Business Law

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1. Introduction

- The Portuguese legal concept of *sociedade* is similar to the Spanish, Italian, French and German concepts of *sociedad*, *società*, *société* and *Gesellschaft* (less clearly in the last case). It encompasses equivalents of both the partnerships and companies of English law.

- On the one hand the idea of *sociedade* refers to a type of contract and on the other hand it refers to a type of legal entity. The purpose of such a contract and of such an entity may be either commercial or civil but, in any case, there must be (unlike, for example, in German law) an economic purpose.

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- Evolution over the last two decades has caused the concept of the *contrato de sociedade* to be widened, to include also the cases where law admits the creation of a company by a unilateral act.

- In this text the word “company” shall be used to translate *sociedade*, although as noted above the English concept of company is different from the Portuguese concept of *sociedade*.

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2. Civil companies *versus* commercial companies

- As in other countries, Portugal traditionally draws a major distinction between civil companies (*sociedades civis*) and commercial companies (*sociedades comerciais*). The former are governed by the Civil Code and the latter by the *Código das Sociedades Comerciais* (the Companies Code that in 1986 replaced the part of 1888 Commercial Code dealing with companies, as well as other subsequent legislation).

- Outwardly, the crucial difference between civil companies and commercial companies lies in their purpose. Commercial companies must have a commercial purpose and civil companies may not have such a purpose.

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- Nevertheless, it should be stressed that companies with a civil purpose may adopt a commercial form and that in doing so they become subject to the rules on commercial companies.
- As the regimes for the various types of commercial companies are quite different from one another, it is difficult and almost irrelevant to make a general comparison between civil companies and commercial companies.

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- The most relevant difference is that all types of commercial companies are legal persons, while ordinary civil companies do not have (according to the majority opinion) legal personality, although they enjoy a certain degree of "patrimonial autonomy". However, besides ordinary civil companies (i.e. those governed only by the Civil Code), there are special types of civil companies ruled by other laws (such as, for instance, *sociedades de advogados* – "law firms"), which are legal persons.

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3. Types of commercial companies

- Commercial companies must adopt one of the types specified by law (they are subject to what in German is called *Typengesetzlichkeit*), these types being:

- sociedades em nome colectivo, which correspond to the French, Spanish and Italian types with similar names;
- sociedades por quotas, which correspond to the German GmbH, to the French *société à responsabilité limitée* and to the Spanish and Italian types with names similar to the latter;
- *sociedades em comandita simples*, which correspond to the French, Spanish and Italian types with similar names;

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- *sociedades em comandita por acções*, which correspond to the French, Spanish and Italian types with similar names;
- *sociedades anónimas* - which correspond to the French and Spanish types with similar names, to the Italian *società per azioni*, and to the German *Aktiengesellshaft*, and, less closely, to the UK public company limited by shares.

- The name of each company must permit identification of the type to which it belongs.
- The names of *sociedades anónimas* must end with the expression *"sociedades anónimas"* or with the letters "S.A." and those of *sociedades por quotas* with the word "*Limitada"* or with the abbreviation "Lda".

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- The names of *sociedades em nome colectivo* must either include the names of all their members or include the name of one or some of them and a reference that indicates the existence of other members, such as "e *Companhia*".
- The names of *sociedades em comandita* must include the name of at least one of the members with unlimited liability and the word "*comandita*".

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- As in other continental European countries, *sociedades em nome colectivo* and *sociedades em comandita simples* have existed at least since the Middle Ages.
- *Sociedades anónimas* descend from the companies that were created by royal charter, the first law allowing their incorporation without previous authorization having been published in 1867.
- *Sociedades por quotas* were created in 1901 under the strong influence of the German *Gesetz bettrefend die Gesellschaften mit beschränkter Haftung*.

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- *Sociedades em nome colectivo* and *sociedades em comandita* (either *simples* or *por acções*) are currently of little economic significance. That is why this text deals mainly with *sociedades anónimas* and *sociedades por quotas* (hereinafter also "SA" and "SpQ").
- The differences between the types of commercial companies relate mainly to the rules governing the liability of their members for the debts of the company, to the rules on the transfer of holdings in their capital and to the structure of the company bodies.

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4. Companies and other legal forms of carrying out economic activities

- According to concepts adopted by Portuguese legal rules, not all legal entities with an economic purpose are companies.
- Entities with charitable objectives, i.e. foundations, clearly lie outside this category.
- But even among self-interested entities with an economic purpose there are some that Portuguese law does not characterize as companies.

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- This is the case of *cooperativas*, *agrupamentos complementares de empresas*, *entidades públicas empresariais* (all of which are types of legal entities) as well as of *estabelecimentos individuais de responsabilidade limitada* (which do not constitute a legal entity).
- Until 1980, the *cooperativas* were ruled by the Commercial Code and were characterized as a special type of company, as in other legal systems.

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- In that year a *Código Cooperativo* was adopted that has removed the *cooperativas* from the primary scope of company law - albeit establishing that commercial law, including the law on *sociedades anónimas*, was applicable to them on a subsidiary basis.

- The second *Código Cooperativo*, which carne into force in 1996, has retained these principles, merely replacing the reference to commercial law with a reference to the *Código das Sociedades Comerciais*.

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- The *agrupamento complementar de empresas* (hereinafter *ACE*) is a type of legal entity created in 1973 under the strong influence of the French *groupement d'intérêt économique*.
- It is intended as a means for enhancing collaboration among pre-existing undertakings and may not have as a primary goal the generation of a profit in its accounts.

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- Underlying the creation of the ACE was the (disputable) assumption that Portuguese law did not allow for non-profit-making companies, namely because the definition of company in the Civil Code (Article 980) sets out - following the definition of the original text of the corresponding article in the French Civil Code (Article 1832) - that the purpose of members of companies is to divide among them profits arising from the activity of companies.

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- The *ACE* is therefore a kind of Portuguese ancestor of the European Economic Interest Grouping.

- Undertakings that are entirely owned by the State may adopt the form of a company or the form of *entidades públicas empresariais (EPE)*. The law characterizes this type of entity as “legal persons of public law” with an “entrepreneurial nature”.

- Although their bodies are similar to those of *sociedades anónimas*, we might say that in practical terms they are less autonomous from the State than State undertakings that take the form of a company.

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- The *estabelecimento individual de responsabilidade limitada* (hereinafter also *EIRL*) was created in 1986, a few days before the publication of the *Código das Sociedades Comerciais*.

- It is not a company or any other kind of legal entity, but a mere separate under-taking belonging to an individual. The influence of the French *entreprise unipersonnelle à responsabilité limitée (EURL)* may be observed in its name and purpose.

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- Indeed, although in 1986 some European legal systems, including those of Germany and France, already provided for single-member private limited liability companies as a means to the limitation of the liability of individuals merchants, Portuguese legislation opted to follow a different path, echoing the suggestions made by a number of writers in the early decades of the twentieth century.

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- Most probably it was due to this Portuguese legal device that Article 7 of the 12th European Directive of 1989 allowed Member States the possibility of not providing for single-member companies if their legislation offers individual merchants other means for limiting their liability.

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- Nevertheless in 1996 the CSC was amended in order to admit the single-member *SpQ*. The EIRL was never embraced by the Portuguese business community, and since the creation of the single-member *SpQ*, it has become almost a dead letter.

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5. The *Código das Sociedades Comerciais*

- The *Código das Sociedades Comerciais* (hereinafter also "CSC") of 1986 was intended to replace old and fragmentary laws, transposing the European Directives on companies in force at the time (i.e. the 1st, 2nd, 3rd, 4th,6th, 7th and 8th Directives).
- Additionally, it took into account the drafts of European Directives then under discussion, which have not been finally approved (i.e. the drafts of the 5th and 9th Directives).

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- It is divided into eight parts, entitled:

- general part;
- *sociedades em nome colectivo*;
- *sociedades por quotas*;
- *sociedades anónimas*;
- *sociedades em comandita*;
- *sociedades coligadas* (i.e. groups of companies);
- provisions on crimes and offences; and
- final and transitional provisions.

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- The *CSC* contains the most important rules on commercial companies and is the centrepiece of Portuguese company law.
- However, there are many other pieces of legislation relevant to companies. These include the *Código dos Valores Mobiliários* (Securities Code), worthy of mention because it contains rules on public companies (i.e. companies open to public investment).
- Since 1986, the *CSC* has undergone several amendments. Taken together, they have materially transformed the contents of the Code, although each one of them has had a limited reach.

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- The most relevant of there amendments was perhaps that brought in by the very recent Decree-Law 76-A/2006, of 29 March 2006, which entered into force on 30 June 2006.
- This statute introduces changes in different fields, and particularly in the following: formal requirements concerning the *contrato de sociedade* and alterations to it, removing the requirement of notarial deeds; winding-up of companies; merger and division; and, last but not least, management and supervision of *SA.*

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6. Some aspects of the regime applicable to all commercial companies

- The general part of the *CSC* consists of 174 Articles. This shows clearly that Portuguese law has many provisions applicable to all companies irrespective of their type.

