Shareholders' rights in private and public companies in Portugal: overview

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TYPES OF LIMITED COMPANIES AND SHARES

1. What are the main types of companies with limited liability and shareholders? Which is the most common? Which type do foreign investors most commonly use?

Under the Portuguese Companies Code (*Código das Sociedades Comerciais*) (PCC), the main types of limited liability companies are:

- Limited liability companies organised by shares (*sociedades anónimas*) (SA).
- Limited liability companies organised by quotas (*sociedades por quotas*) (Lda).

In SA companies, the liability of the shareholders to the company is limited to the number of shares subscribed for by the shareholder. While the company's bye-laws (articles of association) can set out an obligation to give additional consideration to the company, liability for paying the company's debts belongs to the company itself.

In Lda companies, the principle is that only the company's assets are liable for the payment of its debts. The quotaholders' liability towards the company is limited to the share capital consideration stipulated in the bye-laws. However, it is possible to set out in the company's bye-laws the liability of one or more quotaholders for the payment of the company's debts, up to a certain amount. This kind of liability can:

- Be set out as either joint or joint and several to the company's liability (and to be effective only on liquidation of the company).
- Only cover the obligations assumed by the company within the period in which the quota(s) are held by the quotaholder (and are not transferable by death).

Unless otherwise provided in the bye-laws, a quotaholder that pays the debts of the company would have a cause of action for contribution (*direito de regresso*) against the company for the amounts paid.

As in both types of companies the liability of shareholders is limited, the main issues when deciding whether to incorporate an Lda or an SA company are the size of the investment, type of structure intended and sector of activity.

The Lda company is the most suitable type for the incorporation of small- and medium-size companies, as it involves a simplified corporate structure and lower investment requirements, while the SA is most commonly used for larger companies involving more complex corporate structures.

2. What are the minimum share capital requirements for companies?

The Portuguese Companies Code (PCC) sets out minimum share capital requirements to be met by limited liability companies.

An Lda company is subject to a minimum par value of EUR1 for each quota and, accordingly, the minimum share capital depends on the number of quotaholders of the company.

The minimum share capital of an SA company is EUR50,000 with a minimum par value of EUR0.01 per share.

Businesses in regulated sectors such as financial institutions have stricter capital requirements.

3. Briefly set out the main types of shares typically issued by a company and the main rights they provide. Set out the other main financial instruments (for example, bonds) and participation instruments that can be issued by a company.

An SA company can issue registered shares or bearer shares in the form of share certificates or book-entry shares. The issuance of registered shares is mandatory if:

- The shares have not been fully paid up.
- The company's bye-laws restrict the transfer of shares or make it subject to the company's consent.
- Shares are held by a shareholder who is required to give ancillary consideration to the company under the terms of the bye-laws.

An SA can also issue:

- Preferred (or preference) shares that confer on the holder the right to be paid a dividend in priority to remaining shareholders and which have no voting rights attached.
- Redeemable shares.

An SA can also have use shares (*ações de fruição*) as special class of shares which result from the redemption of shares without a corresponding share capital reduction.

Shares providing uniform rights to their holders form a class of shares. The rights provided by different classes of shares may vary, for instance, in relation to voting, profit sharing, or the distribution of the assets in the event of liquidation of the company.

The Portuguese Companies Code (PCC) also allows an SA to issue bonds, provided certain requirements are met. Each issue entitles the holders to equal creditor rights. The PCC sets out examples of bonds which:

- Grant a supplementary interest or a return premium, whether fixed or subject to the profits of the company, in addition to the right to a fixed interest.
- Grant an interest and repayment plan, according to the company's profits.
- Be convertible into shares, ordinary or preferred, with or without voting rights or in other securities.
- Grant a right to subscribe for one or more shares, ordinary or preferred, with or without voting rights.
- Grant subordinated claims against the issuer.
- Arise from the conversion of shareholder or third party claims against the company.
- Grant special security over the issuer's assets or revenue from such assets.
- Issue premiums.

Lda companies can also issue bonds under the same terms and conditions as for SA companies.

4. What is the minimum number of shareholders in a company?

The Portuguese Companies Code (PCC) does not set out a minimum or a maximum number of shareholders for Lda companies. As a result, an Lda company may have a single shareholder.

As a rule, an SA company must have a minimum of five shareholders. However, as an exception, the PCC allows an SA to have only two shareholders when the Portuguese state holds the majority of the share capital of the company.

An SA can be incorporated by a single shareholder as long as that shareholder is a company (national or foreign). The single shareholder of an SA is subject to different liability rules from those generally applying to limited liability companies and may even be jointly liable for the obligations of the company (*see Question 45*).

Full control can also be supervening in an SA. Accordingly, a company which, directly or through other controlled companies or group companies, fully controls another company where there are no other shareholders, is deemed to form a group with the latter, unless the shareholder's general meeting (GM) of the controlling company either:

- Winds up the dependent company.
- Sells the shares or quotas of the dependent company.

GENERAL SHAREHOLDERS' RIGHTS

5. What are the general rights of all shareholders? How can shareholders' rights be varied (for example, additional rights attaching to a class of shares, or limitations on shareholders' rights)? Are such variations generally provided in the company's bye-laws and shareholders' agreements?

The general rights of any shareholder under the Portuguese Companies Code (PCC) are to:

- Share in the profits.
- Participate in shareholders' meetings.
- Be informed about the activity of the company, under the law and the bye-laws.
- Be appointed to the corporate bodies of the company.
- Exercise pre-emption rights, in the case of share capital increase through cash consideration.
- Challenge corporate resolutions.
- Require court investigation of the company.
- Freely transfer shares within the limits of the law and the bye-laws.
- Withdraw in the case of a merger, demerger (spin-off) and redomiciliation.
- Withdraw in the case of a decision to return to activity by the company after the resolution of winding-up.

Usually, all shareholders have the same rights. However, some shareholders may enjoy special rights under the bye-laws. Typical situations include:

- Shareholders owning preferred shares who are not entitled to vote on the company's resolutions but are entitled to a preferred dividend.
- Holders of special classes of shares attaching different financial rights.

It is possible to suppress or limit such special rights if the shareholder concerned consents, unless otherwise provided by law or the bye-laws.

The rights of shareholders can be suspended in certain situations, such as where the shareholder breaches its obligation to subscribe for the company's share capital.

6. Briefly set out the rights of minority shareholders and the shareholding required to exercise such rights.

Minority shareholders' rights in an SA vary according to shareholding thresholds, as follows:

- 10% of the shares grant the right to:
  - oppose the waiver by the company of its right to compensation or court settlement in respect to the liability for the incorporation, management or supervision of the company;
  - request the court to appoint representative(s) for the company in such court proceedings if one has not been appointed by the company or if it is necessary to replace the existing one (replacement may be requested by holders of at least 5% of shares);
  - request collectively (by grouping) that the management body provides written information about the company's business;
  - propose for election up to one-third of the board of directors (for holders of less than 20% and more than 10% of shares), if this is set out in the company's bye-laws;
  - appoint at least one director, when the minority shareholders have voted against the winning proposal, if set out in the company's bye-laws;
  - request for the court-authorised removal of a director for just cause, when a GM of shareholders to discuss the matter has not yet been convened;
  - oppose a resolution of the GM removing a director without just cause, if the director was appointed under the rights above.
  - request the court appointment of one effective and one substitute member to the supervisory board, following a vote

- against the appointment resolution adopted by the company; and
- request court removal of an additional effective and substitute member of the supervisory board appointed by a court decision as above (where the same shareholders have requested the appointment);

- 5% of the shares grant the right to:
  - file an action against directors for damage caused to the company, when the company fails to do so (the threshold is 2% for listed SAs);
  - request the replacement of the representatives of the company when the GM has resolved the filing of an action but has not replaced the company's representatives;
  - request the convening of a GM;
  - apply for court notice of the GM when the request as above has been refused;
  - request the inclusion of matters in the agenda of the GM; and
  - apply for court notice of a new GM when the request for inclusion of matters in the agenda has not been accepted.
- 1% of the shares grant the right to:
  - request information concerning the activity of the company; and
  - request the delivery of preparatory documents of GM by letter.
- No threshold is required for the right to form a group of shareholders in order to reach the minimum number of shares required to have voting rights.

