non-executive directors in the audit committee. The chairperson can be an executive director, but in this case the Governance Code recommends that the board puts in place effective mechanisms for the coordination of the non-executive directors' role and the IPCG Code advises that an independent director is entrusted with such coordination functions.

5 The Governance Code comprises a set of 62 recommendations.

6 Companies with a share capital of less than €200,000 can choose to have a single director. The share capital of the large majority of listed companies (if not of all) is higher than said threshold.

Committees

Companies may create certain specialised committees to address specific matters of their governance. Both the Governance Code and the IPCG Code recommend that the board of directors in one-tier models, or the general and supervisory board in two-tier structures, create committees, such as executive and nomination committees. In the one-tier models, the remuneration committee is elected by the shareholders' meeting.

Both the Governance Code and the IPCG Code recommend the independence of the remuneration committee's members from the directors.[7] The Governance Code also recommends that at least one member has adequate knowledge and experience in remuneration policies. Any persons having provided any services to the board of directors or to any structure in the company dependent on the latter should not, pursuant to the Governance Code, be hired to assist the remuneration committee in its functions.

Companies adopting the German model are required by law to have a committee for financial affairs within the general and supervisory board.

Election and dismissal of directors

In one-tier board structures, directors are appointed and dismissed by the shareholders' meeting and may, in certain situations that prevent them from temporarily performing their duties, be suspended by the supervisory board or by the audit committee, as applicable. Both the Governance Code and the IPCG Code recommend that at least a quarter of the non-executive directors are independent, but the latter permits a lower number in case of companies whose size does not justify such a percentage. The Companies Code sets out that the majority of the audit committee's members must be independent (and at least one must have an adequate university degree and knowledge in accountancy and auditing matters). Directors are deemed independent when they are not associated with any specific group of interests in the company or affected by any circumstances that could jeopardise the neutrality of their decisions, notably by virtue of holding or acting on behalf of holders of shares representing at least 2 per cent of the company's share capital, or by having been re-elected for more than two terms of office, either consecutively or not. The members of the auditing committee are additionally subject to incompatibility provisions; for instance, they must not:

- *a* be members of corporate bodies of group-related companies;
- *b* be direct or indirect service providers of the company or any group-related company;
- *c* have a significant commercial relationship with the company or any group-related company; or
- *d* in any manner be bound to the interests of a competing company.

In the two-tier model, the executive board of directors' members are elected, suspended and dismissed by the general and supervisory board or, if the articles of association so determine, may be elected and dismissed by the shareholders' meeting. Members of the

7 The IPCG Code recommends that the majority (and not the totality, as the Governance Code) of the remuneration committee members' is independent from the directors.

executive board of directors are subject to specific incompatibility provisions (e.g., they must neither be members of the general and supervisory board nor of supervisory bodies of group-related companies).

In both structures, elections are for terms of office of up to four years. Members can be re-elected for more than one term, unless independency criteria apply (such as in the case of directors that are part of the audit committee), in which case two terms are considered the maximum limit.

Remuneration

The remuneration of the directors is the responsibility of the shareholders' meeting or of a remuneration committee appointed by it. The responsibility for the executive board of directors' members' remuneration can be also be vested in the shareholders' meeting by the articles of association, but the general rule is for the same to be entrusted to the general and supervisory board (or to a committee elected by it).

The Companies Code allows the remuneration of executive directors to partially consist of a percentage (the maximum amount of which needs to be set out in the articles of association) of the company's profits, whereas the remuneration of directors with supervisory functions (i.e., members of the audit committee) must mandatorily consist only of a fixed sum. The Governance Code further advises this latter option for all non-executive directors.

The Governance Code and the IPCG Code set out several recommendations concerning remuneration. Essentially, companies are encouraged to structure their remuneration schemes so as to align the interests of those in charge of the management with the long-term interests of the company or shareholders (by basing part of the executive directors' remuneration[8] on performance evaluation) and to deter excessive risk assumption. A substantial part of the variable pay, or the right to exercise any options, should be deferred for at least three years and be linked to the good performance of the company during such period.