- The authors of the Code attempted to draft the largest number of general provisions, including by submitting all types of companies to many of the rules that European Directives only impose upon SA and in some cases upon *SpQ*.

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- In this section we shall outline various aspects of the main rules potentially applicable to all types of commercial companies. In the following sections we shall address some specific aspects of *SA* and *SpQ*.

6.1 Formation of companies

- All companies result from a legal act known in Portuguese law as *contrato de sociedade* - even when this act is unilateral.

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- The *contrato de sociedade* comprises that which in English law is divided between the *memorandum of association* and the *articles of association*. For the sake of simplicity however, we shall often translate *contrato de sociedade* as “articles of association”.
- The minimum number of parties to a *contrato de sociedade* is two in the case of *sociedades em nome colectivo* and of *sociedades em comandita simples*.
- Single-member *SpQs* are admitted with the requirement that the company name contains the word *unipessoal*.

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- The main rule on *SAs* (and on *sociedades em comandita por acções*) states that five members are required for incorporation, but an *SA* or *SpQ* wholly owned by another SA may be incorporated by a unilateral act.

- The principal rules applicable to the formation of all types of companies are:

- the company name must first be authorized by the *Registo Nacional de Pessoas Colectivas*;

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- the *contrato de sociedade* must be drawn up in writing and the signatures of the parties notarized (until Decree-Law 76-A/2006 the *contrato de sociedade* generally had to consist of a notarial deed);
- the company must be registered with the relevant Commercial Registry;
- the *contrato de sociedade* must be published on an official internet site as well as in an ordinary newspaper;
- legal personality results from final registration.

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- The content of the *contrato de sociedade* required by the *CSC* is very similar to the minimum requirement of the 2nd European Directive.
- The cash contributions of the founders of the *SA* and of the *SpQ* must be deposited with a bank prior to the “contrato de sociedade”.
- In these types of companies, contributions in kind must be valued by a chartered accountant, according to rules transposing the 2nd European Directive.

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- The formation of a company is traditionally quite time-consuming and all measures taken so far to speed up the process have enjoyed only limited success.
- In July 2005, a law was published enabling the formation of the *SA* and the *SpQ* in a single day, provided a number of conditions are met.
- Under these rules, as long as the parties are willing to adopt a text of a *contrato de sociedade* corresponding to an officially approved model, the powers to carry out all the formalities required lie with the Commercial Registry.

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- Establishing a name for the company under these rules is easy, as pre-approved names are available to those who choose this alternative route.
- However, these rules do not apply if these are contributions in kind or if the formation of the company (because of its purpose) is subject to any form of authorization.

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6.2 Capital

- All companies must have a fixed capital determined by the articles of association (the sole theoretical possible exception being *sociedades em nome colectivo* without capital contributions).
- The *CSC* extends to all types of commercial companies many of the rules that the 2nd European Directive establishes for the *SA*.
- It would therefore be pointless to elaborate on this subject and we shall only address some of the particulars of Portuguese law.

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- First, the minimum capital required. For the *SA* and *sociedades em comandita por acções*, the minimum is € 50,000.
- No similar requirement exists for *sociedades em nome colectivo,* for *sociedades em comandita simples* and for the *SpQ* (in these companies the minimum capital and quota values are decided in the company contract, although the quota has the minimum value of € 1,00).
- The percentage of the capital that must be paid up on execution of the *contrato de sociedade* is 30% for the *SA* and until 5 years to *SpQ*.

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- Increases and decreases in capital are considered special cases of amendment of the articles of association, subject to the provisions generally applicable to such amendments and to other specific rules.
- The capital may be increased by means of new contributions or through capitalization of reserves. The capital may be reduced to adjust it to the actual equity of the company or to pay back to the members a part of their contributions.
- In the letter case, the operation is subject to a judicial authorization.

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- In capital increases by means of new cash contributions, the members of the *SA* and the *SpQ* have subscription rights.
- The exclusion of such rights is feasible through a resolution of the general meeting on the grounds of the “interest of the company”.
- A curiosity suggestive of Portuguese economic problems is the fact that until January 2005 provisions concerning the transposition of Article 17 of the 2nd Directive (on “serious loss of the subscribed capital”) were not in force.

- After completion of a tortuous path, a rule was adopted on this date corresponding to the softest solution admitted by the European rule.

6.3 Resolutions of the members

- In its general part, the CSC allows resolutions of the members of the companies to be adopted either at the general meeting (*assembleia geral*) or without such a meeting, if all members agree in writing with the contents of the resolution.

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- This means that not all resolutions of the members of companies are adopted at general meetings.
- For the sake of simplicity of language, over the following pages we shall speak only about resolutions adopted at general meetings, but these references are to be interpreted as encompassing all kinds of resolutions of company members (except where otherwise indicated or implied).
- The formalities for convening the general meeting (*stricto sensu*) vary depending on the type of company.

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- In the case of the *SpQ*, the means of convening is by registered letter (with advance notice of at least 15 days) and in case of the SA the means are publication on an official internet site (from 1 January 2006 on-wards) as well as in a ordinary newspaper (with advance notice of at least one month).
- However, if all shares are registered shares, the articles of association may stipulate that general meetings are convened by registered letter or (pursuant to Decree-Law 76-A/2006) even by e-mail (with advance notice of at least 21 days).

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- The convening formalities may be avoided if all members take part in the general meeting and agree to hold the meeting without observing such formalities.
- For the *SpQ*, the *CSC* also allows resolutions to be adopted by circular, but this proceeding is not used in practice.
- Other particulars concerning resolutions of the members shall be given in the specific sections on the *SA* and the *SpQ*.

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6.4 Liability of the members of the company for its debts

- Members of the *SA* and of the *SpQ* are not liable for the debts of the company, once the company is registered.
- However members of the *SpQ* are liable for the payment of the contributions of the other members.
- Portuguese law also enables that the articles of association of a *SpQ* state that one or more of its members are liable for the debts of the company but this possibility is not used in practice.

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- Members of *sociedades em nome colectivo* and the *comanditados* of *sociedades em comandita* are jointly and severally liable for the debts of the companies - but such liability can only be enforced following enforcement of the liability of the company.

6.5 Liability of the directors and of other persons entrusted with control of management and with auditing

- The *CSC* rules both the liability of the directors towards the company and liability of the directors towards the creditors of the company.

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- The main rules of the *CSC* on the liability of directors to the company are (more onerous since Decree-Law 76-A/2006) as follows:

- liability depends on the violation of duties deriving from law or the articles of association;

- liability depends on intention or negligence, the burden of proof (of the non-existence of intention or negligence) falling on the directors concerned;

- there is no liability if the relevant act was performed in accordance with a resolution of the general meeting;

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- the directors involved are jointly and severally liable;

- proceedings to enforce such liability may be started by the company, upon a resolution of the general meeting or (for the benefit of the company) by any shareholder owning 5% or more of the capital.

• Portuguese authors continue to discuss the extent to which the law imposes a general duty of good management on *administradores* and *directores*.

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- The main rules of the *CSC* on the liability of directors to the creditors of the company are as follows:

- liability depends of the violation of legal rules or contractual provisions designed to protect the creditors;

- liability exists only when the assets of the company become insufficient to satisfy its creditors;

- liability exists even if the relevant acts of the directors have been performed in accordance with a resolution of the general meeting and may not be excluded by any act of the company.

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- Members of the boards charged with the auditing are jointly and severally liable with the directors involved, both to the company and to the creditors whenever the damage would not Nave occurred if they had fulfilled their duties.
- They can also be independently liable under terms similar to those applicable to the directors.
- Chartered accountants are also liable to the company and to the creditors of the company according to rules similar to those applicable to the directors.

6.6 Right to information

- The right to information is hardly dealt with in the general part of *CSC*, but the Code has provisions on this subject for each type of company.
- In the *SpQ*, each member has a strong right to demand information. In the SA, the contents of this right depend on the percentage of the shareholding.
- Only shareholders (or groups of shareholders) with 10% or more of the capital may demand information not disclosed in the financial statements and other documents made public by the company.

6.7 Amendment of the articles of association

- The *CSC* governs the amendment of the articles of association both in the general part and in each of the parts dedicated to the specific types of companies.
- Rules included in the general part ad dress mainly the formal requirements for all amendments and general aspects of increases and decreases of capital.

6.8 Merger and division

- The *CSC* governs the merger and division of companies, applying to all types of companies the solutions set out by the 3rd and the 6th European Directives for public limited liability companies.
- Decree-Law 76-A/2006 has simplified the relevant proceedings, which were previously very bureaucratic and time-consuming.