The rights attributed to minority shareholders in an SA regarding the convening and inclusion of matters in the agenda of a GM can be exercised by any shareholder of an Lda.

Minority shareholders holding less than 10% of the share capital have a sell-out right following the acquisition of at least 90% of the share capital of the company.

7. How influential are institutional investors and other shareholder groups in monitoring the company's actions (for example, corporate governance compliance)? List any such groups with significant influence in this area.

Shareholder activism is typically carried out by institutional investors such as hedge funds. In Portugal, hedge funds do not take on an active role in the companies' activities. In addition, shareholdings held by hedge funds do not usually grant voting rights or other conditions to allow them to influence the conduct of the company's affairs. Even where hedge funds possess such shareholdings, they tend not to intervene in business deals or the company's strategy.

GENERAL MEETING OF SHAREHOLDERS

Calling a general meeting

8. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved? Which decisions must be approved by the shareholders in a general meeting?

The shareholders must meet whenever required by law or the bye-laws of the company. The shareholders must meet to resolve and approve the annual accounts within three months following year-end. Companies with consolidated accounts or which apply the equity method require the shareholders' approval of the accounts within five months as of year-end.

The decisions reserved for the GM vary according to the type of company. In general, the GM decides on the most relevant issues of the company, while the day-to-day issues are dealt with by the management body.

In Lda companies, the GM decides on the following matters:

- Payments of supplementary consideration (*prestações suplementares*) by the shareholders.
- Redemption of quotas, acquisition, sale or encumbrance of treasury shares and the consent for the division or transfer of quotas.
- Removal of shareholders.
- Removal of directors or of members of the supervisory body.
- Approval of the management report and annual accounts, distribution of incomes and allocation of losses.
- Discharge of liability of directors, shareholders and members of the supervisory body.
- Corporate claims against directors, shareholders or members of the supervisory body (including the waiver and settlement of such actions).
- Amendments to the company's bye-laws (including share capital increase and reduction).
- Mergers, demergers, transformations, and the winding-up and return to activity of a liquidated company.

Unless otherwise provided in the company's bye-laws the GM also decides on the following matters:

- Appointment of directors and members of the supervisory body.
- Transfer or encumbrance of real estate assets as well as sale, encumbrance and lease of the business establishment.
- Subscription for or acquisition of holdings in other companies and their sale or encumbrance.

Under the Portuguese Companies Code (PCC), the GM of an SA decides on issues specifically assigned to it in the company's bye-laws or the law (for example, approval of annual accounts, merger, demerger and winding-up) and on issues not specifically assigned to the competence of the other corporate bodies.

9. Can a general meeting be held by telecommunication means or written/electronic approval?

Under the Portuguese Companies Code (PCC), the GM can be held by means of telecommunication, unless the company's bye-laws provide otherwise. It is also possible for shareholders to make unanimous written decisions.

10. What are the notice, information, and quorum requirements for holding general meetings and passing resolutions?

In Lda companies, a GM can be convened by any of the directors, by way of a registered letter with at least 15 days' prior notice (unless the law or the bye-laws require other formalities or set out a longer term).

In SA companies, the chairman of the board of the GM (or in specific cases set out by law, the audit committee, the general supervision board, supervisory board or the court) can convene a

GM by publishing a call notice, with one month's prior notice (21 days for public companies). The bye-laws may set out other forms for calling the shareholders and, if the company shares are registered, the publication of the call notice may be replaced by registered letters or, in respect to shareholders which have previously consented, by an e-mail with acknowledgement of receipt, in which case the prior notice required is 21 days.

Information for the preparation of the GM must be made available for the shareholders' analysis at the company's headquarters 15 days before the date of the relevant GM. In SA companies, this information must also be sent to shareholders holding shares corresponding to at least 1% of the share capital within eight days, on their request.

In Lda companies, the directors must provide information to any quotaholder which has requested it. Although the bye-laws may regulate the shareholders' rights to information, its effective exercise cannot be prevented or unduly limited.

During the GM, any shareholder can request additional information regarding a matter under discussion.

In SA companies, at first call, the GM can be held regardless of the number of shareholders present or represented unless:

- The bye-laws set out otherwise.
- The GM is to resolve on amendments to the bye-laws, or a merger, demerger, transformation, winding-up of the company or on any other matters for which the law requires a qualified majority, in which case the presence or representation of shareholders with at least one-third of the share capital is required.

On second call, the GM can be held regardless of the number of shareholders present or represented and the capital represented by such shareholders. The Portuguese Companies Code (PCC) does not set out a quorum for holding the GM in Ldas, but for some specific matters the approval of a certain percentage of the share capital (rather than issued votes) is required.

In SA companies, resolutions must be passed by a majority of votes, regardless of the percentage of the share capital represented, unless otherwise stipulated by law or the bye-laws (abstentions do not count). If the GM is resolving on the appointment of members of the corporate bodies or auditors and there are several proposals, the winning proposal is the one with the majority of votes in favour. In addition, resolutions by the GM on amendments of the bye-laws, or a merger, demerger, transformation or winding-up of the company, or on any other matters for which the law requires a qualified majority, must be approved by a majority of two-thirds of the votes issued, whether on first or second call. If on the second call of the GM, shareholders present or represented hold at least half of the share capital, such resolutions can be passed by a majority of votes issued.

In Lda companies, resolutions must be passed by a majority of votes issued (abstentions do not count), unless otherwise stipulated by law or the bye-laws. In addition, under the PCC, resolutions regarding amendments of the bye-laws, mergers, demergers or transformations of the company can only be passed by a majority of three-quarters of the votes corresponding to the share capital, or by a higher number of votes if required by the bye-laws.

Voting

11. What are the voting requirements for passing resolutions at general meetings?

In Lda companies, shareholders cannot be prevented from participating in the GM, even if they are prevented from voting. Each cent of the nominal value of the quota confers one vote. However, the bye-laws may assign, as a special right, two votes per each cent of the nominal value of the quota or quotas of the quotaholders (plural vote) which, in total, do not exceed 20% of the share capital.

A quotaholder is prevented from voting (even through a proxy), for itself or on behalf of a third party if it has a conflict of interest with the company in respect to the matter being resolved by the GM.

In SA companies, the number and type of shares determine whether the shareholder has voting rights and, if so, how many votes they have. Voting rights are proportionate to the shares held by each shareholder unless otherwise provided by the company's bye-laws.

Unless stipulated otherwise in the bye-laws, one share corresponds to one vote. However, it is possible to make several shares correspond to one single vote, provided that each EUR1,000 of share capital is entitled to one vote and/or to cap on number of votes issued by a shareholder. Plural votes are forbidden.

Therefore, there may be shareholders both with and without voting rights attending a GM. Shareholders are only entitled to participate, discuss and vote at the GM if, according to the law and the bye-laws, they are entitled to at least one vote. The bye-laws may allow that shareholders with no voting rights and bondholders (or their representatives) be present at the GM and discuss the matters in the agenda. Shareholders in an SA can group their shares to exercise their voting rights and can enter into shareholders' agreements to that effect.

