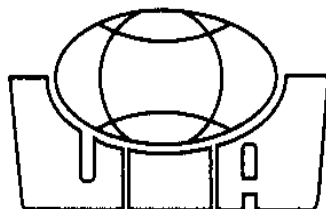


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CORPORATE GOVERNANCE IN PRACTICE

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I. REGULATIONS, RECOMMENDATIONS

1. Are principles of corporate governance incorporated in mandatory rules in your jurisdiction or are there sets of recommendations/codes to follow?

The Portuguese legal and regulatory framework on corporate governance is comprised by provisions of both the Companies Code (*Código das Sociedades Comerciais* – CSC) and the Securities Code (*Código dos Valores Mobiliários* – CVM), as well as soft law regulations and recommendations issued by the Portuguese Stock Market Supervisory Authority (*Comissão do Mercado de Valores Mobiliários* – CMVM) applicable to public companies. Recommendations and regulations enacted by specific industry regulators, such as the Bank of Portugal or the Insurance Institute of Portugal, may also be applicable.

Nonetheless, Recommendations are not binding and public companies may choose to follow different rules or to adopt different policies from a corporate governance standpoint.

In fact, the cornerstone regulatory statute within the scope of corporate governance is Regulation 1/2010, whereby listed companies shall adopt CMVM's Code of Conduct or another Code of Conduct deemed equivalent, thus disclosing to CMVM its decision on this matter.

Pursuant to Regulation 1/2010 listed companies are bound to publish a detailed annual report on their corporate governance practices, including a declaration as to what extent they have complied with the CMVM Recommendations. Each instance of non-compliance must be explained.

Known as the “comply or explain” rule, this regulatory regime thus combines voluntary adherence to a standard of conduct with mandatory disclosure obligations.

2. Please describe in bullet points the main corporate governance rules or principles in your jurisdiction.

- Disclosure of information and transparency
 - General Meetings – complete names of members of the Board of directors and supervisory Board. Proposals to be submitted to General Meetings must be made available to shareholders 15 days in advance. Shareholders are also entitled to request complete and clear information to facilitate informed decisions over the subjects under discussion. (Companies Code).
 - Independent directors
 - Annual report on corporate governance compliance – as mentioned above companies must report annually on a broad range of corporate governance aspects, as well as provide explanations for non-compliance with the CMVM Recommendations.
- Exercise of shareholder rights
 - Voting by proxy (CC, SC and Securities Code)
 - Minority shareholder rights – rights on appointment and removal of directors, veto powers over certain management and policy matters, powers to call a General Meeting and to file proceedings against directors who have failed to protect the rights of the company, access to information, rights to influence the dividend distribution policy, rights concerning the dilution of equity stakes and transfer of shares, and also the power to block a transfer of nominative shares.
- Defensive devices against takeover bids
 - Restrictions on Board action – the target company's Board cannot practise any act that may materially affect the net asset situation of the company. This includes the issuance of shares and/or bonds. During the standstill period, the Board may only practice acts of day-to-day management of the company, and is bound by the bona fide principle.
 - Multiple voting rights – these are forbidden with the exception of companies where

overwhelming global financial crisis.

Risk management has been the subject of severe shortcomings not only at management level but also in relation to the role of the Boards in overseeing their risk management systems.

In this instance and drawing on such lessons, the EU has implemented a new financial supervisory structure.

The new regime established the European System of Financial Supervisors (ESFS) mainly targeted at improving the harmonisation of financial rules across Member States. It is essentially a reaction to the perceived failures by the previous EU regulatory system to provide adequate monitoring and supervision both nationally and in cross border terms.

The superstructure of the EFSF comprises the European Systemic Risk Board (ESRB) and two European Supervisory Authorities (ESA): the European Banking Authority (“EBA”) and the European Securities and Markets Authority (“ESMA”).

Turning to developments at the national level, 2010 was a significant year for the publication of new rules and recommendations by Portuguese institutions within the sphere of corporate governance:

- a) The CMVM provided a new set of Recommendations for listed companies with respect to the General Meeting, management and supervisory bodies, remuneration of directors, management Board, information and auditing and conflicts of interest between companies and shareholder.
- b) Following the publication of a White Paper in 2006 on Corporate Governance, the Portuguese Institute of Corporate Governance (*Instituto Português de Corporate Governance*) published a final draft of its Corporate Governance Code Project (*Projecto de Bom Governo das Sociedades*) as an alternative corporate governance code. The Code is based on “best practices” drawn from both the national and international arenas, however it has been heavily criticised by a number of Portuguese companies for its “excessive complexity, lack of transparency, high cost of implementation, and incredibly tough objectives”.
- c) Amendments to the Individual Income Tax Code and Corporate Income Tax Code were introduced in 2009 and 2010 concerning the taxation of excessive bonuses and golden parachutes.

The *Banco Português de Negócios* (BNP) case is a recent example of corporate governance failure in Portugal. A private bank and a public company, BNP underwent nationalisation following the uncovering of bad management and malpractice-related debt along with other irregularities that were unknown to shareholders and other stakeholders. BNP’s CEO was criminally charged with tax fraud, money laundering, forgery, abuse of credit and illegal gains.

II. SHAREHOLDERS

1. Does the applicable law / recommendations require the equitable treatment of all shareholders, including minority shareholders?

The cornerstone of CMVM's recommendations is the promotion of shareholder activism and power, by encouraging companies to develop legal and technical mechanisms that will foster frequent exercise of voting rights and participation at General Meetings. In this sense, they vigorously advise the active use of voting rights, whether directly or by proxy, and the withdrawal of any statutory restrictions.

As the practice of investing in capital markets is gaining in popularity, the single most important factor for investors is investment security. They need to know clearly that the necessary steps have been taken in order to safeguard their interests and this, ultimately, is linked closely with the existence of good corporate governance practices.

Shareholder democracy plays a fundamental part in the different processes that govern a company, enabling shareholders, through the exercise of their voting rights, to elect the Board of directors and make decisions which are of core importance to the company. Effective exercise of voting rights by shareholders will need to ensure that they have the right to make proposals at General Meetings and to receive adequate and correct information, in order to reach the appropriate decisions.