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6.9 Dissolution and liquidation

- Under Portuguese law, the voluntary winding-up of companies consists in principle of three steps: dissolution, liquidation and the division of assets.
- When the company has no liabilities the liquidation can be avoided and the division of assets may take place simultaneously with dissolution.
- The main causes of dissolution are:

\- a resolution of the members;

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- if the articles of association limit the duration of the company, expiry of the stipulated period;
- a judicial declaration of insolvency.

• Liquidation is carried out by liquidators, whose main duties are to collect debts, to turn assets into cash, to honour the obligations of the company and to prepare the division of the surplus.

• The general meeting may authorize the liquidators to continue the business of the company temporarily.

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6.10 Groups of companies

- Portugal belongs to the short list of the countries where groups of companies are governed by private law. As we have already seen, Part VI of the *CSC* is devoted to *sociedades coligadas*, a (not successful and not commonly used) translation of the German expression *verbundene Unternehmen*.
- This concept encompasses different scenarios for affiliated companies, ascribing duties and liabilities, which increase in line with the power of the relevant company over the other.
- A company that owns 100% of another company is liable for its debts.

7. *Sociedades anónimas*

- As mentioned above, we shall now address some particulars of the *SA*, beginning with their management and supervision, not only because the rules on these subjects are the most relevant from a practical point of view, but also because these rules reveal some degree of originality.

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7.1 Management and supervision

- Prior to the enactment of Decree-Law 76-A/2006, the *CSC* already permitted more than one management and supervision model for *SA*.
- One of these models, corresponding to the Portuguese tradition, consisted of a board of directors (or in some cases of a single director) and a board of auditors (or a single auditor).
- The other model, inspired by the German system of *Aufsichtsrat* and *Vorstand*, consisted of a supervisory board (*conselho geral*) and a board of directors (or in some cases of a single director).

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- Sometimes the first model was described as a one-tier system of management, contrasting with the second, characterized as a two-tier system of management.
- Indeed, the first model envisaged the possibility of dividing the directors into “executive” and “non-executive” and could therefore accommodate a two-tier system of management.
- Following the enactment of Decree-Law 76-A/2006, the *CSC* is even more generous in the range of models it offers for structuring the management and supervision of *SA*.

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- The Code itself says that it offers three models, but in reality the following eight possibilities exist:

- single director (*administrador*) and single auditor (*fiscal único*) - necessarily a chartered accountant;

- single director and board of auditors (*conselho fiscal*)

- comprising at least one chartered accountant;

- board of directors (*conselho de administração*) and single auditor - necessarily a chartered accountant;

- board of directors and board of auditors - comprising at least one chartered accountant);

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- board of directors, board of auditors and chartered accountant (*revisor oficial de contas*);

- board of directors, auditing committee (*comissão de auditoria*) and chartered accountant;

- executive board of directors, supervisory board (*conselho geral e de supervisão*) and chartered accountant;

- single director, supervisory board and chartered accountant. Models including a single director are permitted only in companies where the capital does not exceed € 200,000.

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- Listed companies and companies with “big figures” must adopt one of the models in which there is a chartered accountant acting out of any board of the company.
- In these companies, some (and in some cases the majority) of the members of the board of auditors, of the auditing committee and of the committee of the supervisory board charged with “financial matters” must be independent from the shareholders.

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- The main differences between models including *conselho geral e de supervisão* and the others are:

- when there is no *conselho geral e de supervisão*, the *administradores* must be elected by the general meeting, whilst when there is *conselho geral e de supervisão* this power belongs in principle to this board, although the articles of association may ascribe it to the general meeting;

- when there is a *conselho geral e de supervisão*, all directors must be executive, whilst when there is no *conselho geral e de supervisão* the board of directors may be divided into executive and non-executive members;

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- the articles of association may give the *conselho geral e de supervisão* powers to intervene in management matters, prohibiting the *administradores* from acting in some matters without the consent of the *conselho geral e de supervisão*, whilst similar powers may not be given to the *conselho fiscal*.

- Legal entities may be elected to the *conselho de administração* and to the *conselho geral e de supervisão*, but such entities must designate individuals to hold the office in question, and the persons so designated "hold office in their own name".

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- The members of the *conselho fiscal* must be individuals, with two exceptions: law firms and firms of chartered accountants.

- The *conselho de administração* must have a chairman, who is however is a mere *primus inter pares*.

- The term of office of all members of the boards of management and supervision is limited to a maximum period of four years, although this term is renewable without limitation.

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- Pursuant to the amendments carried out by Decree-Law 76-A/2006, meetings of the boards of management and supervision of *SA* may take place with recourse to telematic means.

7.2 General Meeting

- The main responsibilities of the general meeting of shareholders of *sociedades anónimas* are:

- to amend the articles of association;
- to decide on the allocation of results;
- to approve the annual accounts;

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- to make an annual assessment of the management of the company; and

- to elect and dismiss the *administradores* except if these is a *conselho geral e de supervisão*, in which case, as mentioned above, this responsibility may be ascribed either to the general meeting or to such *conselho geral e de supervisão*.

- The general meeting may not take decisions on management issues unless the management body requests it to do so.

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- The general meeting of an *SA* has a kind of permanent subbody, called the *mesa da assembleia geral*, composed of at least a chairperson and a secretary.
- Convening and conducting meetings falls within the powers of the chairperson. It is also the chairperson who, together with the secretary, drafts and signs the minutes of the meetings.
- Pursuant to amendments of Decree-Law 76-A/2006, the general meetings of *SA* may also be held using telematics.

7.3 Shares and their transfer *inter vivos*

- The capital of an SA is divided into shares (*acções*) with a minimum par value of € 0.01 each.
- Shares can be either registered shares or bearer shares and both can be represented by certificates or electronically.
- The articles of association may provide for different classes of shares, including non-voting preference shares.

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- In the absence of any clause on this matter in the articles of association, shares are freely transferable.
- However, the articles of association may restrict the transfer of shares, *inter alia* subordinating it to the consent of the company or ascribing a right of first refusal to the other shareholders.
- The formalities for the transfer of shares vary depending on whether they are represented by certificates or electronically and whether they are registered shares or bearer shares.
- In any case, these formalities are intended to facilitate the speed of the transactions.

7.4 Amendment of the articles of association

- The main specific rules on the amendment of the articles of association of the *SA* are as follows:

- powers for amendment lie with the general meeting, but the articles of association may ascribe to the management body authority concurrent with that of the general meeting to increase the capital by contributions in cash, provided that such authority is limited in terms of value and time;

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- resolutions on the amendment of the articles of association require mo thirds of the votes cast; and

- in principle, the general meeting may only decide on the amendment of the articles of association if the votes of the shareholders participating in the meeting correspond to at least one third of the total votes; such requirement, however is not applicable if the general meeting is convened for a second time for the same purpose.

8. *Sociedades por quotas*

- Moving on to the particulars of the *SpQ*, we shall address the same issues considered above in connection with the *SA*, in order to provide a comparative framework.

8.1 Management and its supervision

- *SpQ* have one or more directors (*gerentes*), entrusted with the management and representation of the company. Only individuals (either shareholders or third parties) may be appointed directors.

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- The term of the office of the *gerentes* is open-ended, unless otherwise stipulated in the articles of association or in the resolution of election. The articles of association may attribute to the *gerentes* a special right to their office.
- The articles of association may provide for the existence of a *conselho fiscal*, to which the rules on the same body in the *SA* are applicable.
- Using the possibility presented by Article 51/2, of the 4th Directive, the *CSC* excuses those *SpQ* that do not exceed certain figures for balance sheet total, net turnover and number of employees from the requirement of auditing accounts.

8.2 General meeting

- The main responsibilities of the general meeting of *sociedades por quotas* are:

- to amend the articles of association;
- to approve the annual accounts;
- to decide on the allocation of results;
- to make an annual assessment of the management of the company; and
- to elect and to dismiss the directors.

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- Unless the articles of association attribute the relevant powers to the *gerentes*, the general meeting has the power to take decisions on important transactions, e.g. transfer of immovable property and acquisition of holdings in other companies.
- Powers to convene meetings lie with the directors. The chair of the meetings belongs to the holder of highest stake of capital.
- The minutes of the meetings must be signed by all the participants.

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8.3 *Quotas and their transfer inter vivos*

- The capital of an *SpQ* is divided into quotas (a concept that corresponds to the German concept of *Anteile*). The minimum par value of each quota is € 1,00.
- Quotas may not be represented by certificates.
- All members of the *SpQ* must have voting rights, which in principle are proportional to the par values of their quotas *CSC* allows the articles of association to ascribe double voting rights to certain quotas on the condition that these do not correspond to more than 20% of the capital (but this possibility is seldom used).