As with an Lda, shareholders are not entitled to vote on matters where there is a conflict of interest, regardless of voting rights.

The bye-laws may make the approval of certain matters dependent on the vote of a certain class of shares. Conversely, preferred shares do not attach voting rights.

While in an SA the general rule is that the shareholder may be represented by anyone at the GM and the bye-laws may not forbid or limit the participation of a shareholder through a representative, in an Lda, quotaholders can only be represented by their spouse, ancestor, descendant or another shareholder unless otherwise stipulated in the bye-laws.

Voting methods depend on the type of resolution, for example:

- In unanimous resolutions in writing, the votes (necessarily for) are cast by subscribing to the document in which the decision is stated.
- In resolutions by a written vote, the votes are cast in writing (signed) and sent by letter or any other means of communication.
- At the GM, depending on the chosen method, the vote can be cast orally or by a show of hands or in writing (signed, or not if it is a secret vote).

12. Are specific shareholder approvals/resolutions required by statute for certain corporate actions? What voting requirements and majorities apply?

The law sets out requirements for shareholders' approval with specific voting requirements and majorities for certain corporate actions, see *Questions 10* and *11*.

Shareholder rights relating to general meetings

13. Can a shareholder require a general meeting to be called? What level of shareholding is required to do this? Can a shareholder ask a court or government body to call or intervene in a general meeting?

The GM of an Lda company can be called and held at the request of any shareholder. In an SA, the GM can be called and held at the request of any shareholder, or a group of shareholders representing at least 5% of the company's share capital (2% for public companies).

If a GM is not convened, despite being requested by shareholders holding the legal thresholds, the relevant shareholders can apply for court notice of the GM. The same applies to the non-inclusion of matters to the agenda of the meeting.

14. Can a shareholder require an issue to be included and voted on at a general meeting? What level of shareholding is required to do this? Can a shareholder require information from the board about the meeting's agenda?

The inclusion of issues on the agenda must be requested before the GM, otherwise a decision on the issue is voidable unless all shareholders attend the meeting and agree to decide on the concerned issue.

In Lda companies, any shareholder can request an issue to be included and voted on in a GM that is already called or to be called. In an SA company, only shareholders holding at least 5% of the share capital (2% in public companies) can do so.

The request for the inclusion of issues on the agenda must be made within the five days following the last publication of the call, and notice of it must be given to the remaining shareholders at least five or ten days before the GM (depending on whether the call was sent by registered letter or published).

Information for the preparation of the GM must be made available for the shareholders' analysis at the company's headquarters 15 days before the date of the relevant GM (*see Question 10*). In SA companies, this information must also be sent to shareholders holding shares corresponding to at least 1% of the share capital on their request within eight days. In Lda companies, the directors must provide information to any quotaholder that has requested it, although the bye-laws may regulate the shareholders' rights to information, its effective exercise cannot be prevented or unduly limited.

15. Do shareholders have a right to resolve in a general meeting on matters which are not on the agenda?

Matters that are not on the agenda of the GM can only be decided if all shareholders are present and all give their consent that the GM resolve on such matters.

16. Can a shareholder challenge a resolution adopted by a general meeting? Is a certain shareholding level required to do this? What is the time limit and procedure to challenge a general meeting resolution?

A shareholder who has not voted for the decision being challenged, may judicially challenge the resolutions adopted by the GM, regardless of the shares owned, either by requesting the court to annul the resolution (*anulação de deliberação social*) or to hold that the resolution is null and void.

As a court decision may be a lengthy process, in order to safeguard its useful effect, it is possible to apply for a protective order for the suspension of the company's resolutions. In public companies, shareholders applying for the protective order must hold, individually or jointly, a minimum of 0.5% of the share capital.

The protective order must be requested within ten days following the date in which the resolution was adopted or, if the shareholder was not regularly called to the GM, the date in which he became aware of the resolution.

The company cannot implement the challenged resolution while a decision regarding the protective order is pending.

SHAREHOLDERS' RIGHTS AGAINST DIRECTORS

17. What is the procedure to appoint and remove a director?

In Lda companies, the appointment of directors is made by the decision of the GM, unless the company's bye-laws prescribe otherwise.

Directors can be removed at any time by a decision of the GM. The bye-laws may set out a qualified majority for the approval of the removal, or other requirements. If a director is removed with just cause, the GM can approve such removal by a simple majority. If the bye-laws include a clause attributing a special right to the management of the company to one of its shareholders, this clause cannot be amended without the shareholder's consent. However, the shareholders may resolve for the company to request the court for the suspension and removal of a director with just cause and the appointment of a special representative. When there is just cause, any shareholder may request the suspension and removal of the director in court proceedings instituted against the company. If the company has only two shareholders, the removal with just cause can only be decided by the court in judicial proceedings filed by one shareholder against the other.

In SA companies, directors are appointed in the incorporation deed or by the GM. The bye-laws may set out that the appointment of directors must be approved by votes corresponding to a certain percentage of share capital or that the appointment of up to one-third of the total number directors must also be approved by the majority of votes granted to certain categories of shares. However, the attribution of a right to appoint directors to certain categories of shares is forbidden.

In SA companies that have a supervisory board and an executive board of directors (known as the "German model"), directors are appointed by the supervisory board, unless otherwise set out in the bye-laws.

The bye-laws can provide for up to one-third of directors to be appointed solely from people proposed by lists signed by groups of shareholders, provided that none of those groups holds shares representative of more than 20% and less than 10% of the share capital of the company. Each list must propose at least two eligible persons for each of the offices concerned. The same shareholder cannot sign more than one list. If in an isolated election there are several lists from more than one group, the voting must refer to the set of lists. The bye-laws may also set out that a minority of shareholders holding at least 10% of the share capital and which have voted against the winning proposal in the appointment of directors, is entitled to appoint at least one director. In public companies and concessionaries of the Portuguese state, the inclusion in the bye-laws of such a provision is mandatory.

Any member of the board of directors can be removed at any time by a resolution of the GM. The resolution approving the removal without just cause of a director approved in accordance with the special rules for minorities is not effective if shareholders holding at least 20% of the share capital have voted against it. One or more shareholders holding at least 10% of the share capital can request the court-authorised removal of a director with just cause while the GM has not been convened to resolve on the removal.

The PCC sets out that "just cause" means, in particular, a breach of the director's duties and/or incapacity for the performance of the office. If the bye-laws do not set out compensation, a director removed without just cause is entitled to compensation for loss of office not exceeding the amount of the remuneration he would have received until the end of his term, or for four years, whichever is the lesser.

18. Can shareholders challenge a resolution of the board of directors? Is there a minimum shareholding required to do this?

The GM can hold a resolution of the board of directors void at the request of any shareholder with voting rights, regardless of the share capital held, if such resolutions are void or voidable.

19. Briefly set out the main directors' duties to the company and its shareholders. What is the potential liability of directors to the shareholders? Can their liability be limited or excluded? On what grounds can shareholders bring legal action against the directors?

Directors are in charge of the management and representation of the company, in accordance with the law and the company's bye-laws.

