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COMPANY LAW COMMISSION

OPERATION OF A COMPANY BY WAY OF ELECTRONIC MEANS

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I. INTRODUCTION

At the turn of the new millennium, electronic commerce became a reality of daily life, influencing not only the way companies relate do each other, business-to-business (B2B), but also how they relate to their consumers, business-to-consumer (B2C) transactions: globalisation at the click of a mouse button.

The Portuguese law maker could not disregard the new developments in technology. Thus, adapting the existing legal framework to the new technical environment became a priority. One of the first attempts to forge a strategy for the future was the so-called 'Green Book for the Information Society in Portugal' (*Livro Verde para a Sociedade da Informação*) drafted by the Information Society Commission and approved on 17 April 1997 by the Portuguese Council of Ministers. The National Initiative for the Electronic Commerce¹ was created in 1998².

Several important laws were also enacted, some of them with direct impact on companies, for instance, Decree-Law 290-D/99 of 2 August 1999, as amended by Decree-Law 62/2003 of 3 April 2003 and Decree-Law 165/2004 of 6 July 2004 on electronic documents and electronic signatures, and Decree-Law 375/99 of 18 September 1999, on the equivalence between digital and paper form invoices.

¹ Enacted by Resolution No. 115/98 of the Council of Ministers of 1 September 1998.

² The guidelines on this initiative were approved by Resolution No. 94/99 of the Council of Ministers of 25 August 1999.

II. CORPORATE GOVERNANCE

Electronic means within the internal operation of a company

II.1 Is the admission to / participation in a general meeting / board of directors meeting / supervisory board meeting by remote electronic communication possible? If yes, how?

Is there a limitation depending on the issue(s) of the meeting or any other restriction applicable to the use of electronic communications?

Does the physical presence of sufficient participants to constitute quorum impact your answer?

There are no specific statutory provisions addressing the participation of shareholders in general meetings by remote electronic means. This is a fairly new topic and, therefore, the existing legal framework is still evolving and adapting itself to new technologies.

However, through the application of the general rules on the interpretation of legal provisions, it is possible to conclude that in the absence of any of the specific prohibitions set forth by Portuguese Company law on the participation in general meetings, board or supervisory meetings by electronic means, such participation may be allowed by the Articles of Association.

The relevant clauses should provide that remote participation by electronic means is deemed participation in person, address the circumstances in which such participation is allowed, and the technical and procedural requirements. There are no specific prerequisites concerning the type of issues to be discussed or requirements concerning physical presence of sufficient participants to constitute quorum.

An example of clauses in this respect can be seen in the Articles of Association of one of our clients:

“Article 15 - COMPOSITION OF GENERAL MEETINGS ...

13. The exercise of voting rights by correspondence or by electronic means covers all the items of the agenda included in the notice, under the terms and conditions established therein, voting by electronic means being subject to the finding by the chairman of the General Meeting prior to the meeting being convened, that the necessary means exist to ensure the security and reliability of votes cast by these means.”

“Article 26 ...**BOARD OF DIRECTORS' MEETINGS** ...

4. Without prejudice to the provisions of the foregoing number and upon unanimous approval of the participants at the beginning of each meeting, Directors who participate by using telecommunication means providing real-time transmission and reception of voice or of voice and image shall be deemed present.”

In this respect, it is worthwhile mentioning that this matter has been considered an important corporate governance issue and, accordingly, the Portuguese Stock Market Supervisory Authority (*Comissão do Mercado de Valores Mobiliários* – CMVM) issued in 1999 recommendations aimed at fostering and providing absentee votes submitted by electronic means. Since then, several Portuguese listed companies encourage shareholders to vote by electronic means.

³ ⁴

II.2 Is the exercising of the right of remote voting (which allows voting in absentia, that is casting votes by remote electronic communication) possible? If yes, how?

As aforementioned, the exercise of the right of remote electronic voting is possible as long as it is authorised by the Articles of Association.

As also aforementioned, the company’s Articles of Association should lay out the terms in which remote voting by electronic means at general meetings is permitted. The encouragement of voting by electronic means, presupposes the promotion and development adequate technical resources, which are necessary to receive the votes issued by electronic mail and to ensure their authenticity⁵, integrity and confidentiality⁶.

³ Regarding voting by electronic means see *infra* II.2.

⁴ See <<http://www.millenniumbcp.pt/>>.

⁵ The use of digital signature, for instance, should allow the confirmation of the authenticity and integrity of data sent in by electronic means. However, such signatures should be checked by certification bodies.

A solution adopted by a Portuguese listed company, *Electricidade de Portugal* (EDP), is to provide passwords to shareholders voting electronically (see <http://www.edp.pt/>).