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- The articles of association may regulate the transfer of quotas, making it free or restricting it.
- In the absence of any clause on this matter in the articles of association, the transfer of quotas depends on the consent of the company, to be given by the members in a general meeting, unless it is a transfer between members, a transfer between a member and his spouse or a transfer between a member and a person who belongs to his or her direct family line.
- The transfer of quotas must be in writing and must be subsequently registered with the Commercial Registry (traditionally the transfer of *quotas* required a notarial deed, but Decree-Law 76-A/2006 abolished this requirement).

8.4 Amendments of the articles of association

- The main rules on the amendment of the articles of association of an SpQ are as follows:

- powers for amendment lie at all times with the general meeting; and

- resolutions on the amendment of the articles of association require the votes of three quarters of the votes corresponding to the total capital (or more if the articles of association so require).

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9. Future trends

- The future of Portuguese company law will of course reflect the evolution of EU law on the subject. In any case, we can attempt to predict a number of tendencies.
- Concern about corporate governance will continue to be reflected in greater regulation of public companies.
- Globalization will require corporate mobility and the appearance of transnational types of companies (of which the European Company is a mere forerunner).

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- The digital world will require the replacement of formalities.

- The attempt to render Portuguese rules more “competition friendly” will lead to alterations to the current rules on *SA* and *SpQ*, perhaps through the creation of a simplified sub-type of *SA*, as implemented in other countries and as is currently being discussed at the level of European law.

10. Applicable Law and Conflicts of Jurisdiction:

- Company Law is a varied and fast moving field. New legislation is frequent, spurred on by twin pressures: EU policy on harmonisation of the laws of Member States, and the private sector's own reformist zeal for making company law consistent with the realities of commercial life and reflective of current Government social and economic policies.

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- Company Law is effectively the backbone of modern business. It covers virtually every aspect of running a company, including the legal norms concerning the establishment, organisation, operation and management of limited liability companies and joint stock companies. An effective Company Law framework is also an extremely important tool in the development of efficient capital markets.

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- Portuguese companies are regulated by the Portuguese Companies Code, enacted by Decree-Law 262/86 of 2 September, last amended by Decree-Law 76-A/2006 of 29 March, and by additional laws and regulations.

- In accordance with the applicable provisions of Portuguese Company Law and the general principles of private international law concerning companies, corporate entities shall be regulated by the law in force in the jurisdiction where their head office and main place of business are located.

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- Companies with their main place of business abroad but with head office in Portugal will be regulated by Portuguese Company Law.
- Companies with their head office elsewhere, but wishing to conduct business in Portugal for a period of more than one year, must establish a permanent representation in Portugal, which will be regulated by the applicable provisions of Portuguese Company Law.

10.1 Steps to Incorporate a Company in Portugal

- The incorporation of companies in Portugal is subject to the following requirements:

(i) Corporate name certificate application:

- A corporate name certificate must be obtained from the Companies Names Registry ("Registo National de Pessoas Colectivas"). The company name must reflect the company's activities, and should not be misleading as regards the identification of shareholders, nor should it be subject to confusion with another previously registered name;

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- A corporate name must not include forbidden expressions or expressions contrary to the principle of good morals;
- The principle of exclusivity will protect the corporate name in Portugal.

(ii) A certificate of registration, as well as a provisional tax registration card will be issued by the Companies Names Registry.

(iii) Deposit of share capital:

- The share capital legally required to be paid immediately, must be deposited in a Portuguese bank account.

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(iv) Deed of incorporation:

- The deed of incorporation will include a draft of the articles of association and maybe a private document signed before a notary public, if the share capital is entirely paid-up in cash or in assets for whose transfer a notarial deed is not required. If the incorporating company is to take the form a ‘sole quotaholder company’ (“Sociedade Unipessoal por Quotas”), the requirement for signature before a notary public is waived.

(v) Registration with the Tax Authorities:

- The date on which the company intends to commence its activities must be registered with the Tax Authorities by the shareholders. The application for such registration must be signed by the chartered accountant who will be responsible for the company's accounts.

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(vi) Registration with the Companies Registry:

- The deed of incorporation must be registered with the Companies Registry within a period of 15 days. This same entity will also proceed with publicising the articles of association in the Portuguese Official Gazette, and only then shall the company be considered as fully incorporated.

(vii) Social Security:

- The company must also be registered for social security purposes.

11. Share Capital and Capital Maintenance Rules

11.1 Share Capital

- Initial share capital is a fund constituted by contributions made to the company by shareholders at the time of the company's formation, in exchange for shares. It also represents an initial means for the company to act within its corporate scope. It must be disclosed in the company's articles of association as the sum totalling all shareholders contributions.

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- This share capital serves a triple purpose: ensuring viability of the company’s activities, guaranteeing creditors’ interests and limiting shareholders liability to the value of their nominal holdings. This fund shall not be reduced below a legal minimum (which is different for both limited and joint stock companies).
- Effective payment of share capital by shareholders is ensured through the statutory definition of the percentage thereof that may be postponed following the company’s incorporation, pursuant to the legally permitted timeframe.

- Each share is assigned a nominal or par value (below, above or au par) so as to enable each shareholder to measure his interest in and liability to the company. As indicated above, the company's articles of association states the total number of shares/quotas and their nominal values.

11.2 Financial Reserves and Capital Maintenance

- While some types of financial reserves are imposed by law such as legal reserve funds (mandatory or special), and others can be authorised and consequently imposed by the articles of association.
- The legal reserve is the minimum amount of share capital (as liquid assets) required by law to be set aside in order to meet creditors’ demands. Free reserves are those created by non-distributed profits or through the release of any amounts exceeding the legal reserve.

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- Legal reserves represent an increase in the share capital intangibility and therefore an improvement of its function which is necessary for creditors’ protection. In limited liability companies, the reserve must reach a minimum amount which is half of the minimum mandatory share capital (€2,500). In other types of companies the legal reserve is calculated by reference to a percentage of the share capital, which is 20%.
- The provisioned amounts can be used in future share capital increases. If the company acquires its own shares then it is necessary to create a special legal reserve to provide an additional layer of creditor protection (reserve amount is equivalent to share/quota nominal value).

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- As the share capital cannot fall below a statutory minimum, the law provides certain devices aimed at preventing such occurrence from taking place. These include the following:

(a) Prohibition of the distribution of company assets without prior resolution passed at a general meeting, except in specific (and limited) circumstances as statutorily provided for;

(b) Prohibition of the distribution of company assets wherever the net situation of the company, as confirmed in the accounts, is either less than the sum of the capital and the non-distributable reserves, or else it will become so as a consequence of such distribution. The only exception allowed to this rule is the possibility of a reduction in the company's share capital, if specific conditions are met;

(c) Distribution of profits cannot be approved wherever these are necessary to cover losses incurred during the previous year or to form or reconstitute statutory reserves, and, wherever the costs of incorporation, or R&D, have not yet been completely discharged. Exception will be made for cases where the sum of the free reserves and the previous year's accounts are, at least, equal to the amount set aside for the discharge of these costs;

(d) Specific devices triggered wherever half of the value corresponding to the company share capital has been lost.

11.3 Consequences of Breach of Capital Maintenance Rules

- Breach of mandatory maintenance rules will result in various consequences for all intervening parties. Distributed assets in breach of capital maintenance rules will affect shareholders receiving the assets, as well as management and the company itself.

- Distribution of assets in breach of capital maintenance rules will trigger the return of such assets. However, should they have been distributed as dividends or reserves, the shareholders will be allowed to keep them unless it can be proved that they were aware of, or could not have ignored, such distribution being effected in breach of capital maintenance and preservation provisions.

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- Both creditors and the company may commence legal proceedings to recover the assets distributed in breach of the above mentioned rules.

- Distribution of the company's assets, in breach of the legal provisions governing the preservation of subscribed share capital and non-distributable reserves, will encompass winding-up proceedings.

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- In fact, if the company's mid-year and year-end results indicate that the company's net assets have fallen below the minimum threshold of 50 per cent of the share capital, its directors are bound to call a general meeting in order to pass one of the following resolutions:
- winding up the company;
- reduction of share capital (to an amount not less than the statutory requirement);
- acceptance of payments of additional capital contributions by the shareholders as reinforcement of the share capital.

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- Management liability will encompass the breach of directors' activities underlying the duty to act with the diligence of a prudent businessman, in the interests of the company and of its shareholders. Any breach of such duty may trigger civil liability against company directors.

- In respect of the abovementioned general duty of diligence, directors are bound by several duties, such as maintaining the integrity of the assets of the company, whose breach may trigger their civil liability.

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- Directors who breach the aforementioned duties may be liable towards the company, individual shareholders, and company creditors if, due to the willful non-compliance with legal or contractual provisions aimed at protecting those creditors, the company's assets become insufficient to satisfy their claims.

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- Notwithstanding, directors will not be deemed liable if:

- they did not vote in the approval and execution of the harmful resolution;

- they voted against the harmful resolution and stated such opposition in the respective minutes of the board of directors specified meeting; or

- they did everything within their power to prevent the resulting damages.