Generally, directors are not allowed to make use of their powers in an arbitrary manner and must, among other things, comply with the:

- Duty of loyalty, acting in the best interests of the company, attending to the long-term interest of the shareholders and balancing the interest of other stakeholders, such as employees, customers and creditors.
- Duty of care, making use of the availability and technical competence and the knowledge of the company's activities that is appropriate to the performance of the respective duties and employing the diligence of a wise and ordered manager.
- Duty of diligence of an orderly businessman.
- Duty of information of company activity, including the rendering of accurate, true and complete information to shareholders.
- Obligation to comply with legal rules concerning asset/liability ratios.
- Obligation to refrain from performing any acts exceeding the company's business activity, such as in relation to securing or guaranteeing third party obligations.
- Obligation to convey or request that the GM is conveyed in cases of loss of half of the share capital for shareholders to decide on correction measures.
- Obligation to draft the management report and annual financial statements in a timely manner.
- Obligation to request the company's declaration of insolvency when necessary.
- Obligation to refrain from executing void resolutions, when notified by a shareholder.
- Duty of confidentiality.
- Obligation to inform the GM of any situation that may involve a conflict of interests.

Shareholders holding, solely or jointly, 5% or more of a company's share capital (2% in the case of listed companies) can bring legal actions against the directors of the company for damage caused to it, whenever the company does not bring them.

Directors are liable to the company for all damage caused to it by actions or omissions derived from a breach of legal or contractual duties, unless the directors prove they did not act with fault. This liability is excluded if the directors can prove that they acted with information, free of any personal interests and in accordance with rational business criteria. This liability does not apply when the director was not present at the decision-making or voted against it. Directors cannot be held liable for implementing resolutions issued by the GM. In contrast, in companies with a supervisory body, the favourable opinion or consent of this body does not exempt the directors from their liability. The liability of directors towards the company can be waived by a decision of the GM, where no minorities holding at least 10% of the company's share capital have voted against.

In SA companies, the liability of the directors is guaranteed by the rendering of a bond (*caução*) unless the GM agrees otherwise. The rendering of the bond is mandatory in listed companies and in companies which for two consecutive years exceed two of the following thresholds:

- Total balance sheet of EUR100 million.
- Total of the net sales and other profits of EUR150 million.
- 150 workers.

In addition, directors are also liable to both:

- The company, for any damage caused by breach of their legal or contractual duties, unless they are able to prove that they have acted without fault.
- The company's creditors, where their wilful disregard of legal or other requirements in the bye-laws has the effect of dissipating the company's assets.

20. Are directors subject to specific rules when they have a conflict of interest relating to the company? Are there restrictions on particular transactions between a company and its directors? Do shareholders have specific rights to bring an action against directors if they breach these rules?

Directors are forbidden to vote on the relevant board resolution in transactions where they have a conflict of interest and must inform the chairman of the board or the other directors of the conflict.

Under the Portuguese Companies Code (PCC), an SA company is forbidden from:

- Granting loans or credit facilities to directors.
- Making payments on behalf of directors.
- Rendering security for obligations undertaken by the directors.
- Granting an advance exceeding one month on their remuneration.

In addition, unless it is an act within the commercial activity of the company with no special benefits for the contracting director, agreements between the company and its directors (directly or through third parties) are null and void unless they both:

- Are previously authorised by the board of directors (in which meeting the relevant director cannot vote).

- Receive the favourable opinion of the audit committee or the supervisory board.

This applies to agreements entered into with companies that are controlled by or control the company in which the director performs its functions. Although the PCC does not set out a similar provision for Lda companies, it is likely that, with the necessary adjustments, this would also be deemed to apply to Lda companies.

Resolutions adopted in breach of such rules are null and void and can be challenged by the shareholders.

21. Does the board have to include a certain number of non-executive, supervisory or independent directors?

In SA companies, the Portuguese Companies Code (PCC) provides for executive directors (who are responsible for day-to-day management of the company) and non-executive directors. Certain matters (such as the relocation of head offices, share capital increases to be resolved by the directors, or mergers and demergers) cannot be included in the duties of the executive directors.

The PCC does not contain similar provisions for Lda companies, although a delegation of powers by a director is possible.

The provisions of the PCC regarding the board of directors do not specifically address the independence of the directors, which is regulated for members of the supervisory board.

In SA listed companies, it is recommended by the Portuguese Securities Market Commission that the board of directors includes a number of non-executive members ensuring effective monitoring, supervision and assessment of the activity of the remaining members of the board. It is also recommended that non-executive members include an appropriate number of independent members, taking into account the adopted governance model, the size of the company, its shareholder structure and the relevant free float.

22. Do directors' remuneration and service contracts have to be disclosed? Is shareholder approval of directors' remuneration required?

Directors do not have service contracts as their functions are determined by law or the bye-laws.

In Lda companies, directors' remuneration must be approved by the shareholders at the GM, although in specific cases it may be determined by the court.

In SA companies, directors' remuneration can be decided and approved by the shareholders at the GM, or the GM may appoint a remuneration committee for this purpose (the committee cannot approve directors' remuneration consisting of shares). In addition, if the company is organised under the German model (a supervisory board, executive board of directors and certified public accountant), the bye-laws may also provide for the remuneration of the directors of the executive board of directors to be determined by the supervisory board, or a remuneration committee appointed by the supervisory board.

In Lda and SA companies, directors' remuneration does not have to be disclosed to the public. However, under the Portuguese Securities Code and regulation 4/2013 of the Portuguese Securities Market Commission, issuers of shares admitted to trading in a regulated market subject to Portuguese law must disclose information on the structure and practices of corporate governance, in particular in the corporate governance report, including information on the (annual amount of) director's remuneration.

SHAREHOLDERS' RIGHTS AGAINST THE COMPANY'S AUDITORS

23. What is the procedure to appoint and remove the company's auditors? What restrictions and requirements apply to who can be the company's auditors?

In Lda companies, the appointment of the company's auditor (certified public accountant), if required, is usually made by the decision of the GM, unless otherwise set out in the company's bye-laws (or decided by the court). If the company's auditor was not appointed by the court, the GM can dismiss the auditor with just cause.

In SA companies, the appointment of the company's auditor, who can be either a sole auditor or a member of the auditing body, is made by the decision of the GM (the first appointment may be made by in the deed of incorporation or the shareholders' meeting for the incorporation of the company) or may be appointed by the court. If the company's auditor was not appointed by the court, the GM can remove him with just cause.

The Portuguese Companies Code (PCC) also sets out certain restrictions for Ldas and SAs on which persons can be appointed as a company auditor. The following persons cannot be appointed as the company's auditors:

- Beneficiaries of particular advantages relating to the company.
- Persons with management functions in the company.
- Members of the management bodies of a company in a controlling or group relationship with the audited company.
- The shareholder of a partnership (*sociedade em nome coleticvo*) which is in a controlling relationship with the company.
- Persons performing functions in a competing company, who act in representation or on behalf of the competing company or which are in any way bound by the interests of the competing company.
- The spouses and relatives of persons prevented from being appointed under the provisions above.
- Persons, directly or indirectly, providing services or those which have a significant business relationship with the audited company or a company in a controlling or group relationship with the audited company, and their spouses.
- Those who already perform management or supervisory functions in five companies, with the exception of law firms, statutory audit firms and statutory auditors.
- Statutory auditors in relation to which there are other incompatibilities set out in the respective legislation.
- Persons who are legally disabled or incapacitated, insolvent and those sentenced to penalties involving even a temporary prohibition from performing public functions.

24. What is the potential liability of auditors to the company and its shareholders if the audited accounts are inaccurate? Can their liability be limited or excluded?

In addition to any other legal duties/obligations, under the Portuguese Companies Code (PCC), the auditor is:

- Subject to the same duties of care imposed on directors (*see Question 19*).

- Required to make all examinations and verifications necessary for the review and legal auditing of the company's accounts (regardless of the actions of other members of the company).

Under the PCC, auditors can be held liable to the company and its shareholders for damage caused by their conduct where it was at fault. The auditor's liability for errors in the audited accounts is therefore a subjective liability. The auditor cannot be held liable simply because the accounts are inaccurate. In order for the auditor to be liable, the errors or inaccuracies in the accounts presented by the management must have been overlooked due to a deficient and/or negligent performance of its professional activity (that is, an illicit and culpable act).