In addition, listed companies are subject to much tighter remuneration disclosure obligations following the approval of Law 28/2009, of 19 June, such as the yearly submission for the approval by the shareholders' meeting of a statement containing the remuneration policies to be adopted by the company, and the obligation to disclose the amounts actually received, individually and on aggregate, by the corporate bodies' members.

Management and representation powers

In one-tier models the board of directors is entrusted with managing the activities of the company and can delegate the executive powers of day-to-day operation to a managing director or an executive committee. The delegation of powers does not hinder the board's capacity to resolve on the same matters, nor does it exclude the responsibilities of the rest of directors to control the executive committee's or the managing director's performance.

8 The IPCG Code foresees the possibility of directors who are on certain situations entrusted with executive functions also having a variable remuneration component.

The board of directors must determine the composition and functioning rules of the executive committee and its chairperson must ensure that all information concerning its activities is duly disclosed to the remaining directors. Both codes recommend that management powers are entrusted to executive directors.

In the Anglo-Saxon model, the members of the board that also form the audit committee have supervisory rather than executive powers (i.e., they are prevented from exercising the latter) and are responsible for overseeing the administration of the company.

Under the two-tier structure, the company is managed by the executive board of directors, which is required to obtain prior consent from the general and supervisory board before carrying out certain types of acts.

The board of directors or the executive board of directors, as applicable, further represent the company in relation to third parties. Such representation powers are jointly exercised by all directors. The Companies Code determines that companies are bound by the intervention of the majority (or a lower number, if so provided for in the articles of association) of the directors as well as by any directors in whom powers may have been delegated. The company so represented is bound towards third parties, notwithstanding any board resolution (or the lack thereof) and any restrictions that are provided for in the articles of association. The company can, however, oppose restrictions resulting from its objects, provided that it proves that the relevant third party knew of or could not, under the circumstances, ignore the respective clause.

Restrictions in takeovers

According to the Securities Code, from the moment the board of directors (or, if applicable, the supervisory board) becomes aware of the decision to launch a takeover offer for more than one-third of the relevant securities and until either the offer result is determined or the offer ceases – whichever occurs first – the board of directors (or, if applicable, the supervisory board) of the target must not perform any action outside the ordinary course of business that is likely to have a material effect in the net equity of the target and that may significantly jeopardise the objectives announced by the offeror. Such prohibition extends to resolutions taken prior to the decision to launch the offer that have yet to be implemented, totally or partially. The neutrality rule contains exceptions – for instance, it can be evaded by a resolution of the shareholders' meeting (passed with at least two-thirds of the votes cast) and it does not hinder the board of directors from seeking a 'white knight' (i.e., alternative offers).

The existing breakthrough rules are optional and not popular among listed companies; no listed companies have implemented them and several companies' articles of association contain defensive measures. Based on the assertion that suspending the restrictions on the transfer of securities and on the exercise of voting rights attached thereto following the launching of a takeover offer renders the control market more flexible, fosters investment, enhances the liquidity of the shares and improves the governance of companies, the CMVM recently prepared draft legislation imposing breakthrough rules on listed companies. This legislation, however, has yet to be enacted.

Conflicts of interest
Directors are prohibited from voting in any resolutions concerning matters in which they have, directly or on account of a third party, a conflicting interest with the company and they must inform the chairperson of such conflict.

As a rule, contracts between the company (or group-related companies) and its directors, either entered into directly or through third parties, must be approved in advance by the board of directors (without any conflicting directors' vote) and are subject to a prior validation by the relevant supervisory corporate body.

Competition and sensitive information
During their office, directors are under the obligation not to exercise any activity that competes with the company, unless they are authorised by the shareholders' meeting (or the general and supervisory board, as applicable), which shall also establish their access to sensitive information.

Directors are prevented from exercising competing activities in their own name (including holding a stake representing 20 per cent or more in the share capital or profits of a competing company), on the account of others, as an officer of a competitor, or by being appointed on behalf of or to represent a competitor.