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- The Portuguese Companies Code and the Insolvency Code provide for the criminal liability of company directors.
- Company management may incur a criminal liability whenever there is an unlawful distribution of the company's assets or in the case of culpable insolvency of the company.

11.4 Liability of the Parent Company and its Directors

- The applicable provisions of the Portuguese Companies Code establish that the parent company in a “Group Relationship” must cover all annual losses and is jointly liable for settlement of the subsidiary’s debts, namely those resulting from a distribution of assets in breach of the aforementioned capital maintenance rules.

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- Given the almost unrestricted power of direction held by the parent company's board of directors over management of the subsidiaries' affairs, directors may be held liable whenever they issue instructions that are:

a) in matters unrelated to its management;

b) contrary to the provisions of the subsidiary's articles of association;

c) on intragroup transfers of assets without appropriate compensation, or;

d) generally disadvantageous to the subsidiary's interests.

- Directors of the Parent Company are bound by a general duty of diligence regarding the entire group.

11.5 “Undercapitalisation”

- Undercapitalisation may occur if the owned capital of a business is much less than the total borrowed capital. This means that the owned capital of the company is disproportionate to the scale of its operation and the business is dependent upon borrowed money and trade creditors.
- In practice, this creates a situation in which a business lacks sufficient shareholders funds to perform its normal business activities. Such a company usually does not qualify for bank or other loans due to its unacceptably high loan-to-equity ratio.

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- Undercapitalisation is one of the major causes of business start-up failures.
- If the company's assets fall below a certain amount rendering the company incapable of pursuing its objectives, the shareholders or quotaholders will be required to make contributions to reestablish the minimum legally required thresholds of capital.
- The applicable provisions of the Portuguese Companies Code treat this as a situation of undercapitalisation, which may occur by various means and at any point during a company's life.

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11.6 Methods of recapitalisation: How to Deal with Undercapitalisation

11.6.1 Shareholders loans

- Shareholders loans are subjected to a special regime, as they differ in nature and scope from other types of loans.

- They may be provided in the form of cash (or other goods/assets), or alternatively in the form of deferral of credits that are due on the company's profits as dividends. Shareholders loans must be made for minimum period of one year in order to qualify as shareholders loans and this is an essential characteristic that distinguishes them from other forms of loans.

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- A company’s debt in relation to a shareholder is not automatically presumed to be a shareholder loan but where a shareholder acquires a credit from a company creditor, the regime on shareholder loans will be triggered.

- There are no mandatory shareholder loans, except where provided for in the articles of association or where required by a resolution passed at a general meeting, in which case only the approving shareholders or quotaholders are bound to provide a loan.

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- The ranking of shareholder loans is always inferior to other forms of credits. Stamp duty is only payable on shareholder loans where the term of the loan is greater than one year. The contract regulating shareholders loans is not subject to any specific legal form. Interest on the loan amount is not presumed and will only be applicable where contractually stipulated.

- While shareholder loans in practice sometimes take place in joint stock companies, the Portuguese legal framework only provides for their regulation where limited liability companies are concerned. In joint stock companies, shareholder loans can only be mandatory if the share capital is represented by nominative shares (and if it is imposed by the articles of association).

11.6.2 Supplementary Loans

- Supplementary loans are another form of loan from the shareholders to the company, which can be imposed on shareholders if provided for in the articles of association or else following a resolution to this effect passed at a general meeting.

- They are of an exceptional nature and differ from shareholder loans in two ways: such loans must be made in cash and no interest may be applied to them.

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- Reimbursement of supplementary loans to shareholders must respect the general limitations of the capital maintenance regime.

- This form of loan is permitted in limited liability companies but it is unclear whether this should also be the case in joint stock companies, since such entities require anonymity for their shareholders. Nonetheless, there have been cases where the Portuguese courts have decided that it is admissible to apply such legal institutions to the shareholders of joint stock companies.

11.6.3 Increase of Share Capital

- Increase of share capital may prove necessary where a company's existing levels of share capital no longer suffice to pursue its objectives and even begin to put at risk its financial wellbeing. Such a remedy will result in an increase of a company's liabilities to third parties and creditors.

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- There are two generally accepted means of increasing a company's existing share capital, which may be carried out simultaneously:

(i) Resorting to new entries in cash or "in kind"

- True variation in share capital, not just accounting;

- Can be approved by the board of directors or management, but this possibility must be provided for in the articles of association;

- They may be deferred (payment of new entries can be partially postponed: joint stock companies up to 70%).

(ii) Incorporating reserves into the share capital

- The availability of means is increased, as the reserve's value cannot be used by the company without due deliberation.
- The reserves involved may be either legal or free reserves, as the law makes no distinction in this respect.
- There are legal requirements concerning incorporation of reserves, such as capital maintenance rules.

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- Shareholders have preference rights over third parties when it comes to subscribing to new share issues, which must be exercised at the general meeting where the increase of share capital is to be approved.

- In the case of joint stock companies, shareholders must be given prior notification of the general meeting of 15 days if made by announcement or 21 days if sent by mail.

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- Also where joint stock companies are concerned, preference rights may be sold freely or by any other means assigned to a third party provided that the articles of association do not forbid this practice or the transfer of shareholdings.
- In limited liability companies a duly issued authorisation by the company is necessary, unless the articles of association provide that given shareholders may freely sell or assign their shareholdings. Only certain types of transfer are freely admissible by law, such as those between shareholders and their heirs.

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- The applicable provisions of the Portuguese Companies Code do not specifically regulate cases where shareholders do not attend the general meeting where the share capital increase is deliberated.

- Preference rights only take place in new cash/money entries.

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- Capital increases generally follow a simple form consisting of a shareholders resolution with approval of the documents indicating the deferred entries. A more complex form is only necessary in cases of entry “in kind” where assignment of the asset will require a public deed. Such increase will be registered subsequently.
- The new payments must be duly collected otherwise the company’s directors will incur penal responsibility.

12. Most Common Types of Companies - Private Companies

- The types of companies most frequently adopted in Portugal are:

(i) Private limited quota companies (“Sociedades por Quotas”)

(ii) Sole quotaholder companies (“Sociedades Unipessoais por Quotas”)

(iii) Joint Stock Companies (“Sociedades Anónimas”)

12.1 Private Limited Quota Companies

- This type of company is the most common, simple and financially-sound solution for small and medium-sized enterprises. Its share capital is divided proportionally into quotas (a type of shareholding subject to registration with the Companies Registry and which must be transferred by private document). The quotas must be registered, and are not represented by securities or certificates.

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- As laid out below, quotas transfers can be restricted by the company's articles of association, and/or by a shareholders' agreement. Shareholders ("quotaholders") are jointly and severally liable for paying up the share capital, up to its total amount.

- The word "Limitada" (limited), which must be present in the trade name, refers to the fact that only the company's assets can be used to pay the creditors in circumstances of debt or bankruptcy.

- The incorporation of a limited company requires at least two quotaholders (with the exception of sole quotaholder companies) and a minimum share capital which is established in the company contract with a free value of the share capital.

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- The share capital can be paid up in cash alone or in cash and assets, which must be specified and assessed by a “revisor oficial de contas” - a statutory auditor. Cash payments can be partially postponed, up to a maximum of 5 years.

- Where the capital is paid up partly in assets, the total sum of the immediate cash payment and the value of the assets cannot be lower than the statutory minimum share capital.

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- A quota cannot be transferred without the company's prior consent, except where the transfer is to a spouse, parent(s), child(ren) or quotaholder(s). Such prior consent may be expressed tacitly.

- The company's consent must be requested by the transferor prior to the transfer and given by a general meeting resolution, unless otherwise stipulated in its articles of association.

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- Under certain circumstances, the refusal of such consent is of a preemptive nature, i.e. the transfer is ineffective if carried out in contravention of such refusal of consent. Such refusal must be accompanied by an acquisition offer to the transferor.

- Quotaholders may introduce into the articles of association certain limitations regarding the free transfer of quotas or specific requirements to obtain the company's consent, or even forbid the transfer of quotas. In this last situation, quotaholders have the right to withdraw from the company ten years from the date when they first assumed such capacity.

12.1.1 Corporate Bodies:

(i) Directors - Management of this type of company is assigned to one or more directors who do not necessarily have to be quotaholders. Directors may be nominated in the articles of association or, if this is not the case, by resolution of the quotaholders. The articles of association may, however, require different or additional steps to be taken in nominating directors of the company.

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- Quotaholders will always be entitled to remove directors except if the latter are also quotaholders and have a special right to their position. In such a case, removal must be carried out with the express consent of the director in question or by just cause.

- Directors of this type of company must be individuals. If a legal entity is elected as director, it must nominate an individual to fulfil such a position.

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- Directors' duties comprise making the day-to-day decisions necessary to manage the business and performing all tasks that are not assigned to any other corporate body of the company.