Consequently, if the audited accounts are inaccurate and a review reveals gross negligence in the detection of material errors which should have been easily detectable, or if the auditor subsequently expresses its agreement that it should have given an opposite technical opinion, the auditor would be in breach of the PCC and liable for damage caused.

In addition, under the charter of the certified auditors association, the relationship of the auditor is contractual. As a result, the auditor may also be held liable for breach of its contractual duties.

Auditors are also required to enter into a mandatory liability insurance in favour of third parties.

DISCLOSURE OF INFORMATION TO SHAREHOLDERS

25. What information about the company do the directors have to provide and disclose to its shareholders? What information and documents are shareholders entitled to receive?

In Lda companies, directors must, on request, allow any shareholder:

- To access information regarding the management of the company.
- To consult the accounts, books (including the minutes books) and documents.

This information must be provided in writing to any shareholders who request it. In addition, shareholders are also entitled to inspect the company's assets in the same terms.

All shareholders are entitled to receive the information necessary for the preparation of the GM and to receive, at the GM, the information required to enable it to better form an opinion on the matters to be resolved. In particular, if the GM is to resolve on the annual accounts of the company, directors must make available to the shareholders the annual report and accounts as of the date in which the call for the GM is sent.

In SA companies, any shareholder with 1% or more of the share capital can consult, on reasonable grounds, the following documentation at the company's registered office:

- The annual report and financial statements relating to the previous three financial years.
- The convening notices, minutes and attendance lists of general and special meetings of shareholders and meetings of bondholders for the previous three years.
- The total amount of remuneration paid to members of the corporate bodies in each of the three previous years.
- The total amount paid in each of the three previous years to the ten or five employees of the company who received the highest remuneration, depending on the number of employees of the company.
- The share register document.

In addition, shareholders with 1% of the shares can also receive the preparatory information for the GM by post, on request.

The information for the preparation of GMs must be made available to shareholders during the 15 days before the date of the GM, in accordance with the provisions of the Portuguese Companies Code (PCC).

Shareholders holding shares corresponding to 10% or more of the company's share capital can request to receive written information from the board regarding corporate issues, which can only be refused in legitimate circumstances.

Shareholders are entitled to inspect the corporate books or other accounting documents of the company at the company's headquarters or request the relevant information to be provided to them in writing. Such inspection must be made by the shareholder itself, which can be assisted by an external accountant or other expert. In an SA, this inspection can also be made by the person entitled to represent the shareholder at the GM.

26. What information about the company do the directors have to disclose under securities laws (where applicable)?

Under the Portuguese Securities Code, issuers (as defined) are required to disclose their annual accounts and financial statements. Their management report must include the following:

- The structure of their capital, including shares which are not admitted to trading, with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of share capital that it represents.
- Any restrictions on the transfer of shares.
- Qualifying holdings in the company's share capital.
- Identification of any shareholders that hold special rights and a description of such rights.
- The system of control of any employee share scheme where the voting rights are not exercised directly by the employees.
- Any restrictions on voting rights.
- Shareholders' agreements among shareholders which are known to the company and may result in restrictions on the transfer of securities or voting rights.
- The rules governing the appointment and replacement of board members and amendment of the bye-laws.
- The powers of the board, in particular in respect of resolutions to increase equity.
- Any significant agreements to which the company is a party and which take effect, alter or terminate on a change of control of the company following a takeover bid, as well as the effects thereof, except where their nature is such that their disclosure would be seriously prejudicial to the company (this exception does not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements).
- Any agreements between the company and members of the management body or employees providing for compensation if they resign or are made redundant without valid reason or if their employment ceases because of a takeover bid.

- Core information on the internal control and risk management systems implemented in the company regarding disclosure of financial information.
- Compliance with a corporate governance statement to which the issuer is subject to by virtue of a legal or regulatory provision (and a specification of any deviation from that code with the reasons for such deviation).
- Compliance with a corporate governance statement which the issuer voluntarily abides by (and a specification of any deviation from that code with the reasons for such deviation).
- Location where the public can find the corporate governance code to which the issuer is subject.
- Content and description of the way the issuer's corporate bodies' function, as well as any committees created.

Any issuers that have securities admitted to trading on a regulated market or that have requested their admission to such a market must promptly disclose:

- Any information that directly concerns them or the securities issued by them which is of a precise nature and has not been made public and, if it were made public, would be likely to have a significant effect on the prices of such securities, their underlying instruments or related derivatives (inside information).
- Any significant changes concerning such information, through the same channel as used for the public disclosure of the original information.

27. Is there a corporate governance code in your jurisdiction? Do directors have to explain to shareholders in the company's annual report if they have not complied with it (comply or explain approach)?

The Portuguese Securities Commission has issued a corporate governance code. Although this code is deemed soft law (that is, a breach of this code involves no legal sanction), certain provisions correspond to provisions of the Portuguese Securities Code and the Portuguese Companies Code (PCC). In such cases, breach of corporate governance rules would result in the sanction stipulated in the law.

In addition, under the Portuguese Securities Code, the management bodies of the issuer must include in their annual report on corporate governance, among other things, a declaration on how the issuer has complied with the code of corporate governance under which it is legally or voluntarily bound, indicating which parts have not been complied with and the reasons for not complying (comply or explain approach). See *Question 26*.

28. What information can shareholders request from the board about the company? On what grounds can disclosure of company information be refused? Are shareholders entitled to inspect the company's books and similar company documents?

For the type of information shareholders can request from the company, see *Question 25*.

In Lda companies, the shareholders' right to information can be regulated in the bye-laws, as long as the exercise of the right is not effectively prevented or limited without fair grounds. In particular, this right cannot be excluded when it is:

- Invoked in suspicion of actions that could lead to the document author's legal liability.
- Aimed at judging the accuracy of financial statements.
- To enable the shareholder to vote in a meeting already called.

Unless otherwise provided in the bye-laws (in accordance with the Portuguese Companies Code (PCC)), such information or inspection can only be refused by the directors when:

- There is a concern that it may be used for purposes not related to the company and which may cause damage to the company.
- The rendering of such information breaches a legal confidentiality duty to protect third parties.

If there is a refusal to render information, or the information provided is false, incomplete or unclear, the shareholder can call a shareholders' resolution so that such information is provided or corrected. In addition, the shareholder concerned can request the court to investigate the company.

The corporate body most able to render the information requested can only refuse shareholders' rights to information at the meeting if, by providing such information, it would cause severe damage to the company or to a related company (*sociedade coligada*), or a breach of a legal duty of confidentiality. Unjustified refusals are grounds for an annulment of the resolutions.

In SA companies, shareholders that have been refused information requested (whether in regard to shareholders holding 1% or 10% or more of the share capital (*see Question 25*)) or that have received false, incomplete or unclear information can request the court to investigate the company.

The provisions regarding information requested at the shareholders' meeting are the same for SAs as for Ldas.

Shareholders holding 10% or more of the share capital cannot be refused written information on company matters from the board of directors or the executive board of directors if the information is for the purposes of finding the liability of the members of such bodies, or of the supervisory board or the general and supervision board (unless due to its content or other circumstances it is clear that the request is not intended for such purpose).

SHAREHOLDERS' AGREEMENTS

29. Briefly set out the main provisions of a typical shareholders' agreement.

The provisions of shareholders' agreements vary but typically include:

- The right to appoint members of the management body of the company.
- Non-compete clauses.
- Shareholder's rights of first refusal.
- Call/put options.
- Deadlock and dispute resolution mechanisms.