⁶ Decree-Law 290-D/99 of 2 August 1999, as amended by Decree-Law 62/2003 of 3 April 2003 and Decree-Law 165/2004 of 6 July 2004, contains specific provisions aiming at guaranteeing the secure use of open electronic networks, in general, and the Internet, in particular, for instance, by means of encryption. Article 3 provides that the electronic document satisfies the legal requirement of written form in the same manner as a declaration/statement satisfy the Civil law requirements of written form.

Does the physical presence of sufficient participants to constitute quorum impact your answer?

The physical presence of sufficient participants to constitute quorum does not impact on the exercise of remote voting by electronic means. Pursuant to the CMVM Recommendations on absentee votes, votes issued by mail or electronically should be counted as part of the quorum of a general meeting.

This goes in tandem with the objective of fostering shareholders participation in the company's decision making process, which is encouraged by the use of electronic means of communication. However, the company's Articles of Association may provide otherwise.

II.3 Is the granting of a proxy to a general meeting by remote electronic communication possible? If yes, how?

It is possible to grant a proxy to a general meeting by remote electronic communication.

As provided by the general rules on participation and voting by proxy in a general meeting, the proxy must be granted by a letter addressed to the Chairman of the meeting and signed by the relevant shareholder (Article 380 (2) of the Companies Code).

Pursuant to Article 3 of Decree-Law 290-D/99 of 2 August 1999, as amended, which incorporates Directive 1999/93/EC of the European Parliament and the Council of 13 December 1999⁷ into the domestic law, an electronic document must satisfy the legal requirements of written form in the same manner as a declaration/statement satisfy the Civil law requirements of written form.

Furthermore, Article 7 states that an advanced electronic signature satisfies the legal requirements of a signature in relation to data in electronic form in the same manner as a hand-written signature satisfies those requirements in relation to paper-based data. An electronic document is considered to be sent and received by the addressee if sent to and received by an electronic mail agreed by the relevant parties (Article 6 of Decree-Law 290-D/99, as amended).

Thus, insofar as the company allocates an electronic mail address for the purposes of communicating with shareholders and the above mentioned letter is sent by electronic means, addressed to the Chairman of the meeting and authenticated by an advanced electronic signature, such electronic document will be deemed to have the legal effects of a signed letter.

⁷ 2000 OJ L 13/12.

Is it mandatory for Board of Directors and/or Supervisory Board members to be physically present? May Board of Directors and/or Supervisory Board members be represented by proxy?

It is not compulsory for board members to be physically present at a board of directors' meeting. Pursuant to Article 410 of the Companies Code, representation by proxy is possible, provided that this is authorised by the company's Articles of Association, and the proxy is granted to another member of the board of directors. The mandate should be given by a letter addressed to the Chairman of the meeting.

As far as supervisory board members are concerned, the Portuguese corporate provisions do not specifically foresee their representation by proxy.

II.4 Is it possible that the documents required by the law to be submitted to the approval of the General Meeting, including the Auditors' Report, be submitted by remote electronic communication in electronic form? If yes, how?

Auditors' reports, as well as proposals and other legally required documents to be submitted to general meetings' approval. may be disclosed to investors by electronic means.

It is common practice amongst Portuguese listed companies to post press-releases and notices regarding important corporate events on their websites, as well as proposals to be discussed in general meetings and other information, such as financial and corporate governance reports. Examples of Portuguese listed companies that publish this type of information on their websites are Portugal Telecom (<http://www.telecom.pt/>), EDP (<http://www.edp.pt/>), and Sonae (<http://www.sonae.pt/>)⁸.

The CMVM actually recommends the use of electronic communication to make information and preparatory documents to the general meeting, including the notice of the meeting, available to investors⁹. In fact, corporate dynamics require constant updating of company information. As general meeting resolutions should reflect all facts occurred up to that date, electronic means can provide easy and quick access to the relevant information, including the notice of the meeting.

The use of electronic means with regard to disclosure of preparatory documents must also conform to the relevant legal requirements.

⁸ These companies also include information on corporate structure, share capital, percentage of free-float, number of shares, main shareholders and credit rating.

⁹ See CMVM Recommendations on absentee votes and on corporate governance.

This issue is not, however, regulated by statutory provisions, but rather stems out of corporate practice.

II.5 Is the dissemination of pre- and post-General Meeting, Board of Directors and Supervisory Board information (e.g. invitation, minutes) by remote electronic communication possible? If yes, please give a broad overview.