A well-functioning shareholder democracy must also ensure that the Board of directors consists of qualified individuals who are able to promote the interests of all shareholders and control company management, to prevent potential conflicts among shareholders on typical issues concerning overall corporate policy and strategy.

The treatment of minority shareholders provides a good indication of the degree to which such democratic values have been instilled into a company's operations and as such may be regarded as one of the key indicators of a healthily functioning corporate governance regime.

2. What disclosure obligations, with respect to what information does the management have vis-à-vis shareholders, how frequently and in what form? Is there any rule or recommendation that encourages dialogue of management and shareholders?

The CMVM's recommendations and regulations provide that companies are bound to disclose information on preparatory documents for General Meetings as well as financial information, through the use of new technologies.

The applicable provisions of the Portuguese Companies Code stipulate that preparatory information must be made available to shareholders in the 15 days before General Meetings and that shareholders are entitled to accurate and complete information at General Meetings, concerning subjects under discussion, namely with regard to relations between the company and other companies, which are paramount.

CMVM Recommendations advise in this sense on the implementation of mechanisms to promote equal access to information for all shareholders, as well as the creation of an internal system for risk control. The latter should also specifically promote the disclosure of information on the matter of assessment of risks inherent to the company's activities.

The remuneration committee submits to the General Meeting, policy guidelines and principles for the attribution of remuneration for previous and current years.

Plans for the allotment of shares and/or stock options to employees and/or members of the Board of directors must be submitted to CMVM, pursuant to the applicable provision of the CMVM regulations.

Duties of communication outlined by these provisions also refer to the acquisition or disposal of shares, by members of the Board of directors of a subsidiary or its parent company, as well as the number of shares held by that subsidiary and the percentage of voting rights counted according to Article 20 of the Portuguese Securities Code.

The applicable provisions on corporate governance compliance of Regulation 1/2010 also establish that all companies issuing shares to be negotiated in regulated markets, should provide up to date information that includes the following:

- i. Corporate name and head office;
- ii. Articles of Association;
- iii. Identification of members of the corporate bodies;
- iv. Investors Advice Bureau or similar service;
- v. Proposals to be submitted at the General Meeting.

3. Do you think that such rules sufficiently support the information rights, rights to protect their asset value and exit of the minority holders, and especially institutional investors, venture capital investors, etc.? Is it possible to assume that shareholders provide effective corporate governance control? Or is there a need for stronger activism by regulators.

The existing legal framework on minority shareholder rights is spanned across numerous provisions of the Portuguese Companies Code and the Portuguese Securities Code as well as the Regulations and several Recommendatory documents issued by CMVM, Bank of Portugal or the Insurance Institute of Portugal.

It makes the protection of such rights its objective, both in public and privately-held companies, by specifically addressing corporate matters such as shareholder voting rights on appointment and dismissal of directors, specific veto powers, dividend distribution, prevention of dilution of equity stake, transfer of shares and rights to information access, as well as exit mechanisms such as, squeezing out compulsory sales mechanisms.

In this regard Shareholders are provided with a certain degree of effective corporate governance control arising from the provisions in force governing the exercise and protection of their rights. Additionally management control may be exercised through enshrining and fine tuning specific provisions crafted in Shareholders Agreements.

CMVM Recommendations also encourage institutional investors to make an active and diligent use of their voting and information rights and disclose information on their policies towards the companies in which they invest.

It is mandatory for such management companies and other institutional investors to disclose their voting policies to the public.

Institutional investors play an important role in corporate governance matters as their independent and critical analysis provides an invaluable assessment of the performance of the companies they invest in. Such scrutiny may also stimulate improvement in the company's management performance.

CMVM's Recommendations and Regulations consider the most recent reforms in the legal and regulatory framework and in this regard raise significant governance issues, particularly over matters of management

entrenchment versus shareholders sovereignty. They aim to promote an active and ideal governance model that establishes a level playing field for international investments in the Portuguese corporate landscape.

Such debate promoted by the main regulator and supervisory authority brings about highly relevant matters on Corporate Governance fields putting forward strong arguments to dismantle corporate careers against the market for corporate control intending to raise investor confidence and enhance the ability of the market forces to function.

In this regard the Portuguese regulator and supervisor has been considerably active on one side promoting shareholders activism and shareholder power, fostering accountability, transparency and fairness in governance matters but also has defined its core aims and targets to promote investor confidence, competitiveness and ultimately economic growth.

III. BOARD OF DIRECTORS OR SUPERVISORY BOARD

1. Structure: Are there any rules or guidelines in your country with regard to Board diversity? Is Board diversity a material issue in terms of corporate governance? Why?

There are no rules or guidelines in Portugal regarding Board diversity. In fact, gender diversity data recently come to light has pointed out that for example, women are particularly rare on Portuguese Boards, where only 3.5% of seats are held by women. The relevance of this becomes clear when one considers research suggesting that a single female on the Board, will often find it hard to successfully challenge the Board with a different point of view and that the female point of view is more effectively delivered, when there at least two or better still, three women on the Board. Lone women on Boards often report feeling isolated and ignored or, say they feel self conscious about representing their gender, rather than being included for their genuine Board capability.

We consider that Board diversity is a material issue in terms of corporate governance as it is brought about righteously in the context of socially responsible investing. Recent research has found out companies with diverse Boards perform better than Boards composed of directors with homogenous gender, ethnicity and skill sets. Specifically the study found that a sub set of companies with a highly diverse Board exceeded the average returns of Dow Jones and Nasdaq and this is over a 5 year time span. Such data is attracting the interest of investors.

Although gender diversity is not addressed by Portuguese Corporate Governance Recommendations or Regulations, requirements for independent directors on the Boards are highly recommended and advised. In fact it is recommended that Boards should include a number of independent directors.

Is there a required minimum of independent directors and what is the standard for a director to be considered independent in your jurisdiction?

Ideally the majority of non-executives should be independent, not only from shareholders but also from the business operations of the company.