Shareholders' agreements can refer to the exercise of voting rights but not to the behaviour of the intervening parties or other persons performing management or auditing functions. Shareholders' agreements are null and void where the shareholder undertakes to:

- Vote in accordance with the instructions of the company or any of its bodies.
- Always approve the proposals made by the company or any of its bodies.

- Use or not use its voting rights in exchange for special advantages.

30. Are there circumstances where shareholders' agreements can be enforceable against third parties?

Shareholders' agreements are only enforceable between the parties and cannot be used as grounds to challenge actions of the company or of shareholders against the company. To be enforceable by third parties, provisions included in the shareholders' agreement must be repeated in the bye-laws.

31. Do shareholders' agreements have to be publicly disclosed or registered?

Shareholders' agreements typically do not have to be disclosed to the public nor registered in any public registry.

However, the Portuguese Securities Code includes specific provisions for public companies (*see Question 26*) that apply when agreements are aimed at acquiring, maintaining or reinforcing a qualified shareholding in a public company, or to ensure or frustrate the result of a takeover. Such agreements must be notified to the Portuguese Securities Market Commission by any of the parties within three days.

The Portuguese Securities Market Commission determines the disclosure of such agreements, in total or in part, when relevant. Resolutions that are adopted on the basis of shareholders' agreements and that are not disclosed or notified to the Portuguese Securities Market Commission are voidable.

Shareholders' agreements referring to voting rights are ineffective if they are entered into either between shareholders of credit institutions or insurance companies that are not registered with either the Bank of Portugal or the insurance regulator, respectively.

DIVIDENDS

32. How can dividends be paid to shareholders and what procedures and restrictions apply? Is it possible to exclude or limit the right of certain shareholders to dividends? Is the payment of interim dividends allowed?

The payment of dividends must be preceded by the approval of the accounts determining the profits of the company.

The Portuguese Companies Code (PCC) also sets out limits on the payment of dividends for Lda and SA companies. In addition to the rules applicable to decreases of share capital, dividends cannot be paid to shareholders if the equity of the company, including the net result of the year as it is included in the approved annual accounts, is less than the sum of the share capital and reserves (stipulated by law or the bye-laws) or becomes lower due to the the distribution of dividends.

Year-end profits that are necessary to cover retained losses or to form or rebuild reserves required by law or the bye-laws cannot be distributed to shareholders. While expenses related to the incorporation, investigation and development are not completely paid up, dividends cannot be paid to shareholders (unless the amounts of unrestricted general reserves (*reservas livres*) and retained earnings is at least equal to such expenses). Reserves that are not included in the company's balance sheet cannot be used to distribute dividends to shareholders.

Dividends belonging to the shareholders with quotas or shares that are not fully paid up are not paid but credited for compensation of the share capital contribution debt (without prejudice to the enforcement of the company's claims).

In Lda companies, unless otherwise set out in the company's bye-laws or resolved by the GM by a majority of three-quarters of the votes by share capital, half of the yearly distributable profits must be distributed between the shareholders. The distribution is made in the proportion of the shareholder's quotas, unless otherwise set out in the bye-laws.

For Lda companies, although the PCC does not set out any provisions on the advance payment of dividends, the provisions of the PCC in this respect for SA companies (*see below*) are likely to be deemed to apply.

In SA companies, unless otherwise set out in the company's bye-laws or resolved by the GM by a majority of three-quarters of the votes by share capital in a GM convened to that effect, half of the yearly distributable profits must be distributed between the shareholders.

The bye-laws can authorise the advance payment of dividends, provided that the following conditions are met:

- The board of directors or the executive board of directors, with the consent of the supervisory board, the audit committee or the general and supervision board resolve on the advance distribution.
- The resolution of the board of directors or the executive board of directors is preceded by an interim balance sheet, drafted within a maximum of 30 days before and certified by the certified public accountant, evidencing the existence of amounts available for the advance payment of dividends, in compliance with capital ratios maintenance and taking into account the verified results.
- Only one advance payment is made in the course of each exercise and always in the second half of the year.
- The amounts to be attributed as advance payment do not exceed half of the distributable amounts.

The right to dividends may be limited in the case of special rights in the SA, such as use shares which can give their holders a different amount of dividends (*ações de fruição*) or a priority in the payment of the dividend-right (*ações preferenciais*). The distribution of dividends may also be limited or excluded when all the shareholder's rights are suspended. However, any limitation or exclusion of distribution of dividends is always temporary.

At least 20% of the company's net result must be allocated for the legal reserve. The legal reserve must correspond to at least one-fifth of the company's share capital, with a minimum of EUR2,500 in Lda companies. The amounts allocated assigned to the legal reserve can only be used:

- To cover the part of the losses in the balance sheet which cannot be covered by other reserves.
- To cover the part of the retained losses which cannot be covered by the profits or the use of other reserves.
- For the incorporation of share capital.

FINANCING AND SHARE INTERESTS

33. Can shareholders grant security interests over their shares?

Shareholders are entitled to pledge their shares/quotas. The pledge of shares/quotas must be executed in the form required and under the limitations on the transfer of shares/quotas. The rights inherent to the shares/quotas can only be exercised by the pledgee if so agreed by the parties.

In Lda companies, unless otherwise set out in the bye-laws, the grant of a security interest over the quotas requires the company's consent. In SA companies, the bye-laws may set out requirements for the pledge of registered shares compatible with the protection of the corporate interest.

34. Are there restrictions on financial assistance for the purchase of a company's shares?

An SA company cannot grant loans or provide funds or security in any manner to a third party, so that the latter subscribes for or acquires by any means a shareholding in the company. Although the Portuguese Companies Code (PCC) does not set out an equivalent rule for Lda companies, it is likely that a similar restriction would be deemed to apply.

This prohibition is not applicable to current banking operations or to staff buyouts. However, the net assets of the company cannot become inferior to the subscribed share capital, and the legal or statutory reserves that cannot be distributed, due to such a transaction or operation.

Agreements or unilateral acts breaching these provisions are null and void.

SHARE TRANSFERS AND EXIT

35. Are there any restrictions on the transfer of shares by law? Can the transfer of shares be restricted? What are the rights of shareholders in the case of an issue of new shares (pre-emption rights)?

In Lda companies, the transfer of a quota requires the consent of the company, unless the transfer is executed among spouses, ascendants or descendants or between shareholders. It is effective once notified in writing to the company, or expressly or tacitly recognised by the company.

The bye-laws may provide that, following the death of a shareholder, the quota does not transfer to his successors and instead subject the transfer to certain requirements so that the company redeems, acquires or causes its acquisition by another shareholder or third party.

In Lda companies, the bye-laws may include a lock-in provision which entitles the quotaholders to exit from the company within ten years from the acquisition of the quota.

In SA companies, shares are freely transferable and the bye-laws cannot exclude or limit the transferability of the shares, except in the case of registered shares, for which:

- Transfers may require the company's consent.
- Pre-emption rights for the other shareholders may apply.
- The rendering of a pledge or right of use (*usufruto*) over the shares may be subject to certain requirements, subjective or objective, in accordance with the corporate purpose.

In certain circumstances where the company's consent is required, the company must acquire the shares if it opposes the transfer.

In Lda and SA companies, in the case of new shares (an increase of the company's corporate capital in cash) the shareholders have pre-emption rights over third parties to acquire the new shares in the proportion of the share capital held before the increase. A decision of the GM can waive the shareholders' pre-emption rights, if this is in the best interests of the company.