- Management will take decisions by majority except if otherwise required by the provisions set out in the articles of association. It may confer powers to enter into certain types of contracts, on a single director.

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(ii) General Meeting - The general meeting is where all relevant decisions in the life of this type of company are made, including, among others, the following:

- Exclusion of quotaholders;
- Exclusion of directors or members of the fiscal board;
- Approval of the annual management report, accounts and profit distribution;

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- Exemption from responsibility of the management and fiscal board;
- Amendments to the articles of association;
- Merger, demerger, transformation or dissolution of the company.

• Unless the law or articles of association state otherwise, decisions are taken by majority of issued votes, not counting abstentions.

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(iii) Auditing - Auditing is optional in a limited quota company. However, those companies without a fiscal board ("Conselho Fiscal") are required to appoint a Statutory Auditor ("Revisor Oficial de Contas") if two of the following limits are exceeded, for two consecutive years:

- Total net assets: € 1,500,000;
- Total net sales and other profits: € 3,000,000;
- Number of employees: 50.

- If a company chooses to have a fiscal board this corporate body will be governed by the provisions applicable to joint stock companies.

12.1.2 Distribution of Profits

- Quotaholders have the right to share in the company's profits in proportion to their contribution to the share capital.

- At least half of the annual profits must be distributed to the quotaholders, notwithstanding the statutory restrictions with regard to legal reserve and company solvency (however, the statutory restrictions regarding legal reserve and company solvency must be observed).

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- Exceptions to the aforesaid rule may be stipulated in the articles of association, or in a resolution passed in that sense by a majority corresponding to three quarters of the share capital at a general meeting convened for that purpose.
- If the articles of association entitle the management or fiscal board to a share of the profits this share can only be paid after the quotaholders have received their share of the profits.

12.1.2.1 Distribution of Profits before the Year-End Results

- The company may distribute profits before the year-end results. However, in order to do so, private limited quota companies must comply with the legal and accountancy requirements.

12.1.3 Dissolution

- The dissolution of a company will occur when:

(I) stipulated in the Articles of Association;

(ii) agreed in a resolution passed at a general meeting by a majority of three quarters of the voting rights corresponding to the capital. However, a different majority may be provided for in the articles of association;

(iii) the company has achieved the corporate object for which it was originally formed;

(iv) the company's corporate object has been subsequently declared illegal;

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(v) the company is declared bankrupt;

(vi) determined by a court of law or by a general meeting resolution approved by a simple majority where:

- the number of quotaholders remains below the minimum legal requirement for more than a year;
- fulfilling the company's corporate object is deemed impossible;
- the company has had no de facto activity for five consecutive years;
- the company carries out an activity that is not included in its corporate object.

12.1.4 Winding-Up

- Winding-up of the company occurs by effect of its dissolution, and entails the full settlement of the company's debts and the division of its remaining assets between the quotaholders.

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12.2 Sole Quotaholder Company

- This type of company is a form of limited quota company which may be incorporated from the outset by a single quotaholder or through restructuring a limited quota company, by concentrating all of the capital into a single quotaholding, irrespective of the form and motive for such concentration.

- Such restructuring must be accomplished either by a deed through which the sole quotaholder acquires the remaining quotas of the company, or by a deed of transformation. In such instances, a private document will suffice where the company's assets require a notarial deed for their transfer.

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- Decisions will be taken by the sole quotaholder alone, and must be registered and signed in the minutes book.

- The sole quotaholder may enter into written legal agreements with the company itself in order to carry out the company's corporate object, if expressly provided for by the articles of association.

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- All provisions of the Portuguese Companies Code which presuppose a plurality of shareholders will no longer be applicable.

- The name of the company must include at the end the expression “sole quotaholder company” or “sole quotaholder Ltd” (“Sociedade Unipessoal por Quotas”).

12.3 Joint Stock Companies

- In order to incorporate a joint stock company, at least five shareholders and a minimum share capital of € 50,000, divided into shares with a value of no less than one Euro cent each, will be required.

- The share capital can be paid up in cash alone or in cash and assets. The latter must be specified and assessed by a statutory auditor, and paid up immediately. If paid up in cash alone, at least 30% must be paid up immediately while payment of the remaining 70% may be postponed for a period not exceeding five years.

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- Shares may also be classified in accordance with the rights which they confer on shareholders:

(i) Common Shares - confer all rights and duties prescribed by law;

(ii) Non-Voting Preference Shares - do not confer any voting rights but provide an entitlement to a dividend of not less than 5% of their value, paid out in preference over any other dividend share, provided they do not exceed 50% of the share capital;

(iii) Redeemable Preference Shares - may benefit from a premium, and may be redeemed by a resolution passed at a general meeting or on a set date.

12.3.2 Transfer of Shares

- There is no specific contractual form for the purchase and sale of shares. However, a record must be kept of the shares issued by joint stock companies.
- The transfer of shares cannot be forbidden and can only be restricted by the company’s articles of association, where permitted by law.

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- Such restrictions may include, the use of pre-emption rights conferred on other shareholders in relation to nominative shares, the requirement to obtain the company's prior consent or compliance with specific requirements deemed to serve the company's best interests.

- These restrictions may only be introduced by amending the articles of association, and only with the consent of shareholders whose shares may be affected by the respective amendments.

12.3.3 Bonds

- If the company's articles of association have been registered at least two years in advance and the two most recent balance sheets have been duly approved, the company may issue bonds, provided they do not exceed a value that is twice the amount of the paid up share capital.

- The following types of bonds may be issued:

(i) Bonds that grant their holder the right to a fixed interest rate and provide a supplementary interest on a refundable premium that is pre-agreed or dependent on the company's profits;

(ii) Bonds that grant the holder the right to interest and provide for redemption plan, both in accordance with the issuer's profits;

(iii) Bonds that provide a premium on issue;

(iv) Bonds that may be converted into shares;

(v) Bonds that entitle their holders to acquire one or more shares.

12.3.4 Corporate Bodies

- Provisions concerning the governance structures of joint stock companies were substantially modified by Decree-Law 76-A/2006 of 29 March. These provisions were enacted in June 2006.

12.3.4.1 Governance Structures

- In accordance with the respective amended provisions of the Portuguese Companies Code, joint stock companies must adopt one of three governance structures:

(i) A unitary structure, comprising a board of directors ("Conselho de Administração"), overseen by either (i) a fiscal board ("Conselho Fiscal") (ii) a single auditor ("Fiscal Único") or (iii) a fiscal board and a statutory auditor ("Revisor Oficial de Contas");

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(ii) A dual structure in which management powers are shared between an executive board ("Conselho de Administração Executivo") and a supervisory board ("Conselho Geral e de Supervisão"), overseen by a statutory auditor.

(iii) A new structure, inspired by the Anglo-Saxon model, comprising a board of directors which includes an audit committee ("Comissão de Auditoria"), and a statutory auditor ("Revisor Oficial de Contas").

12.3.4.1.1 Unitary Structure

12.3.4.1.1.1 Board of Directors/Single Director

- In this structure, management is carried out by a board of directors.

(i) Composition and Nomination

- The board of directors must be composed of the number of members stipulated in the articles of association. If that comprises an even number, then the president must have the casting vote.

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- Members of the board are nominated either in the articles of association or at the general meeting for the term stipulated by the articles of association, which cannot exceed four years.
- Members of the board of directors do not necessarily have to be shareholders.
- Joint stock companies whose share capital does not exceed € 200,000 may nominate a single director instead of a board of directors. All provisions of the Portuguese Companies Code which presuppose a board of directors will no longer be applicable.

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- The directors of a joint stock company must be individuals. If a legal entity is elected as director, it must nominate an individual who will act as its representative in his or her own name.
- The articles of association may allow for the election of replacement/reserve directors up to a maximum of a third of the effective members of the board of directors.
- The articles of association may empower the general meeting to elect the chairman of the board. Otherwise such individual will be elected by the board itself.

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(ii) Powers of the Board of Directors/Single Director the board of directors or single director shall be empowered to:

- ✓ manage and conduct, in general, the company’s business, subject to decisions taken by shareholders at general meetings, or by intervention of the fiscal board, where required by law or the articles of association;
- ✓ elect the chairman of the board and co-opt board members (if the articles of association do not attribute this power to the general meeting);
- ✓ convene general meetings;

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- ✓ produce the annual report;
- ✓ decide on purchase, sale or encumbrance of fixed assets;
- ✓ decide on the closing winding up of subsidiaries or divisions;
- ✓ grant guarantees on behalf of the company;
- ✓ decide on the company’s restructuring and/or its activities;

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- ✓ relocate the company's registered offices and increase the company's share capital;
- ✓ make or develop proposals for the merger, demerger or transformation of the company;
- ✓ take decisions on any matters as established in the articles of association.

(iii) The board of directors or single director will also have exclusive and full powers to act on behalf of the company.