Moreover, non-executive members should be no less than a quarter of the total number of directors. It is pointed out their role is paramount in representing the interests of minority shareholders and, in overseeing executive directors in financial areas and matters affecting the strategy and future of the company as well as in areas where executive directors may have conflicts of interest.

Independent and non-executive directors also have an important role to play in appointment and remuneration committees and audit Boards.

The concept of independent directors is generally linked to the non-representation of dominant shareholders in the company. In this sense, and in line with CMVM Recommendations, the appointment of independent executive directors will allow for the prevention of corporate decisions being taken in the interest of dominant shareholders alone and to ensure that the best interests of companies are preserved.

Non-executive directors need to be able and willing to challenge management supervisory proceedings to manage conflicts of interest and oversee related party transactions. Independent and non-executive directors also have an important role to play in appointment and remuneration committees and audit Boards.

CMVM Recommendation and Regulations go as far in this matter as to set out the criteria for determining the independence of Board members. In this regard, the Board has all times the power and the duty, in light of the emergence of new information, to assess the independence of its members.

Are staggered Boards a requirement under your jurisdiction? Do they improve Corporate Governance? Are they advisable?

Staggered Boards are neither a requirement nor an option for Portuguese companies. The Portuguese legal framework on Board structures does not make provision for those classified as traditional staggered Boards. Additionally it does not provide for election and dismissal rules that may have as their main objective, to hinder the process of replacing Board members. Board members are traditionally elected by the General Meeting and for a period of four years.

The Articles of Association may stipulate that the election of directors must be approved by votes corresponding to a certain percentage of the share capital. Alternatively, the election of a certain number of directors (no more than a third of the total) must also be approved by a majority of votes granted to certain shares. However, the assignment to certain classes of shares of the right to appoint directors, is not allowed.

The dismissal of directors can take effect at any time through a resolution passed at the General Meeting, called to that effect, although directors appointed by the shareholder state/government are immune from such trigger. Directors elected under the rules governing nomination by groups of shareholders representing minority stakes cannot be dismissed without just cause unless shareholders representing at least 20% of the share capital vote in favour. These provisions do not allow for staggered Boards to be enforceable nor to become a widespread practice within the Portuguese jurisdiction.

Board continuity, one of the most cited arguments in favour of staggered Boards, is currently guaranteed by a Nomination Committee in leading Portuguese companies. Resistance to takeovers, often cited abroad as another advantage of staggered Boards, is deemed against Corporate Governance principles.

It is a fact that staggered Boards often deter takeovers, hence reducing the premium paid by the bidder, ultimately holding back the growth of the market for corporate control, while reducing shareholder return and value.

2. Meetings: How often must the Board hold meetings under the law of your jurisdiction? Are the frequency and duration of the meetings a real measure of how deeply involved the Board is in the Company's business?

Statutory legislation stipulates that except where otherwise provided for in the Articles of Association, Board meetings should be held at least once a month. Frequency and duration of the meetings is an effective measure of how deeply the Board is involved in the company's affairs. How well Board members use their time at Board meetings is one of the key factors in developing a cohesive leadership group.

To make Board meetings productive, interesting and supportive of the Board's leadership role, meetings should be a means to an end. That is to say, with a clear agenda where Board members are able to reach the best possible decisions on management of the company's affairs based on accurate, informative material distributed suitably in advance for this purpose

Passive Boards, having little or no intervention in the management of the company, shall solely operate at the discretion of the CEO alone. They lack, furthermore, the accountability to shareholders that certifying Boards have. Only Boards engaging in the management of the company shall define their own boundaries and the CEO's responsibilities, while providing additional insight and support to the latter. In addition, the number and diversity of the meeting's attendants is also crucial, since an excessive frequency of meetings usually trims down the number of non-executive directors attending in the case of non-proactive Boards.

Only intervening and operating Boards shall be able to convene more often, on short notice, make key decisions to be implemented by the management alone or with the Board's support. Yet, quarterly Board meetings for results reporting should alternate with meetings for strategic planning and budget approval.

3. Management Reporting. What is the frequency and content of management reports to the Board in your jurisdiction? Is there a rule in your jurisdiction establishing how long in advance to a Board meeting are directors to be given the materials related to the topics/decisions that will make the agenda of that meeting? Should Boards and management be required to disclose their policy on Enterprise Risk Management (ERM)? Should the Board ensure that risk oversight is on the Board's agenda?

Management reports must be provided to the Board well in advance of the next Board meeting.

The size of the company and of its affairs will determine how frequently such meetings will take place and the appropriate management reports to be provided. To the latter, management must also prepare and attach minutes of previous Board meetings as well as notices for impending Board meetings.

At any time Board members may request additional information on the ongoing affairs and specific matters under the supervision and development of the Board of directors.

The appropriate Recommendations issued by CMVM on Corporate Governance provide that supervisory Boards shall advise, follow up and carry out ongoing assessments on the management of the company with reference to strategic activities that may be singled out for risk management purposes, as well as for monitoring and benchmarking any such risk management control mechanisms promoted and developed by the Board.

Their effectiveness and dynamics as well as risk mitigation strategies will be further scrutinised in the Corporate Governance Report.

The Board is equally required to disclose its policy on enterprise risk management on a yearly basis and to ensure that the overall risk management approach is in line with current best practice.

Risk assessment is a fundamentally important part of the risk management process and in this regard, risk assessment will be required as part of the decision-making process intending to exploit business opportunities. To that effect, risk assessment should be attached to all strategy documents presented to the Board.

Risk assessment procedure and techniques are paramount in developing benchmarks to determine the significance of the identified risks.

Companies are equally recommended to report externally their risk management policy procedures and control as well as risk performance.

4. Compliance: What is the Board's role in Compliance issues in your jurisdiction? What is the scope of director's fiduciary duty regarding Compliance? What is the appropriate dividing line between Board and officers' responsibility in this area? Does a director ever have a duty to protect the Company from overly aggressive Compliance efforts? Should the Chief Compliance Officer or any other executives have a direct reporting line only to the Board?