The dissemination of pre- and post- general meeting information, as well as pre- and post- board of directors and supervisory board meetings, information on proposals, notices and minutes of general meetings, directors and supervisory boards meetings may either be posted on the company's website or sent to shareholders by e-mail (if previously required), directors and supervisory board members. The CMVM encourages the disclosure of information by electronic means of communication and Portuguese listed companies do use their websites to make this information available to investors. For instance, EDP has notices for general meetings and resolutions, amongst other relevant information to investors, posted on its website¹⁰.

However, as aforementioned this matter is not regulated by statutory provisions rather stemming from corporate practice.

II.6 With respect to Questions 1-5, if the answer is yes, may the remote electronic communication be the only way (excluding the traditional communication) determined by the company in connection with the arrangement of the above or does it necessarily exist parallel to other forms of communication?

Although remote electronic communication may coexist in parallel with the means of communication statutorily foreseen in the applicable corporate legal provisions, remote electronic means may not supersede the ones statutorily foreseen.

II.7 Is it mandatory for listed companies or all companies to have a web site? If yes, what kind of information is required to be published therein?

Pursuant to Article 3-A of CMVM Regulation 7/2001¹¹, companies listed and admitted to trading on the Portuguese regulated market, located or operating in

¹⁰ See

<<http://www.edp.pt/index.asp?LID=PT&MID=2&OID=6020000&PID=6000000&CID=206247&SESSID=s52Q01C21100k08K3V6b3Dr>> for the minutes of the general meeting held in 31 March 2005.

¹¹ As amended by CMVM Regulation 11/2003.

Portugal, are required to have an updated and easily accessible website. The website must contain the following information¹²:

- Indication of corporate name;
- Confirmation of public company status;
- Head office address;
- Companies Registry;
- Tax registration number;
- Share capital;
- Indication of the fact that the company is in liquidation, if applicable;
- Articles of Association;
- Identification of the members of the board of directors and other corporate bodies, as well as the permanent representatives in charge of liaising with the market;
- Contact details for the investors relations department;
- Financial reports for the last two years;
- List of the company's events for every six months, including, *inter alia*, the dates of the general meetings and the dates of quarterly, half-yearly and annual announcements;
- Proposals presented for discussion and voting at each general meeting, during the fifteen days prior to the date of the general meeting¹³; and
- Notices of the general meeting, circulated during the thirty-day period prior to the meeting.

The aim of the provisions is to improve efficiency of securities markets via the use of electronic means, while ensuring the integrity of the markets in general and, in particular, the protection of investors and the quality of the information disclosed. This is a remarkable move towards saving cost effectiveness in the running of a company. In particular, it simplifies the process of preparing general meetings, which is critical given the demands imposed by increasingly globalised markets with stakeholders in multiple locations.

The main principles guiding the use of electronic means of communication among listed companies is the principle of functional equivalence, according to which the existing provisions regulating the securities markets should not discriminate between paper based transactions and electronic transactions, and the principle of neutrality, which means that the relevant provisions should treat all forms of technology equally. According with the equivalence principle¹⁴, the information disclosed via the Internet must be complete, accurate, true, objective and lawful. Entities which disclose information via the Internet are responsible for its contents.

¹² Vis-à-vis Article 171 of the Companies Code.

¹³ See Article 289 of the Companies Code.

¹⁴ The publication of specific information required by law to be made through a newspaper of mass-circulation or in the bulletin of a given regulated market, configures an exception to the principle of equivalence.

In this regard, the CMVM recommends a set of procedures designed to guarantee the adequacy and reliability of the information. In this sense, all information addressed to Portuguese residents must be in Portuguese, adequate security measures should be adopted in order to ensure the integrity and authenticity of the information posted on the website, and an e-mail address must be provided in order to facilitate the contact between the entity responsible for the website and the addressees.

Such requirements do not exist upon non-listed companies. However, in order to keep pace with the so-called information society, other companies may gain credibility among stakeholders and pursue sound marketing strategies by maintaining a website and disclosing key information about their activities therein.

Would posting information in the website be sufficient or are traditional communication methods still necessary?

Making certain types of information available in the company's Website is sufficient. Article 1 of CMVM Regulation 4/2004 permits listed companies which are located or operating in Portugal and admitted to trading on the Portuguese regulated market to publish their financial reports by electronic means of communication, amongst others, provided that these reports are readily accessible to investors through the companies' websites and that the CMVM is notified of this fact.

In fact, pursuant to amendment of 167 of the Companies Code¹⁵, firms which were originally obliged to make publications of certain acts and contracts in the Portuguese Official Gazette (Diário da República) are now allowed to post them in the website allocated for this purpose by the Ministry of Justice.