36. Can minority shareholders alter or restrict changes to the company's share capital structure?

Minority shareholders can block the approval of certain issues (blocking minorities) for example if, under the Portuguese Companies Code (PCC) or the bye-laws, the approval by a qualified majority is required. This is the case for amendments to the bye-laws in Lda companies (amendments to the bye-laws include, among other things, an amendment to the amount of the share capital).

37. When are shareholders required to notify changes to their shareholding to a regulatory authority?

Apart from public listed companies, credits institutions or insurance companies, shareholders of Ldas and SAs are not required to obtain authorisation from, nor provide information to, any public authority about events that affect their shareholding interest in the company. However, depending of the sector of commercial activity, there may be certain requirements to be met with the applicable regulator.

38. Can companies buy back their shares? Which limitations apply?

Companies can buy back their shares in some specific situations.

In Lda companies, the company cannot acquire its own shares that have not been fully paid up, except in cases of loss of the quota by a shareholder in favour of the company. The company can only acquire its own shares:

- Without consideration.
- In an enforcement proceeding against the shareholder.
- If the company has unrestricted general reserves not lower than the double of the consideration to be paid for the acquisition of the shares.

In general, SA companies cannot subscribe for their own shares unless both:

- The acquisition is not forbidden or limited by the bye-laws.
- The shares do not represent more than 10% of the share capital.

In certain specific circumstances, the company can acquire more than 10% of its own shares, such as when the acquisition:

- Is a result of compliance with the law.
- Aims at executing a resolution regarding a decrease in the share capital.
- Results from the acquisition of a broader estate.
- Is made without consideration.
- Is made under enforcement proceedings or settlement (or other court proceedings with the same purpose) filed by third parties.
- The acquisition is a result of a process set out by law or the bye-laws in cases of failure by the shareholders to give the necessary consideration in respect to the shares.

39. What are the main ways for a shareholder to exit from the company? Can shareholders require their shares to be repurchased by the company? Can shareholders be required

to exit the company in certain circumstances? How are the shares valued in this case?

Shareholders can withdraw from a company voluntarily by transferring their shareholdings in accordance with the applicable law and the bye-laws (*see Question 35*).

The Portuguese Companies Code (PCC) sets out specific cases entitling shareholders to withdraw from the company, which differ for Ldas and SAs, although the following apply to both types:

- Transfer abroad of the company's head offices which the shareholder voted against.
- Shareholdings incurred due to error, wilful misconduct, coercion or usury in the execution of the incorporation deed (provided that the requirements for annulment are verified).
- Mergers or demergers which the shareholder voted against, where this possibility is allowed by the bye-laws.

On the acquisition of at least 90% of a company by a single shareholder, minority shareholders can under certain circumstances require the purchase of their shares and the free shareholders of a company (*sócios livres*) in a subordinate relationship can request the directing company to purchase their shares.

The specific cases of withdrawal in Lda companies, other than those that may be stipulated in the bye-laws, are the following:

- A share capital increase to be subscribed for, in total or in part, by third parties, which the shareholder has expressly voted against.
- When the shareholder has expressly voted against but there is just cause to expel the shareholder and the company has not resolved to expel him or has not requested a court-authorised removal.
- Ten years after the acquisition of the quota when its transfer is prohibited by the bye-laws.
- Where the bye-laws allow the right to amortise its quota in accordance with the rules for withdrawal.
- Change of corporate purpose which the shareholder voted against.
- Extension of the company with limited duration, which the shareholder voted against.
- A wound-up company's return to activity, which the shareholder voted against.

The withdrawal can only occur once the shareholder has fully paid up its shares.

In SA companies, the right to withdraw is an exception and the bye-laws cannot include provisions in this regard other than those set out by law as above.

In the case of withdrawal, the value of the shareholders' shares is determined based on the situation of the company by the time the decision is made by an accountant appointed by the parties or, in the event of dispute, by the court. The parties can also request a second evaluation in order to determine the value of the shares. However, the bye-laws may set out different rules resulting in a greater amount being due.

The PCC sets out, for Lda companies, that a shareholder can only be required to exit the company in the following cases:

- Court-ordered removal in accordance with the law.
- Shareholders defaulting on the payment of their share capital consideration within the applicable legal time period or failure to give additional consideration set out in the bye-laws.
- Abuse of information which has been made available and unjustly causing damage to the company.

In all cases, the removal requires a resolution of the GM.

In Lda companies, the company may be entitled, under the law or the bye-laws, to redeem the quota or to acquire it or cause its acquisition by a third party or another shareholder, in the following circumstances:

- **Legal compulsory redemption.** This possibility includes, among other things, the company's right to redeem the quota if the bye-laws include a restriction on the transfer of the quota on the death of the shareholder, or if the bye-laws require the consent of the company for transfers of quotas and such consent is refused.
- **Compulsory redemption under the bye-laws.** Redemption without the consent of its holder on an occurrence set out in the bye-laws that is deemed grounds for compulsory redemption, provided that such a provision was already included in the bye-laws at the time the quota was acquired, or if its inclusion in the bye-laws was unanimously decided by the shareholders.
- **Agreed redemption.** Without legal or contractual grounds with the consent of its holder and if this possibility is foreseen in the bye-laws.

In contrast, in SA companies the PCC sets out that:

- Defaulting shareholders can lose their shares to the company.
- The situation of the shareholder cannot be affected if there is a default on the payment of ancillary consideration, unless otherwise set out in the bye-laws.

In SA companies, the bye-laws may impose or allow (by way of a decision of the shareholders) the redemption of shares, in both cases without the consent of their holder, followed by a decrease of the company's share capital and the extinction of the shares. While no specific legal provision has been included in the PCC for SA companies, it is likely that bye-laws would be deemed to be able to allow the redemption with the holder's consent.

MATERIAL TRANSACTIONS

40. What rights do shareholders have in the case of material transactions, such as a sale of all or substantially all of the company's assets, and a company reorganisation such as a merger or demerger?

Generally, shareholders have a right to information, which is enhanced in corporate reorganisations. The Portuguese Companies Code (PCC) sets out, in the event of merger or demerger, a series of documents, including the project for the merger or demerger, that are mandatorily published in the commercial registry and made available to the shareholders. Following such publication (or simultaneously), the GM of the participating companies are convened to resolve on the project, with its approval dependent on qualified majorities (*see Question 10*).

In addition, the merger or demerger can only be registered after obtaining the consent of shareholders who are harmed by the reorganisation due to the:

- Increase of the obligations of all or some shareholders.
- Special rights attributed to some shareholders being affected.
- Proportion of the shareholdings being altered.

If a company has different categories of shares, merger or demerger resolutions are only effective after being approved by meetings of the different categories.

In addition, shareholders that have voted against the reorganisation may have the right, under the law or the bye-laws, to withdraw from the company (*see Question 39*).

Where there is a sale of a substantial part of an Lda company's assets, the resolution to sell or encumber immovable property of the company or sell, encumber or lease the commercial establishment is taken by the GM unless otherwise provided in the bye-laws. In SA companies, this is in principle a decision of the management body.

Shareholders have the right to challenge the decisions of the GM or the management body.

41. What rights do shareholders have if the company is converted into another type of company (consider if applicable, a European Company (SE))?

In the case of conversion of a company, shareholders voting against the conversion may be entitled, by law or the bye-laws, to withdraw from the company. As a result, the company is required to either:

- Redeem the shares (if possible according to the law).
- Acquire the shares (if the legal requirements are met).
- Promote their acquisition by third parties.

In addition, the conversion may be prevented by the opposition of shareholders holding special rights that cannot be maintained due to the conversion.