The Board is responsible for issuing an annual report on Corporate Governance Compliance in line with the applicable CMVM Recommendations and Regulations. In this regard the report must disclose information on:

- i. Distribution of responsibilities between the different corporate bodies and departments in the company;
- ii. Risk control system;
- iii. Increases or decreases in stock quotation;
- iv. Company's policy for the calculation of dividends; value of every share distributed over the last three financial years;
- v. Characteristics of the schemes for the allotment of buy options for shares adopted or valid in the financial year in question and disclosure and thorough explanation of any non-transferability clauses;
- vi. Investor Relations desk or equivalent body, and description of its responsibilities in the company's website;
- vii. Committees created by the company, namely a remuneration committee, an ethics committee, an investment committee and a committee for the assessment of corporate structure and governance;
- viii. Transactions made between the company and members of its Board(s), committees and departments, or any relevant owners of preference shares, or held in parent companies;
- ix. Disclosure of the independent and non-independent members of the remuneration committee;
- x. Disclosure of auditor remuneration and of auditing services fees;
- xi. Description of the internal risk-control system.

Exercise of voting and representation rights (namely concerning postal voting), the introduction of the possibility of electronic voting, and the introduction of electronic voting must also feature in the report.

The company's procedures, code of conduct and control mechanisms must be disclosed as follows:

- i. Description of internal procedures adopted to monitor risks inherent to the activities of the company, namely the existence of risk management units.
- ii. Indication of existing restrictions which may impede potential takeovers, especially caps on voting rights, special rights held by any shareholder, or shareholders agreements.
- iii. Codes of conduct adopted by the company regarding all matters in general, as for instance, codes of conduct in conflicts of interest, secrecy and incompatibility, and the means provided to shareholders of accessing those codes and regulations.

On management structure, the company must inform the following:

- i. Board structure and identification of Board members, with differentiation between executive and non-executive as well as independent and non-independent directors, including professional qualification and positions held in other companies of the same group;
- ii. Existence of an executive committee or other committees, with management duties, including a description of the duties and composition of those committees, with differentiation between independent and non-independent members;
- iii. Indication of whether remuneration of Board members is dependent on the results of the company or share price performance;
- iv. Indication of payments awarded to all members of the Board, with differentiation between executive and non-executive members, and the fixed and variable part of the remuneration, disclosing the amounts paid by other companies of the same group;
- v. Description of how the Board exercises effective control over the company, particularly information regarding:
 - Matters brought before the executive committee;
 - Matters that are not open for discussion by the executive committee;
 - Number of meetings held by the Board during the year in question;
 - Procedures put in place to ensure that the members of the Board are aware of the subject discussed by and decision made by the executive committee and information disclosed to this effect;

- Distribution of competencies between the president of the Board and the president of the executive committee;
- Confidentiality duties concerning matters discussed by the Board;
- Conflicts of interest within the Board, and the maximum number of positions which directors may hold on the Boards of other companies.

The accuracy of the report and compliance with Recommendations and Regulations in force on Corporate Governance encompass directors' fiduciary duties and responsibilities. Overly aggressive compliance efforts may hamper the swift and smooth running of the company and in this sense, its best interests and ultimately those of the shareholders.

In this regard to ensure compliance and minimise compliance failures or lapses it may be advisable to appoint a chief compliance officer who will be able to discharge the Board's responsibilities, see to whistle blowing activities and communicate the importance of compliance to all company members.

5. Whistle Blower regulation: Is there whistle blower regulation in your jurisdiction? How effective is whistle blower regulation in terms of Corporate Governance? Are there monetary or other rewards in your jurisdiction, in this connection?

CMVM Regulations require companies to annually disclose their policy on internal whistle blowing and on the implementation of an independent complaint system. However, such provisions do not provide for the undertaking of compulsory measures, nor do they recommend the adoption of a complaint system.

Nonetheless, CMVM Recommendations promote the existence of guidelines for the adoption of whistle blowing policies. Much of whistle blowing regulation in Portugal falls under the supervision of the Portuguese Data Protection Authority, which, according to its own guidelines, do not allow for anonymous whistle blowing to take place. Such legislation has made whistle blowing a part of corporate governance practices since September 2009.

At the core of such provisions are mainstream guidelines issued by the Portuguese Data Protection Authority, although anonymous whistle blowing may not be permitted. Equally CMVM recommendations recommend guidelines for the adoption of whistle blowing policies.

In this regard, the reporting of dangerous or illegal activities so that the misconduct or perceived misconduct can be addressed should be subject to internal policies and regulations, setting up the appropriate channels and the persons or entities in charge of dealing with the report of alleged malpractices.

Its effectiveness at large will depend however on the cultural environment where such practices are enforced, on the setting up of the appropriate channels and mechanisms to promote healthy and open communication, ethics policy as well as institutionalisation of mechanisms to aid reporting.

A culture of openness will encourage employees to point out malpractices in the organisations where they work. Yet, the widespread policy of most Portuguese companies regarding whistle blowing is to not incorporate one.

Organisations that foster openness will benefit from higher levels of malpractice reporting by employees. Additionally, employees are more likely to undertake action regarding irregularities and misconduct, within an organisation, if complaint systems in place offer higher levels of confidentiality or shielding for the whistle-blower.

The Association of Certified Fraud Examiners' findings on whistle blowing support the implementation of independent complaint systems, thus considering it the best option for detecting malpractices within companies, prevailing over external control. In fact, companies without complaint systems experience much higher losses than companies with proper systems in place, whilst the misconduct persists for a

lengthier period of time in the former cases.

6. Double Stand as Director and Officer: How conflict rules are regulated in your country? Is the Chairman allowed to act also as CEO of the company? Are officer and director roles and responsibilities sufficiently segregated in your jurisdiction as to provide independent oversight?

The chairman of the Board can in fact also act as CEO of Portuguese companies. In such cases, Corporate Governance CMVM Recommendations in force provide that where the president of the Board of directors or chairman carries out day to day management duties, it is recommended that he is advised by non-executive directors through the appropriate mechanisms put in place in order to secure and foster independence as well as a clear background and knowledge of decision-making processes.