General duties and directors' liability
The Companies Code subjects directors to a general duty of diligence that is detailed in fiduciary and loyalty duties as well as in duties of care.

In broad terms, directors must possess adequate availability and technical competences, as well as knowledge of the company's activity, which permit them to properly perform their functions. Directors must also act with diligence, in a judicious and organised manner, in the best interests of the company (which has generally been understood as the interests of shareholders), and additionally take into consideration the interests of other stakeholders, such as employees, clients and creditors.

Breach by directors of their duties may lead to their liability towards the company, the shareholders and the company's creditors.

Certain breaches by directors of their duties may lead to criminal liability and, in certain circumstances, directors may also be personally held liable for tax debts incurred by the company during the period in which they exercised office.

Directors of listed companies are required to provide surety or to subscribe to an insurance contract, in an amount of at least €250,000, in favour of the holders of compensation rights, the costs of which must not be borne by the company (except for the part of the compensation exceeding such amount). A recent law change has provided for the exemption of surety in relation to non-executive and non-remunerated directors.

iii Supervisory corporate bodies and auditors

Members of the supervisory body and auditors are elected by the shareholders' meeting. The general and supervisory board must have a higher number of members than the executive board of directors.

There are some differences in the functions entrusted to the members of supervisory corporate bodies depending on the governance structure adopted but, in general, all are responsible for:

a supervising the corporate activity;
b supervising the internal audit and risk control systems;
c controlling the financial information and bookkeeping of the company;
d receiving communications of irregularities; and
e issuing reports regarding their supervision and opinions about the accounts submitted by the board of directors.

Auditors are essentially responsible for examining the books, accounts and financial statements of the company and verifying the adequacy of the adopted accountancy policies and standards.

The supervisory bodies' members and the auditors are generally subject to independency and incompatibility criteria and the auditors must be certified chartered accountants duly authorised by the Chartered Accountants' Bar. The Governance Code recommends replacing the auditor after two or three terms of office, depending if terms are for four or three years, whereas the IPCG Code advises that the supervisory body issue an opinion on whether the auditor should be kept at the end of each term.

Members of supervisory bodies may be held liable on the same terms as directors and can additionally be held jointly and severally liable with directors for acts and omissions of the latter if the damage caused by the directors would not have occurred had the former complied with their supervisory functions. Auditors can be held liable for damages caused, *inter alia*, to the company and to shareholders by their wilful misconduct.

Members of the supervisory corporate bodies must also provide a surety or sign an adequate liability insurance policy, under the same terms as the directors. Auditors are also under an obligation to possess special insurance for their activity.

III DISCLOSURE

Listed companies are required to disclose to the CMVM and to the market individual and, if applicable, consolidated financial information essentially on an annual, bi-annual, quarterly or intercalary basis, depending on the type of information. Certain financial information must also be submitted to the tax authorities and to the commercial registry office. Moreover, companies are urged to disclose, *inter alia*, their financial statements and annual reports on the activity of their supervisory bodies on their website, and also to provide such information in the English language.

Listed companies use CMVM's online 'SDI' platform to disclose relevant information that is then immediately made accessible for consultation by the general public. Information to be provided on a regular basis consists of, notably:

a annual reports and accounts prepared by the board of directors;
b reports and opinions of the supervisory body;
c lists of qualified holdings; and
d related parties' transactions.

Occasional information, such as price-sensitive information, must be disclosed immediately. Companies may only decide to defer the disclosure of relevant information for a limited period if its immediate disclosure would harm their legitimate interests, such deferral will not harm the interests of the public and the company can prove that it is able to ensure the the information's confidentiality.

Listed companies must also disclose their annual corporate governance report on a comply or explain basis.

The Governance Code recommends that companies ensure a permanent contact with the market in order to respect the principle of shareholders' equality and to prevent asymmetries in information access. Companies therefore often create an office to provide support to investors.

IV CORPORATE RESPONSIBILITY

i Internal control and risk management

Following recent financial scandals, listed companies in Portugal have been urged to establish internal procedures and systems concerning risk management, internal control and internal audit. Understandably, financial institutions have particularly stringent requirements in this respect.