¹⁵ Amended by Decree-Law 111/2005 of 8th July, effective as of the 1st January 2006.

II. EXTERNAL RELATIONS

(A) General questions on the acknowledge of electronic documents

- 1. If a declaration is made by electronic means or a document is drawn up in electronic form, under what circumstances can it be deemed as a written document?**

As aforementioned, a declaration made by electronic means or a document drawn up in electronic form will be deemed to comply with the legal requirement that it be in written form in the same manner as a declaration or statement satisfies the Civil law requirements of written form.^{16 17 18}.

If such an electronic document bears a qualified electronic signature certified by an accredited certifying entity, it will be deemed as having the same validity as a signed private document pursuant to article 376 of the Civil Code.

- 2. If a declaration is made by electronic means or a document is drawn up in electronic form, under what circumstances can it be deemed as a private instrument with full probative force?**

As aforementioned, an electronic declaration or documents drawn up in electronic form will be deemed to have the full probative force of a private signed document, when it bears an advanced electronic signature based on a qualified certificate issued by an accredited certification service provider¹⁹ (Articles 3 (1), (2) and 7 of Decree-Law 290-D/99, as amended).

If an electronic document or electronic declaration is not susceptible of being represented in written format, it shall have the same full probative force as a mechanical reproduction of facts, if it bears an advanced electronic signature based on a qualified certificate issued by an accredited certification-service-provider (Article 3 (3) of Decree-Law 290-D/99 and Article 368 of the Portuguese Civil Code).

¹⁶ *Supra* II.3.

¹⁷ 2000 OJ L 178/1.

¹⁸ Method of functional equivalence (see. Nuno Trocato da Costa, *Regulando a Contratação Electrónica*, 2005, p. 27 as in <http://www.verbojuridico.net>. The author says unless a text that appears on the computer screen is stored in any storage media, such as CD-ROM and hard disk, which allows it to survive when the computer is shut down, it cannot be regarded as a document in written form.

¹⁹ The rules on the several accreditation services provided by the certifying entities, services such as registration, issue, distribution, management and revocation, provision of secure signature-creation devices and chronological validation, as well as the respective subcontracting regime, are laid out in Regulatory Decree 25/2004 of 15 July 2004.

3. Is it possible that the company concludes contracts by remote electronic communication? If yes, how? Under what circumstances will such contract be deemed as a contract in written form and at least a private instrument with full probative force, I such formal validity requirement is established by law?

Portuguese companies may conclude contracts via remote electronic means. In fact, in the terminology adopted by Christopher Reed, is merely a matter of “old wine in new bottles”²⁰.

Decree-Law 7/2004 of 7 January 2004 lays down the provisions regulating the process of entering into of electronic contracts, defined as contracts concluded by electronic means or by means of a data-processing technique (Article 24).

The general provisions of Portuguese contract law are fully applicable to these contracts. The underpinning principle of the Decree-law is the freedom to conclude contracts by electronic means (Article 25) and the effectiveness of these contracts in accordance with the contracts legal provisions underlying principle ²¹.of freedom of form. (Article 219 of the Portuguese Code).

The legal provisions on electronic contracts promote the entering into and conclusion of contracts by electronic means. The issue of evidential weight remains, however, a matter to be further analysed and carefully dealt with ²².

(B) Electronic means in the company's communication with its partners, customers and the authorities

1. Is it possible that the company fulfils its mandatory data supplying obligations (if any) to authorities by remote electronic communication? If yes, please give a broad overview.

The Portuguese legal framework is slowly coming into grips with the new technologies and adopting new measures aimed to cut red tape and speed up proceedings. In fact, the use of remote electronic means of communication is of outstanding importance in implementing these measures. Therefore, although a company can fulfil its mandatory data supplying obligations by electronic means of communication, this practice is not yet wide spread among administration and

²⁰ *Internet Law: Text and Materials*, Butterworths, 2000, pp. 174 et seq.

²¹ With the exception of contracts requiring specific legal formalities (Article 25 (2) of Decree-Law 7/2004).

²² When an electronic contract is deemed a private instrument with full probative force, see *supra* question II (A) (2).

supervisory bodies, it is possible to name a few examples where this is a prerogative at the reach of companies, as follows;

Financial intermediaries may receive orders for the securities subscription or other transactions from investors and also transmit them to the negotiation system by electronic means of communication (Article 290 of the Securities Code, CMVM Regulation 21/2000 and CMVM Instruction 7/2004). The financial intermediaries are also obliged to communicate to the CMVM by electronic means (using the extranet with access to intermediaries for the purposes of communicating with the supervisory authority), amongst others, the statistical information on the volume of transactions²³.