Whether the roles and responsibilities of officers and directors are sufficiently segregated in the Portuguese jurisdiction and, in this instance, provide independent oversight is questionable.

However, the applicable provisions of the Portuguese Companies Code make provision in this regard that certain matters cannot be referred and decided by the CEO and the executive committee that he chairs and must instead be referred to the Board of Directors.

Among the matters on which the CEO and the executive committee are not empowered to decide are:

- Election of the chairman of the Board;
- Nomination of other Board members when vacant positions became available;
- Calling General Meetings;
- Approval of accounts and annual management reports;
- Giving indemnities on behalf of the company;
- Deliberating on change of corporate headquarters, increase of share capital as well as any proposed Mergers and Acquisitions, Demergers or Corporate Restructuring.

In essence, the essential divide is between executive, who as a rule represents majority shareholders, and the non-executives who should be independent. The underlining criteria to establish the independence of Board members stem from provisions on conflict of interests enshrined in the Companies Code whereby, independent directors should not represent shareholdings of more than 2% of the share capital of the company in question or, hold an executive role either in the company in question, or in a controlling or group of companies, be employed or carry out management duties in a competing company, earn remunerations from the company or other companies in a controlling or group relationship with the former, except for remuneration earned when carrying out management duties.

Members of the Board who have a significant commercial relationship with the company or with other companies which are in a group relationship with the former, members of the Board who are married or have close family ties with any of the abovementioned individuals, and members of the Board which are associated with any specific interest groups in the company or which are in a situation deemed capable of affecting their analysis and decision-making independency, will not be deemed independent and should not serve at the Board in this capacity.

Where the chairman has a more executive role in the company heading responsibilities relating solely to strategy and representation he will clearly be required to fulfil the criterion of being qualified as independent.

7. Audit Committee: Are there any Audit Committees or similar bodies in your jurisdiction? Briefly describe such body's role. What is the role of the Audit Committee with regard to the Company's corporate governance rules? Should Audit Committees be passive or proactive in overseeing management, internal auditors and external auditors?

The applicable set of provisions establishes that only one of the three management structures available to Portuguese companies, the Anglo-Saxon model, shall comprise an Audit Committee. In other models (unitary management or dual structure), the company's supervision shall be conducted by similar corporate bodies such as fiscal Board, single auditors and/or statutory auditors.

Auditing Committees shall be composed by a minimum of three non-executive directors, elected from the members of the Board in a General Meeting. The Companies Code provides that at least one member must be independent and CMVM recommends that independent directors comprise at least a quarter of all non-executive directors in a company.

To ensure their independence, members of the Audit Committee may only receive fixed income paid by the company. Moreover, in order to be protected against unfair and arbitrary termination, members shall only be dismissed on grounds of just cause.

Auditing Committees are in charge of overseeing the preparation and disclosure of financial information in terms of quality and truthfulness.

Members of the Auditing Committees also receive reports of irregularities, claims and complaints from shareholders or third parties in relation to potential breaches of corporate duties, and supervise not only the implementation of schemes for purposes of registering such claims, but also risk management and internal audit procedures.

Auditing Committees play a major role in enforcing and supervising the observance of corporate governance rules by monitoring the company's management, especially when adopting a proactive stance. Members of audit committees must participate in all the commissions' meetings, attending meetings of the Board of directors, executive committee and General Meetings and are often called to provide assistance in settling differences between other corporate bodies.

Crucial to proper financial performance and to the fulfilment of applicable statutory provisions on accounting and reporting practices, the Auditing Committee has the final say in choosing and appointing a statutory auditor or an audit firm.

8. Nomination Committee: Is there an obligation to have a Nomination Committee in your jurisdiction? Are there rules requiring a Nomination Committee to be in charge of searching for and selecting new directors and issue a report on that procedure? Do companies have to have clear and disclosed succession plans for Officers? And for Directors? Are there any applicable rules in your jurisdiction?

There is no obligation under our jurisdiction for companies to have a nomination committee to appoint Board members. In fact, Board members are mandatorily elected by the General Meeting, although initially they can also be nominated in the Articles of Association.

However, the current Corporate Governance Code recommends that listed companies create and enact clear rules to select potential candidates to the Board as independent and non-executive directors.

The rules are designed as a means of preventing executive directors from interfering or tampering with the process of nominating independent non-executive directors.

The current Corporate Governance Code further recommends that listed companies create a nomination Committee in order to ensure a timely identification of potential candidates with the high profile required for the performance of a director's duties.

Board succession planning is set out in the provisions of the Companies Code governing the filling of vacant positions in the Board, minimum and maximum numbers of the Board, term limits of its members' positions, the possibility of term renewal and maximum numbers of terms permitted, as well as independence requirements.

Recruitment to fill the vacant positions will be made initially from within the existing remaining directors and end when necessary, by election of a new member of the Board by the General Meeting.

The Articles of Association may equally make provision for retirement plans as well as retirement on sickness grounds, pension plans and potential insurance policy requirements in these regards. Such provisions must however be previously approved by the General Meeting.

The nominating committee or Board chair should have regular candid discussions with Board members regarding their intentions. Some organisations ask directors to reconfirm their commitment annually.

Directors should also have input into what committee or officer positions they are interested in holding. Some organisations have a requirement that directors hold officer positions or participate on committees, and this should be made clear when the director is brought on to the Board.

9. Performance: Is there any specific process, rules and parameters for assessment of directors' performance?

There are no mandatory statutory provisions on the standards by which director's performance are to be evaluated. Nonetheless, top tier companies are recently disclosing and improving their evaluation models, as chairmen and investors are becoming increasingly interested in benchmarking and tracking Board effectiveness.

Good corporate governance can be a competitive advantage if the Board focuses on performance, not just conformance. Therefore, Board members should be evaluated in accordance with similar criteria applicable to executive officers and face the same type of performance measures, including Board compensation structures indexed to performance.