INSOLVENCY

42. What rights do shareholders have if the company is insolvent?

Shareholders' rights in the event of insolvency are very limited. If the company is put into liquidation due to insolvency, its shareholders are entitled to the remainder of the company's assets, if any, after all other creditors of the company have been paid their claims (although this rarely occurs). In addition, unless the shareholders have claims against the company and prove their claims in the insolvency proceedings, they are not usually a part of the insolvency process.

Conversely, an insolvency plan may include several measures affecting shareholders, such as:

- A reduction of the share capital in order to cover the losses, including a reduction to zero or any other minimum amount required for each type of company, followed by an increase of the share capital to an amount equal or higher than such minimum.
- An increase of the share capital, in cash or kind, to be subscribed for by third parties, notably the conversion of claims into shareholdings with or without complying with shareholders' pre-emption rights set out by law or the bye-laws.
- Amendments to the company's bye-laws.
- Converting the company into another type of commercial company.
- Replacement of the corporate bodies.

The reduction of the share capital to zero is only allowed if there would be no remaining amounts to distribute between the shareholders in the event of full liquidation of the company's assets. The approval of the share capital increase without complying with the shareholders' pre-emption rights (including consideration in kind) requires, alternatively, the share capital to be reduced to zero and that such measure does not lead to a loss of value of the shareholdings still maintained by the shareholders. Under certain circumstances set out in the insolvency law, the shareholders are also entitled to request the court not to homologate (sanction) the insolvency plan.

43. Can shareholders put the company into liquidation? What is the procedure to do this?

Shareholders can cause the liquidation of the company by resolving on its winding-up. Once the company is wound up, it enters automatically into liquidation (unless otherwise provided by law).

In Lda companies, the winding-up decision requires the approval of a majority of three-quarters of the votes corresponding to the share capital unless the bye-laws set out a higher majority (or unanimity) or other conditions.

In SA companies, resolutions by the GM on the winding-up of the company must be approved by a majority of two-thirds of the votes issued, whether on first or second call (if on the second call of the GM, shareholders present or represented hold at least half of the share capital, such resolutions can be passed by a majority of votes issued).

In exceptional situations, including the absence of activity for two consecutive years, the lack of the minimum number of shareholders required by law or the carrying out of activity not comprised in the corporate object, the Portuguese Companies Code (PCC) allows for the winding up decision to be adopted by absolute majority of the votes issued at the GM.

CORPORATE GROUPS

44. Is the concept of a corporate group recognised under specific legislation?

The Portuguese Companies Code (PCC) recognises the concept of corporate groups. Generally, this concept is limited only to companies with head offices in Portugal (including Lda and SA companies). A corporate group is characterised by a:

- Vertical legal relationship (control or simple holding).
- Horizontal direct line (reciprocal holdings).
- Specific contractual relationship (subordinate relationship).

Such groups may include:

- Companies in simple participation relation, involving the holding of 10% or more of the other entity, either directly or indirectly.
- Companies with reciprocal participations, involving reciprocal shareholdings exceeding 10%.
- Companies in a control relationship, that is, a situation involving the exercise of a dominant influence, such dominance being assumed whenever a company:
  - holds the majority of the share capital;
  - has more than half of the votes; or
  - can appoint the majority of the members of the board or of the auditing body.
- Dominant relationships, characterised by the holding of the whole share capital of other entity.
- Parity groups, where two entities accept to abide by a joint management.

- Subordination relationships, where one entity agrees to subordinate itself to the directions of another.

From an accounting perspective, the National Accounting Rule 15 (NCRF 15) – "Investments on subsidiaries and consolidation", which is based on the International Accounting Standard (IAS) 27 – "Consolidated and Separate Financial Statements" sets out that a corporate group includes a company and all its subsidiaries, meaning all the companies it controls. Whether there is control is ascertained on the basis of the shareholding percentage directly and/or indirectly held, on the voting rights and also on the potential voting rights under warrants, call options on shares, and so on.

From a tax perspective, the Portuguese Corporate Income Tax (CIT) law also provides for the concept of a corporate group, which is not the same as the accounting one. For CIT purposes, a corporate group comprises a company (designated as dominant company) and those other companies which share capital is, directly and/or indirectly, held by the former in at least 75%, if this shareholding grants more than 50% of the voting rights. Companies cannot be included in tax groups if they are:

- Non-Portuguese resident.
- Insolvent and wound up.
- Dormant for more than one year.
- Not subject to the general CIT regime.
- Subject to tax losses for more than three consecutive years (except under certain circumstances).

45. Does a controlling company have any duties and liability to the shareholders of the company it controls? What are the rights of company shareholders if the controlling company carries out actions that are prejudicial to the shareholders?

After acquiring control of at least 90% of the share capital of an entity, the controlling shareholder may be forced by the minority shareholders to acquire their shares in the company (*see Question 39*).

Generally, regarding the liability of the controlling shareholder, the Portuguese Companies Code (PCC) sets out that:

- A shareholder that (solely or jointly with others by way of a shareholders' agreement) has the right to appoint a director without the other shareholders' consent under the bye-laws is jointly and severally liable with the appointed director if there is fault in the appointment.
- A shareholder that holds the votes required to appoint a director or member of the auditing body is jointly and severally liable with the person he appoints if there is fault in the appointment and the appointment resolution has been approved by the votes of the shareholder and less than half of the remaining shareholders present at the meeting.
- A shareholder which, under the bye-laws or the voting rights held (solely or jointly with others through a shareholders' agreement), has the right to remove or cause the removal of a director or member of the supervisory body and by using its influence causes that person to carry out certain actions or omissions, is jointly and severally liable with that person.

In addition, if a company is reduced to a single shareholder and is deemed insolvent, that shareholder is liable for the obligations undertaken after the concentration of the shares or quotas, if there was a breach of the obligation to allocate the company's estate for the fulfilment of its obligations.

In the case of a subordination agreement (that is, a company which subordinates its management to another) the directing company (*sociedade directora*) must pay to the free shareholders the balance between the actual profit of the subordinated company and the highest of either the:

- Average profits earned by the free shareholders in the three years before the subordination agreement, calculated as a percentage of the share capital.
- Profit which would have been earned by the free shareholders if they had exchanged their shares into shares of the directing company.

Both a directing company and controlling company (the company holding 100% of the share capital of other) are responsible for the obligations of the subordinated/fully controlled company, before or after the subordination agreement or the controlling situation, and during its term. This liability cannot be claimed before thirty days have elapsed from the subordinated/controlled company's default.

The subordinated/controlled company can demand compensation from the directing/controlling company for annual losses that are accrued during the subordination agreement's/controlling relationship's term, if the losses are not compensated by reserves accrued during that period.

Directors of the directing company or the controlling company are liable to the subordinated/controlled company (*see Question 19*).

46. What are the limitations on owning reciprocal share interests in companies?

Under the Portuguese Companies Code (PCC), companies are in a reciprocal share interest relationship as of the moment they hold at least 10% of each other's share capital. A company must report the percentage of shareholding held after crossing the 10% threshold. In the case of companies with reciprocal holdings, the company which last reported the amount of shares held cannot acquire new shares in the other company. Acquisitions made in breach of this rule are not null and void, but prevent the acquiring company from exercising the rights attached to the excess shares, other than the right to share in liquidation proceeds.

In addition, a company cannot acquire shares or quotas in companies which, directly or indirectly, control it. This rule does not apply in the case of acquisitions made without consideration, by adjudication in court enforcement proceedings or resulting from the sharing of liquidation proceeds.

ONLINE RESOURCES

Companies Site (*Portal da Empresa*)

W www.portaldaempresa.pt

Main activities. A website created to simplify the process of incorporating or dissolving companies. Changes to directors, the head office and other daily matters can be made online.

Practical Law **Contributor profiles**

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