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- Delegation of Powers

➢ Except if forbidden by the company's articles of association, the board of directors may delegate day-to-day management decisions to an executive committee ("Comissão Executiva"), formed by members and chosen from the board, or to a single director.

➢ Upon creating the executive committee ("Comissão Executiva"), the board of directors must define its composition, chairman, procedures and powers, which cannot include those referred to in items (ii), (iii), (iv), (vi), (viii), (ix) of paragraph (b) above.

➢ Unless the Articles of Association stipulate otherwise, the board of directors can also entrust particular responsibilities to one or several directors.

12.3.4.1.1.2 Fiscal Board ("Conselho Fiscal")

- Auditing may be performed by:

(a) a single auditor or a fiscal board;

(b) a fiscal board and a registered auditor who cannot also be a member of the same fiscal board.

- The following companies are required to adopt the supervisory model defined in (b):

(i) Listed companies;

(ii) Companies not in a position of subordination to another company, if they exceed two of the following limits for two consecutive years:

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- Balance sheet: € 100,000,000;
- Total net sales and other profits: € 150,000,000;
- Number of employees: 150.

• The fiscal board must have either three full members and one or two alternate members or more than three full members and two alternate members. One of the full members and one of the alternates must be either a statutory auditor or a qualified auditing firm ("Sociedade de Revisores Oficiais de Contas") and cannot be shareholders.

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- However this is not mandatory whenever the company decides to have an independent registered auditor.

- If the company nominates a single auditor, it is also required to nominate an alternate auditor. Each must be either a statutory auditor or a qualified auditing firm.

- The fiscal board/single auditor/registered auditor is empowered, *inter alia*:

(i) to oversee the board of directors activities as well as the company’s books and accounts;

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(ii) to deliver an opinion on the board of directors annual report; and

(iii) to certify the company's books and accounts to be filed with the tax and administrative authorities.

- In order to ensure their independence, members of the fiscal board or single auditor are awarded a fixed remuneration and can only be dismissed at a general meeting on grounds of just cause.
- Certain individuals may not be a member of the fiscal board or a single auditor where there is conflict of interests:

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(i) Individuals who may receive benefits from the company;

(ii) Individuals who carry out administrative functions in the company;

(iii) Members of corporate bodies of other companies which are in a group relationship;

(iv) Individuals who directly or indirectly have commercial relations with the company or with a company which is in a group relationship;

(v) Individuals that are employed by competing companies or who are bound to these companies in any way.

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12.3.4.1.2 Dual Management Structure

12.3.4.1.2.1 Executive Board ("Conselho de Administração Executivo")

- Joint stock companies which adopt the dual management structure are required to nominate either a single director (if they have a share capital under € 200,000) or an executive board with the number of members defined in the articles of association.
- Directors are either nominated in the articles of association, by the supervisory board or at a general meeting for the term stipulated by the articles of association, which cannot exceed four years (if the term is unspecified it shall be four years).

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- Members of the executive board cannot also be members of the supervisory board (“Conselho Geral e de Supervisão”) or fiscal board of companies which stand in a controlling or affiliated group relationship.
- The single director or executive board have full management powers, as well as full powers to act on behalf of the company.
- The president of the executive board will be elected either by the general meeting or by the members of board.

12.3.4.1.2.2 Supervisory Board ("Conselho Geral e de Supervisão")

- The members of the supervisory board are nominated in the articles of association or by the general meeting and must outnumber the directors.

- The supervisory board is empowered to, *inter alia*:

(i) examine the company's books and accounts as well as the annual report;

(ii) oversee directors' activities and examine the board of directors annual report;

(iii) represent the company in its relations with the directors;

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(iv) submit an annual report on its own activities to the shareholders;

(v) grant or deny its consent to share transfers wherever such consent is required by the articles of association;

(vi) convene general meetings if appropriate;

(vii) nominate and dismiss directors;

(viii) ensure compliance with the law and articles of association.

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- The creation of a financial committee is required whenever:

(i) The company is listed in a regulated market;

(ii) The company is not in a group relationship and exceeds two of the following limits for two consecutive years:

- Balance sheet: € 100,000,000;
- Total net sales and other profits: € 150,000,000;
- Number of employees: 150.

- Members of the supervisory board are, unless otherwise stipulated in the articles of association, entitled to a remuneration which must be fixed in accordance with the complexity of the functions to be performed and the financial background of the company.

12.3.4.1.2.3 Statutory Auditor (“Revisor Oficial de Coutas”)

- The statutory auditor is elected by the general meeting by proposal of the supervisory board and must be either a statutory auditor or a qualified auditing firm.
- The statutory auditor’s overall powers and duties are to oversee the company’s books and accounts.

12.3.4.2 Company Secretary (“Secretário da Sociedade”)

- Joint stock companies quoted on the stock exchange are required to nominate a company secretary as well as an alternate. Such nomination is optional for unquoted companies.

- The company secretary is nominated upon incorporation of the company or by the board of directors, and is empowered to, *inter alia*:

- (i) attend general meetings as well as those of the board of directors and supervisory board, and record their respective minutes;

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(ii) maintain the minutes book as well as the share registration book;

(iii) certify copies of company records, including minutes of general meetings and the articles of association, wherever such copies are requested by shareholders;

(iv) respond to requests for information by shareholders;

(v) certify signatures of members of the corporate bodies;

(vi) authenticate all documents submitted to the general meeting.

12.3.4.1.2 Anglo-Saxon Structure

- Companies which adopt this model will have a board of directors (“Conselho de Administração”), which includes an audit committee (“Comissão de Auditoria”), and an independent statutory auditor.

12.3.4.1.2.1 Audit Committee

- The audit committee must have at least three members which are elected in the General Meeting from among the members of the board of directors.

- The audit committee is empowered to, *inter alia*:

(i) oversee the company's activities, namely regarding its compliance with the law and articles of association;

(ii) examine the company's books and accounts and oversee the preparation and disclosure of financial information;

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(iii) prepare an annual report with regard to its overseeing activity, providing opinions on the report, accounts and proposals presented by the board;

(iv) convene general meetings, whenever the chairman of the general meeting fails to do so;

(v) oversee the efficiency of risk management, internal control and internal audit systems;

(vi) propose the appointment and ensure independence of the statutory auditor;

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(vii) receive communications from shareholders or third parties in relation to potential breach of corporate duties.

(viii) enter into agreements with experts to render consultancy services to members of the audit committee.

- Members of the audit committee must participate in all the commission's meetings, which shall be held at least every two months. They must attend meetings of the board of directors and executive committee, as well as general meetings.

- They are bound by confidentiality duties in relation to all the information they may gain access to in the exercise of their duties. The president of the audit committee is under the legal obligation to report to the Public Prosecutor omissions or the commission of acts that may constitute a crime.

- To secure the independence of members of the audit committee these may only receive fixed remuneration and may only be dismissed on the grounds of just cause.

12.3.4.3 General Meetings

- General meetings take place if convened by the board of directors or executive management board, by the fiscal board, by the audit committee, by the supervisory board or by shareholders holding at least 5% of the share capital.

- The holding of at least one general meeting per year is mandatory and must take place within three months from the date of filing of the company's accounts.

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- Matters which general meetings are empowered to decide on include:

(i) Approval of the annual report;

(ii) Proposals put forward by the board of directors as approved by the fiscal board, on reinvestment of profits;

(iii) Evaluation, appointment or removal of members of corporate bodies;

(iv) Increases or decreases in the share capital, mergers, demergers, or corporate restructuring;

(v) Assessment and amendments to the articles of association.

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- Shareholders with at least one voting right are entitled to vote and debate matters under discussion at a general meeting. Those without voting rights and anyone owning bonds in the company may participate in the meetings and discuss the matters raised therein unless otherwise stipulated in the articles of association.

- If the articles of association require a certain number of shares in order to be able to vote the shareholders may aggregate their shareholding in order to meet this requirement.

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- Each shareholder has one vote per share, except where otherwise set out in the articles of association. Effectively, the articles of association may reflect agreements between the shareholders in the sense of that one vote will correspond to a block of shares, or there is a restriction on the maximum number of votes cast per shareholder, either in the shareholder's own name or on behalf of another shareholder (voting cap).

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- Any shareholders having more than a single vote may not split their voting rights (all votes must be cast in the same direction).
- A quorum for a general meeting is only required where determined by the articles of association or where the general meeting is convened to decide on any of the matters referred to in item (iv) above. In this case, a quorum of a minimum of one-third of the share capital is required. However, if this quorum has not been met, in the next general meeting convened for the same purpose no quorum will then be required.

- Resolutions are approved by a simple majority (irrespective of the percentage of share capital present in the meeting), unless the articles of association require otherwise or the resolutions relate to any of the matters referred to in item (iv).
- In this case a two-thirds majority of the votes cast is required.