We find that the current emerging trend to introduce some form of measurability shall be responsible for a multiplier effect as positive experiences spread to fellow Board members on multiple Boards, thus becoming indirectly exposed to good practices and performance evaluation.

Board and Committee reviews are now being regarded as an annual requirement and, while some consider that it is purely an internal affair, others consider that regular performance assessment should be facilitated by outside experts in organisational behaviour. The option of external evaluators schemes, now starting to gain traction, provides objectivity, benchmarking and candid feedback.

Behavioural changes are also fostered by direct feedback focusing on qualitative criteria and rarely on quantitative criteria, although the latter are still needed for scoring purposes. Indeed, improving competencies and behaviours through feedback is the most important outcome of management evaluation.

IV. REMUNERATION AND INCENTIVE POLICY

Many of the authors analysing the financial crisis pointed out that one of the factors behind financial risk taking business decisions (especially in the case of financial institutions) was based on misalignment of incentives with long-term goals of corporations, as incentives are an important component in risk and risk-taking. In the case of banks, for example, shareholders usually holding a minority stake may not entirely be relied upon to impose on managers the optimal level of risk-taking. Therefore, normally there are regulations imposed which, specify the criteria of managers' incentive policies.

1. Is there such a policy which specifies remuneration schemes of financial institutions in your jurisdiction?

The remuneration policy of public companies' directors is either determined at a General Meeting or, more often, by a remuneration committee also appointed by a General Meeting, as provided by the Companies Code. The members of the remuneration committee should be independent.

The applicable legal framework does not consist of binding rules regarding the makeup of remuneration packages. Thus, remuneration may encompass fixed salary, a variable component and profit sharing, with a maximum percentage being stipulated beforehand in the Articles of Association.

Most public companies adhere to CMVM's Recommendations and Corporate Governance Code, whereby variable remuneration of executive officers and directors should comprise a significant part of the total salary. Compliance with these recommendatory provisions must be disclosed in an annual report. Where financial companies are concerned, stringent disclosure duties have been put in place by Bank of Portugal's Regulation 1/2010 (*Aviso*). This statute requires that the annual report on corporate governance compliance, as provided for by CMVM Recommendation 1/2010, must also encompass additional information on remuneration policies.

2. If yes, what are the main criteria which may ensure that managers may part-take in sharing risks and in the course of their decision making self-interest in short and medium term performance of the financial institution is brought in line with long term interests of shareholders, depositors and bondholders?

Financial institutions (and public companies in general) should opt for remuneration policies underpinned on long term performance criteria. Previously set up performance assessment criteria would consider real company growth, shareholder return on capital, long term sustainability and weighing all risks, pursuant to CMVM's Governance Code guidelines.

Moreover, variable remuneration should account for a considerable fraction of the management's total remuneration, which should be capped beforehand. A significant fraction of the total annual remuneration shall be deferred and its payment shall be contingent on the fulfilment of predetermined performance targets.

Guaranteed variable remuneration is deemed an ill-advised practice and does not constitute a means for the alignment of interests of a company's management with its shareholders.

Pay for performance allows for alignment of interests between management and shareholders, while disclosure obligations regarding salaries also protect, to a degree, other stakeholders such as depositors and bondholders.

Executive compensation shall be frequently tied to performance and equity ownership is required.

According to the information disclosed by CMVM (2009 figures) on publicly held companies remuneration packages, “Board members mostly got variable remunerations directly from the company and received higher fixed remuneration from the remainder of the companies within the group”. On average, fixed remuneration accounts for 54.4% of total remunerations, but PSI 20 companies have higher variable remuneration ratios of 65.8% and financial sector companies of 58.3%. In fact, 51.7% of Board members received a variable remuneration component that reached a substantially high amount.

3. On a more general level, what restrictions, if any, exist on compensation of Directors? What restrictions, if any, exist on compensation of CEOs and senior officers?

There are no statutory compensation restrictions applicable to salaries paid to those who manage companies in Portugal. Companies Code provisions and CMVM’s Recommendations on remuneration of Board Members, in line with the applicable EU Directives, set out that Directors with executive duties shall receive remuneration with a fixed and variable component, while that of non-executive directors and members of the Audit Committee shall consist of a fixed component only.

CMVM’s 2011 report referring to 2009 data, points out that “the remuneration of executive members of the Board was significantly higher than that of non-executive members, both as regards their average and when comparing the distribution of the absolute individual remunerations”.

Furthermore, newly introduced tax legislation penalises lump sum payments of bonuses to Board members by levying higher Personal Income Tax on the said income.

Additionally, payments above a Euro 27,500 threshold accounting for more than 25% of the previous year’s total remuneration shall be subject to a 35% flat rate Corporate Income Tax. Roll over relief is applicable in cases where 50% of remuneration payments are deferred for three years.

Finally, golden parachutes payments are also penalised if not directly correlated to the company’s performance, hence being subject to a Corporate Income Tax final flat rate of 35%.

4. Are there rules on clawback policies in addressing executives’ compensation?

There are no clawback rules applicable to executives’ compensation.

5. Are there rules on the equilibrium between short-term and long-term goal-based compensation?

Please refer to the answer to question 2.

6. How effective are say-on-pay rules (i.e. non-binding shareholder vote on executive compensation including both regular compensation and golden parachute situations)?

Pursuant to provisions in force since 2009, the Board of Directors or the remuneration committee of publicly traded companies must annually prepare a report on the company’s remuneration policy, which will be subject to non-binding approval by the General Meeting. This report must highlight the measures deployed to align shareholders with management interests, criteria to set out variable remuneration, the awarding of stock option plans, performance assessment measures, which will determine the capping of variable remuneration.

The General Meeting powers in this regard are however limited as they will not decide on Directors' Remuneration, or be entitled to submit proposals for voting. General Meeting powers in effect are restrained with regard to approval or rejection of the remuneration policy as they are being put forward for approval at the General Meeting. Thus debate on such matters at the General Meeting and disclosure of related information will be aimed at fostering shareholders activism and influencing future outcomes on remuneration policy and criteria. In the Portuguese case, the remuneration committee is mandatorily elected by the General Meeting. This requirement reveals itself certainly most effective in aligning shareholders interests with management. Furthermore, it provides say on pay criteria for effective remuneration for management.