Both the Governance and the IPCG Codes recommend that companies:

a set out strategic objectives for risk assumption;
b identify the major risks connected with the company's activity;
c analyse the impact and probability of each potential risk; and
d determine mechanisms for controlling the implementation of risk management measures.

Internal control mechanisms include whistle-blowing policies that enable shareholders, workers and others to report, through a special channel, fraudulent behaviours, irregularities and improper internal management, thus promoting corporate responsibility and transparency and preventing illegalities that could impact on the company's financial situation.

Members of supervisory corporate bodies are in charge of receiving whistle-blowers' reports of irregularities. Companies must, in their annual report on corporate governance, inform on their whistle-blowing policies by identifying the means used for communications, the persons in charge of receiving them, the treatment to be given to the communications and the identification of the persons with access to such information.

Portugal's Data Protection Authority, the CNPD, has approved a resolution concerning the principles applicable to the treatment of personal data within the scope of ethical lines, which sets out the requirements with which companies' whistle-blowing systems must comply; confidentiality has been favoured over anonymity as a way of safeguarding risks of libel and discrimination.

ii Corporate responsibility

As mentioned above, the Companies Code foresees that directors consider other stakeholders' interests in their decision-making processes. It also requires companies

to include in their annual management report an analysis of the performance of the company in matters related to activities that are not financial, such as environmental and employees' related issues.

Listed companies have recently started to develop internal policies aimed at balancing their corporate initiatives with social responsibility; however, only a few have chosen to create specific corporate responsibility or ethic committees for such purpose.

V SHAREHOLDERS

i Shareholder rights and powers

Matters reserved to shareholders

The majority of Portuguese listed companies have traditionally been controlled by large-block shareholders and Portugal can essentially be considered a 'shareholder-centric' rather than a 'board-centric' jurisdiction. Notwithstanding shareholders being prevented from resolving on matters related to the management unless so requested by the board, the shareholders' meeting can be seen as the ultimate decision-making corporate body.

In effect, certain decisions that would have a major impact on the company are reserved to shareholders, including:

a the amendment of the articles of association;
b share capital increases (as a rule);
c approval of mergers, de-mergers or the winding-up of the company;
d approval of annual accounts;
e distribution of dividends; and
f the appointment and dismissal of directors and supervisory board members.

Voting and participation rights

Although companies can, with certain restrictions, set out a minimum number of shares to be granted voting rights, listed companies have increasingly adopted the one-share/one-vote system. This principle is advised by the Governance Code, although the IPCG Code does not contain a recommendation in this respect. In addition, the law permits different categories of shares to be issued, such as preferential non-voting or redeemable shares, but the same class of shares must be granted the same rights.

Further to the transposition in May 2010 of Directive No. 2007/36/EC, listed companies' shareholders have seen their rights reinforced. Holders of more than 2 per cent of the share capital can request that a shareholders' meeting is convened and may request the inclusion of items in the agenda, as well as present proposals for resolutions. Shareholders may participate in the meeting if they provide evidence that on the fifth day of negotiation prior to the date of the meeting they hold shares enabling at least one vote (on the basis of a record date principle without share blocking).

Minority shareholders' rights

Minority shareholders are conferred certain special protection rights, for which exercise shareholders may aggregate. Example of such rights are the collective information right for shareholders that hold shares representing at least 10 per cent of the share capital and the right to appoint members to the board of directors as specified below.

Public companies must include in their articles of association a system of protection of minorities setting out that:

a not more than one-third of the members of the board of directors (or executive board) are elected on a separate poll from a list subscribed by groups of shareholders that, jointly, hold not less than 10 per cent and not more than 20 per cent of the share capital. The rationale behind this provision appears to be that a shareholder ceases to qualify as a minority shareholder and to have the rights inherent to such capacity when it holds more than 20 per cent of the share capital; or

b the minority of shareholders that voted against the list approved for the board of directors (or executive board) by the majority of the votes cast designates not less than one director, provided that such minority holds not less than 10 per cent of the share capital (in the absence of choice, this system is applicable).

ii Shareholders' duties and responsibilities

Shareholders – including controlling and institutional shareholders – are not subject to particular fiduciary duties, even though general loyalty and good faith duties can be extracted from some legal provisions (such as that granting shareholders the right to request the annulment of abusive resolutions).