Moreover, companies with shares or other securities that confer the right to subscription, acquisition or disposal, admitted to trading in regulated markets and domiciled or operating in Portugal, must notify the operator of that market and the CMVM of any acquisition or disposal concerning such securities (Article 11 and seq. of CMVM Regulation 4/2004). Such obligation may also be fulfilled via electronic means of communication.

The issuing of shares or other securities is subject to registration. This obligation may also be fulfilled by remote electronic means of communication, using certified electronic documents (Article 43 of the Securities Code and Governmental Order 290/2000 of 25 May 2000).

In addition, the trading in securities by investment funds domiciled in Portugal, or by collective investment institutions with a registered office in other European Union Member States that meet the requirements of the Directive on Undertakings for Collective Investment in Transferable Securities (UCITS), as well as other non-harmonized collective investment institutions, may also be carried out through remote electronic means of communication (Decree-Law 323/99 of 13 August 1999, implemented by CMVM Regulation 24/99).

2. Is it possible that the company fulfils its obligations with respect to filing tax returns by remote electronic communication? If yes, please give a broad overview.

Yes, a company may fulfil its obligations with respect to lodging corporate tax returns²⁴ with the Portuguese Tax Administration by remote electronic communication.

The Portuguese Tax Administration provides several online services available to taxpayers to fulfil their obligations in Portugal. For this purpose, taxpayers are required to access the Portuguese Tax Authority's website at <http://www.e-financas.gov.pt/de/jsp-dgci/main.jsp>, in order to register online and to request a

²³ This communication must be made within the first three days of the date of the transactions.

²⁴ *Modelo 22.*

password, which is then provided via regular mail. Once taxpayers or their representatives have all the required identification details, they can login in to the Tax Authority's website and access secure pages which contain information and forms on personal or corporate fiscal status and enable them to fulfil tax obligations.

Companies may fulfil their obligations and access their fiscal information not only in relation to corporation tax, but also withholding tax, VAT and property taxes.

3. Is it possible that the company files corporate documents with the competent authority (Court of Registration or other authority which is in charge of the registration of companies and the changes in corporate data) by electronic means? If yes, how?

It is possible that companies file documents with the competent authority by using remote electronic means of communication. Decree-Law 111/2005 of 8th July enables the immediate incorporation of a company, by electronic means, through the Centre for the Incorporation of Companies and other Formalities, simplifying the procedures for incorporating a company in Portugal.

Moreover, Directive 2003/58/EC of the European Parliament and the Council of 15 July 2003²⁵, which must be incorporated into Portuguese legal framework by 31 December 2006, sets out the principle that companies should be able to choose whether to file their compulsory documents and particulars with the relevant competent authorities, either by paper means or by electronic means. Thus, the current state of affairs will change once the Directive is incorporated into domestic law.

4. Is it possible that the company receives from the Commercial Registry or Court of Registration or other authority or entity responsible for issuing such corporate documents having full probative force (such as company extract) by electronic means? If yes, how?

Portuguese provisions do not yet encompass the possibility of companies receiving documents from the Commercial Registry, Courts or Notaries by remote electronic means. Pursuant to Decree-Law 12/2001 of 25 January 2001 companies may request certificates to the Companies Registry or Land Registry via electronic communication. The certificates are then issued in paper form and dispatched via regular mail by the Registrar.

However, a law proposal amending Decree-Law 12/2001 will adjust this situation to the demands of the information society that we now live in. The law proposal specifies

²⁵ 2003 OJ L 221/13.

that in the event the above mentioned certificates are requested by a lawyer or by a law clerk (*solicitador*), an electronic copy of these certificates certified by an advanced electronic signature, which would grant full probative force to the certificates, may be sent by the Registrar to the applicant via electronic mail²⁶.

5. Can regulatory authorities (e.g. Commercial Registry, Securities Commission, Stock exchanges) request information, serve notice or carry out any other procedure by electronic means? Are traditional methods still have to be used?

Portuguese regulatory entities in general do not request information, serve notice or carry out any other procedure by electronic means. The practice amongst regulatory authorities is to carry out formal notifications, via regular registered mail.

The entity in charge of regulating, supervising and representing the communications sector in Portugal (*Autoridade Nacional de Comunicações, ANACOM*), replies to all information requests and notices via regular registered mail. Likewise, the CMVM communications are made either via regular mail or by fax, but never via electronic means of communication; however, approximately 80% of the queries received by the CMVM are sent via electronic means of communication.

²⁶ See also Directive 2003/58/EC.