7. What are the rules in regard to stock ownership by directors and officers in your jurisdiction?

Board members and officers may engage in risk seeking behaviour when holding shares in a company within their powers. Therefore, listed companies are required to report on plans for allocation of shares and/or stock options among members of the Board of directors and/or company employees. The report must contain an explanation for the adoption of such policy and the criteria concerning shares and stock options, validity of options, incentives for their granting and vesting conditions.

V. M&A RELATED ACTIONS

1. Due Diligence

Is a majority shareholder entitled to request from the management that a data room for purposes of the sale of his shares be prepared?

Yes, a majority shareholder where represented and in control of the Board may request the preparation of a data room in order to disclose confidential data to potential acquirers of his/her stake during a due diligence process.

However, since much of the released information is confidential and restrictions on the viewers' ability to release it to third parties are enforceable, auditing shall generally be provided so that a record is kept of which parties have entered the data room (a physically secure continuously monitored room), or have had access to the contents therein (in instances of online data rooms) and information leaks of trade secrets are traceable.

Is management authorized to disclose internal information to third party buyers of shares or of a part of the business? Would a consent from the Board or the shareholders' meeting be required?

The reply to this question will be different whether we are considering disposal of assets or shares, in a publicly traded company or in a privately held one.

In a publicly-traded company information available will be mostly on public records. Hence before the launch of the takeover bid, there will be seldom or no involvement of the management in providing information to a potential bidder. In an acquisition of shares of a privately held company, directors are in general bound by the bona fide principal in the disclosure of information to a potential acquirer. In addition the General Meeting approval will be required to provide sensitive information which will be mostly covered and protected by confidentiality agreements.

What limitations would insider trading rules impose upon such process?

The misuse of internal information to obtain an unfair advantage in investment opportunities is deemed by the applicable provisions of the Companies Code as abuse of information, which in the case of Board members constitutes insider trading. Given this stance, Board members may not use their professional awareness of undisclosed facts and information to engage in share deals (either directly or indirectly, such as through the disclosure of information to a third party) in order to obtain a profit or avoid a loss.

Engaging in insider trading constitutes grounds for the dismissal of Board members by a Court of Law, at the request of any shareholder and may also be subject to criminal proceedings.

Are members of the Board authorized to pass on information to individual shareholders?

Members of the Board are authorised to pass on information to shareholders holding at least 1% of the overall share capital. In fact, minority shareholders have the right to access any complete and clear information, as and when it may be required. Refusal of the requested information may lead to court proceedings.

The applicable provisions of the Companies Code allow shareholders to aggregate their shareholdings in order to meet the information requisition requirements by the Articles of Association or by statutory

provisions.

Is the management entitled to engage the company in the acquisition of another business without the conduct of due diligence?

The applicable Companies Code provisions provide that in the exercise of their duties, directors are bound by a business judgment rule as a standard of performance. This legal principle encompasses the duty to act in the best interests of the company and shareholders, and always on an informed basis.

Generally, in M&A deals, acting on an informed basis is contingent on thorough due diligence proceedings being conducted. Hence acquiring a target company without due diligence and therefore without the required attentiveness and prudence, shall be deemed as a breach of management's duty of care due to the higher risk of failure or subsequent losses.

2. Transactions

Can the management generally cause the company to enter into M&A transactions (acquisition or sale of businesses) without consent of the Board or the shareholders' meeting?

Under certain circumstances management can cause the company to enter into deals equivalent to M&A transactions without the consent of the Board or the General Meeting.

This will be the case in asset deals with an equivalent effect of a merger such as the purchase of key assets and goodwill of the target.

3. Public Takeover

Is the management of a listed company entitled to take "defensive measures" against an unfriendly bid? If yes, which "defensive measures" may management take? To what extent is the (prior) approval of the Board and/or the shareholders' meeting required for "defensive measures"?

Yes, management of a listed company may take defensive measures against an unfriendly bid but only with the backing of a General Meeting resolution approved by at least 75% of the voting rights. Where this level of support is unattainable, the Securities Code establishes that the target company must assume a passive role during the standstill period whereby it is excluded from practising any act that may substantially affect the net asset situation of the company and thus prevent the bidder from achieving its goals by diminishing the target's net value. This includes the issuance of shares and/or bonds. Boards are only allowed to practice acts of day-to-day management not exclusively aimed at frustrating a hostile takeover bid.

Incidentally, CMVM's Corporate Governance Code advises that any measure taken against takeover bids should be in the best interest of both company and shareholders

4. Involvement of Management in a Disposal Process by Shareholders

At what point in time do shareholders usually involve management in the process of the disposal of their entire shareholding in the company? Would the shareholders typically conclude an exit agreement with the management in order to regulate and incentivize the process? Would the answer to the above questions be different if only a majority shareholder intends to dispose of his shares?

In takeover bids of publicly traded companies, management typically becomes involved once the draft announcement of the takeover offer becomes public. At that stage the Board is empowered with mandatory duties to compile a detailed assessment report, covering all aspects of the offer including consideration of the company strategy and the repercussions on all stakeholder interests including workers.

Management is bound to advise shareholders and stakeholders either to accept or refuse the offer. Such assessment reports will in due course be disclosed to CMVM and the bidder.

In both publicly traded and privately held companies, the Articles of Association may provide that the transfer or the disposal of nominative shares is conditional on the Company's approval given by the Board or at the General Meeting.

Board involvement will also be active at the early stages of the share disposal process, where shareholders agreements may provide that management will broker and mediate the given shareholders' exit.

Management involvement before that stage may occur where the Board represents and has been nominated or appointed by the exiting shareholders. In those circumstances there will be management co-operation from the very early stages of the disposal process.

Where the exiting shareholders do not control or have substantial influence on the Board, exit agreements may be entered into with the outgoing management in order to regulate and incentivise the whole process of disinvestments.