Shareholders are prevented from voting in resolutions concerning matters where they have conflicting interests, specified in the Companies Code as follows:

a the release of a liability or obligation of the shareholder as such or in the capacity of member of a corporate body;

b any litigation against the company;

c the shareholder's dismissal from an office in a corporate body with just cause; or

d any relationship to be established with the company that is unrelated to the articles of association.

The duty of launching a mandatory takeover offer is triggered by the acquisition of an interest in shares that carry more than one-third or one-half of the voting rights.

iii Shareholder activism

Traditionally, there has not been any significant shareholder activism in Portugal. This can perhaps be explained by the fact that large-block shareholders are present in the majority of Portuguese listed companies and thus minority shareholders do not usually have a record of being active in trying to influence such companies.

Proxy battles as a form of shareholder activism are not common in Portuguese listed companies; nor are specific shareholder campaigns.

iv Contact with shareholders

One of the most important forms of contact between shareholders and listed companies in Portugal is through compliance with information and disclosure obligations.

Information to be made available prior to shareholders' meetings must also be disclosed on the company's website as from the date of disclosure of the relevant convening notice, which must be published at least 21 days in advance of the meeting.

As referred to above, certain matters require a minimum shareholding in order for shareholders to be granted certain rights; for example, only stakeholders with a stake of more than 10 per cent are entitled to request from the board of directors information concerning corporate matters. In general, the board cannot refuse to provide such information if the requesting shareholder asserts that the examination of such information is in order to assess a possible liability of the directors or members of the supervisory body (unless it is clear that the purpose of the information request is for another reason).

Shareholders may also request information to the board of directors during shareholders' meetings.

VI OUTLOOK

Both the CMVM Report and other reports recognise a general increase among listed companies towards voluntary compliance with the recommendations and principles of corporate governance and recognise a fall in the discrepancies between companies' self-evaluation and that of the CMVM.

Nevertheless, the CMVM has identified certain matters where compliance levels may still be considered insufficient and in need of improvement, such as:

a measures aimed at preventing takeover offers' success;

b internal audit and conflict of interests with external auditor; and

c remuneration policies.

In terms of expectations for the future, attention will certainly be on the next developments involving the IPCG Code, in particular, whether this new code, which purports to be more flexible and easily adaptable, will be adopted by Portuguese listed companies, which could mean the eventual setting aside of the Governance Code.

Appendix 1

ABOUT THE AUTHORS

BERNARDO ABREU MOTA

Campos Ferreira, Sá Carneiro & Associados

Bernardo Abreu Mota finished his law degree in 1997 at the Faculty of Law, Catholic University of Lisbon, where he also did a postgraduate in commercial companies law.

He started his career as a lawyer at Ferreira Pinto & Associados and in 2002 joined Vasconcelos, F Sá Carneiro, Fontes & Associados, one of Portugal's most prestigious law firms, which was incorporated by Uría Menéndez two years later and where he became a partner.

In 2009 Mr Abreu Mota participated in the integration of Campos Ferreira, Sá Carneiro & Associados and focuses his practice on company law, M&A and private equity.

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Mariana Veiga Montez has been an associate lawyer at Campos Ferreira, Sá Carneiro & Associados since 2010 and is part of the firm's commercial and corporate law and M&A practice areas.

Ms Veiga Montez provides legal advice in all types of commercial and corporate-related matters, assisting in the preparation and negotiation of commercial contracts and being involved in mergers and acquisitions projects.

She has been a member of the Portuguese Bar since 2008, having previously worked as an intern and associate lawyer in PLMJ – AM Pereira, Sáragga Leal, Oliveira Martins, Júdice & Associados. In 2010 she obtained an LLM degree in international company law from King's College London.

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