Such exit agreements will typically include non-compete clauses, restrictive covenants on non-involvement rights and enforcement of tag-along rights.

5. Dual-Track Process

Under which circumstances can a majority shareholder force the company to follow a dual-track disposal process?

Even though a majority shareholder is entitled to give instructions to a company regarding the sale of its shares, the dual track share disposal process is not a viable divesting option. The applicable legal framework in Portugal does not allow for a private share deal to be enforced whilst takeover proceedings are ongoing.

In the event that a private sale is ultimately pursued, only the threat of a public offer may put additional competitive pressure on potential acquirers to make an offer for a higher consideration.

Portuguese companies are prevented from choosing the option that yields the most value, since preconditions, withdrawal and amendment of public offers are subject to stringent requirements.

In fact public offers should be undertaken in conditions that ensure equal treatment for all addressees. Apart from decreasing the consideration offered (minimum of 2%), further amendments to the bid are off limits or subject to stringent requirements and must always be favourable to potential acquirers.

Furthermore, the bidder's shares shall be locked (and cannot be sold) at the beginning of bidding proceedings, rendering the private deal useless, as it cannot be enforced. The bidder is only permitted to amend or withdraw the terms of the offer in situations that involve an unforeseeable and significant change of circumstances, deemed to exceed normal inherent risks, and provided it does so within a reasonable time and subject to CMVM's authorisation.

Additionally, all preconditions must be in accordance with a legitimate interest of the bidder and may not

influence performance of the securities market. Defeating conditions may be applicable, but conditions dependent solely on the whim of the bidder are prohibited.

6. Delisting

Under which circumstances can the acquirer of the majority of shares force the company to delist from the stock exchange?

A majority shareholder is able to provide through his potential influence on the Board recommendations on the possible delisting of the company.

Deliberations taken at the General Meeting on these matters must meet a 90% threshold voting in favour.

Equally, the acquisition of 90% of voting rights by a sole party at the onset of a takeover bid will trigger delisting proceedings.

A company not trading for more than one year on the stock exchange will be eligible for delisting as well.

7. Squeeze-Out

Under which circumstances can the acquirer of the majority of shares achieve a squeeze-out of the minorities?

A shareholder with more than 90% (either directly or indirectly) of the voting rights in a publicly held company, as a consequence of the launch of the takeover bid, is entitled to acquire the remaining shares within three months of the closing date of the offer (squeeze-out mechanism).

Likewise, after the launch of a takeover bid, shareholders holding less than 10% of the voting rights in the target company are entitled to sell their shares to the bidder (sell-out mechanism).

Compulsory purchase proceedings of the remaining shares may be triggered through a written request addressed to the bidder or to the CMVM, in cases where the former does not comply with the request. In all compulsory acquisition proceedings, equal treatment of all shareholders must be assured, in particular regarding the calculation of the consideration to be paid. The price shall be set at its market value, in accordance with the provisions applicable to public offer bids.

BIBLIOGRAPHIC REFERENCES

AMADEU, José Ferreira, 1997 “Os futuros e opções” in Direito dos Valores Mobiliários (Obra Colectiva) LEX

AZEVEDO, Raquel and Simon Behr, March 2007, “Corporate Governance- Setting the Standards on Minority Shareholder Rights: The Portuguese Case”, Volume 18 Issue 3 – International Company and Commercial Law Review

BESWICK, Simon, “Buying and selling private companies and businesses”, 2001, Butterworths;

BLACK, Fischer and Myron Scholes “The pricing of Options and corporate liabilities”, The Journal of Political Economy

CARVALHO, Francisco Proença de and Filipa Loureiro, “O crime de abuso de informação privilegiada (insider trading), em especial a questão dos administradores como insiders primários, quando actuam em representação da sociedade”

CÂMARA, Paulo, 2009, “Manual de Direito dos Valores Mobiliários”, Almedina

CÂMARA, Paulo, “Say on pay: o dever de apreciação da política remuneratória pela assembleia geral. Auditoria interna e governo das sociedades” in estudos em homenagem ao Prof Paulo Pitta e Cunha

CAMEIRA, Maria Antónia, 2009, Portuguese Business Law 2nd Edition

CAMEIRA, Maria Antónia, 2009, “Effects and recovery from the financial crisis”, presented at 53rd UIA Congress

CAMEIRA, Maria Antónia and Raquel Azevedo, November 2007, “Corporate Governance On Nonlisted Companies Special Features Of Corporate Governance In Connection With Family-Run Companies”, presented at 51st UIA Congress

CORDEIRO, António Menezes, 2011, “Direito das Sociedades”, Almedina

Cordeiro, António Menezes and Paulo Câmara, 2007, “A reforma do Código das Sociedades Comerciais” in Jornadas em homenagem ao Professor Doutor Raúl ventura, Almedina

CUNHA, Paulo Olavo, 2010, “Direito das Sociedades Comerciais”, Almedina,

LEMOS, Kátia Matos and Lúcia Lima Rodrigues, 2007, “Divulgação de Informação sobre operações com instrumentos derivados: evidência empírica no mercado de capitais português”, ESG – EEG, Universidade do Minho

SILVA, Artur Santos, António Vitorino, Carlos Francisco Alves, Jorge Arriaga Da Cunha e Manuel Alves Monteiro, 2006, “Livro Branco Sobre Corporate Governance Em Portugal”

CMVM - Cadernos do Mercado de Valores Mobiliários

CMVM - Regulations

CMVM - Code of Good Practice

Websites

Association of Certified Fraud Examiners
<http://www.acfe.com/>

CMVM – Comissão do Mercado de Valores Mobiliários
www.cmvm.pt

Entrepreneur.com
<http://www.entrepreneur.com/>

European Corporate Governance Institute
<http://www.ecgi.org/>

International Financial Law Review
www.iflr.com

International Finance Corporation
<http://www.ifc.org>

Instituto Português de Corporate Governance
www.cgov.pt

Practical Law Company
www.practicallaw.com

OECD Principles of Corporate Governance
<http://www.oecd.org/>