12.4.4 Distribution of Profits

- Shareholders have the right to share in the company's profits in proportion to their contribution to its capital. At least half of the annual profits must be distributed to the shareholders, notwithstanding the legal limitations with regard to reserve requirements and maintenance of company solvency.

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- Profits will be distributed within 30 days counting from the passing of the resolution approving distribution of profits but may be extended by an additional 60 days at the general meeting, in exceptional circumstances and only if the respective shares are traded on a regulated market.
- The articles of association, or a resolution passed by a majority of three quarters of the votes representing the share capital at a general meeting convened for that purpose, may stipulate exceptions to the abovementioned rule.

12.4.4.1Distribution of Profits before the Year-End Results

- It is possible to distribute profits before the year-end results, provided that this is permitted in the articles of association and such distribution is effected only in the second half of the year.

- This distribution must be approved by board of directors' resolution together with the auditor's or fiscal board's consent, following the release of a midterm balance sheet, within the previous thirty days. It must be certified by the statutory auditor, attesting to the existence of distributable profits, notwithstanding the statutory limitations concerning legal reserves and company solvency.

- Such a distribution of profits can be effected once only during the entire fiscal year and can never exceed half of the total distributable profit for the same fiscal year.

12.4.5 Dissolution

- The statutory provisions applicable to the dissolution of limited quota companies also apply to the dissolution of joint stock companies.
- However, if the dissolution is determined by a general meeting resolution, a minimum of one third of the share capital is required to achieve a quorum, and a two thirds majority must approve the resolution.

12.4.6 Winding-Up

- The winding up of the company occurs as a consequence of its dissolution, and entails the full settlement of the company's debts as well as the division of its remaining assets between shareholders.

13. Specific Types of Companies

- As stated above, specific types of companies in Portugal, such as Pure Holding Companies and Public Companies, are regulated outside the Portuguese Companies Code, although its provisions are also applicable to them.

13.1 Pure Holding Companies ("SGPS - Sociedades Gestoras de Participações Sociais")

- SGPS are pure holding companies whose corporate object consists solely of managing holdings in other companies as an indirect way of conducting business, and are specially regulated by Decree-Law 495/88 of 30 December, as amended by Decree-Law 318/94 of 24 December and Decree-Law 378/98 of 27 November and the Portuguese Companies Code, where applicable.

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- The acquisition and holding of at least 10% of share capital in the investee company, for more than a year, is deemed to be an indirect means of conducting business.
- Pure holding companies may, however, hold less than 10% of the share capital in a particular company they invest in, under the following circumstances:

(a) The total value of these holdings does not exceed 30% of the total funds representing investments of at least 10% in each investee company, taking into account the investments stated in the previous approved balance;

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b) Each one of them is acquired for no less than € 5,000,000; or

(c) The acquisition follows a merger or demerger of those companies; or

(d) The acquisition is effected by a company that submits its management, by contract, to the direction and control of the pure holding company.

- As mentioned above, pure holding companies are prohibited from disposing of or encumbering shareholdings held for less than a year, except if acquired by exchange or if the respective capital gains are reinvested within six months.

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- Pure holding companies are also prohibited from owning fixed assets, except for their own premises, as well as from granting loans to companies other than those in which they invest.
- The investees of pure holding companies are forbidden from acquiring the latter's shares or those of its investors. Exception is made if the shares are adjudicated by a decision of a court of law in a procedure (debt recovery proceedings) against the company's debtors or if they are acquired without cost.

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- Finally, pure holding companies must be incorporated as either private limited quota companies (“Sociedades por Quotas”) or joint stock companies (“Sociedades Anónimas”). Their company names must include the wording “Sociedade Gestora de Participações Sociais”, or SGPS.

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13.2 Public Companies

- Public companies ("Sociedades Abertas") are either open to public investment and listed on the stock exchange, or subject to a public offer for sale on the stock exchange.

- These companies are regulated by the Portuguese Securities Code enacted by Decree-Law 486/99 of 13 November, as amended, and by the Portuguese Companies Code.

- Matters concerning this type of company are specifically dealt with in detail in the chapter on capital markets.

14. Migration of Companies to Another Jurisdiction

- The migration of companies is recognised by the Company Law of many States, although it is not well understood or consistently defined from State to State.

- Migration from the Portuguese legal point of view can be defined as the international transfer of the corporate domicile of a company to and from Portugal, as described by the Civil Code and by the Portuguese Companies Code.

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- According to the applicable provisions, the transfer of the corporate domicile of a company to and from Portugal will not affect its original identity, provided that certain prerequisites are complied with.

14.1 The Portuguese Legal Framework

- The Portuguese Companies Code stipulates that a company is free to move its domicile, without losing or changing its legal status. However, there are a number of rules and regulations regarding the transfer of domicile which must be taken into account.

14.1.1 Migration of Foreign Companies to Portugal

- Migration of foreign companies to Portugal is provided for by the Portuguese Companies Code as follows:
- "A company that transfers its head office to Portugal will maintain its corporate identity, if such action is permitted by the applicable law in force in its current jurisdiction. However, the company's articles of association will have to be redrafted in accordance with Portuguese Company Law and registered with the Portuguese Companies Registry."

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- Effectively, the company that transfers its head office to Portugal should also carry out any necessary corporate restructuring to conform with one of the existing Portuguese corporate vehicles, as set out in the Portuguese Companies Code.

- The definition of the type of company to be adopted when migrating to a new jurisdiction must be specified in the company resolution, to be passed at a general meeting deciding on the company's effective migration.

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- Any company that transfers its head office to Portugal, without complying with the legal requirements, will continue to have foreign status and will be regulated by the law in force in the jurisdiction where it was incorporated. In such cases the company may, under a given number of circumstances, be obliged to terminate its activities in Portugal.
- If a company intends to do business in Portugal for more than a 1 year then it must institute a permanent representation in Portugal (e.g. a branch), otherwise this is not necessary.

14.2.2 Migration of Portuguese Companies to Another Jurisdiction

- A company that has its head office in Portugal and intends to transfer it to another jurisdiction can maintain its corporate identity, if the law of the destination country so allows.
- A corporate resolution passed by a majority of no less than 75% of voting rights corresponding to the company's share capital, must approve the international transfer of head office. It is subject to registration and publication in the Portuguese Companies Registry. Shareholders who voted against the resolution have the right to withdraw from the company within 60 days of such publication.

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- The Portuguese regime for international transfer of head office intends to provide for the protection of minority shareholder rights, as well those as of other stakeholders. Effectively, the right to withdraw from the company that is granted to shareholders who voted against the resolution intends to foster their rights.
- Similarly, the requirement to publish the resolution is intended to provide stakeholders with the information necessary to protect and enforce the rights they may have in relation to the company.

14.3 Applicable Law Following Migration

- Following migration, the company will be regulated by the applicable provisions of the Portuguese Companies Code. As aforementioned, certain requirements must be met in order to conclude the migration. Namely, the company must conform to a recognised Portuguese corporate structure and its articles of association must be redrafted pursuant to the applicable provisions of the Portuguese Companies Code.

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- Although such companies may be governed by the legal framework on companies in force in the jurisdiction where they were incorporated, redrafting of the articles of association may not include clauses that impose on third parties obligations that contravene the applicable Portuguese provisions.

14.4 Treatment of the Migrant Company as an "Equal"

- The Portuguese legal framework treats migration of companies in accordance with the provisions of Article 49 of the EUF Treaty (general freedom of establishment) and Article 54 (requiring the same rights to be accorded to corporate entities as for individuals). Therefore a company planning to establish itself in Portugal will be granted the same rights as companies domiciled in another State.

15. Corporate Relationships: Affiliated Companies

- The most common forms of corporate relationships are affiliated relationships, as follows:

15.1 Holdings

- A company that holds (even if indirectly, through a subsidiary company or through a company with which it is in a group relationship) at least 10% of the share capital of another (and with which it is not in any other of the corporate relationships described below), must inform it of any further transactions involving its holdings carried out since acquiring the qualifying holding.

15.2 Mutual Holdings

- Two (or more) companies that hold at least 10% of each other's share capital will be defined as having mutual holdings. Such status will result in a mutual duty of disclosure of the information.

15.3 Controlling Relationships

- A company that exercises a dominant influence over another will be in what is legally defined as a controlling relationship.

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- Dominance may be presumed if the first company owns the majority of the other's share capital or voting rights, or if it can nominate more than half of the members of the board of directors of the other company.
- A company dominated by another must not directly or indirectly acquire shares of the dominant company, unless this acquisition is determined by a court of law or is the result of a donation.

15.4 Group Relationships

- Group relationship rules do not provide for a definition of the group relationship, providing instead three types of intercompany relationships that will automatically constitute a "Group Relationship":

- "Total domination", if the parent company is *ab initio* or subsequently becomes, directly or indirectly, the sole shareholder in the subsidiary;

- "Horizontal group contract", if two independent companies agree by contract to submit their management to a single board of directors; and

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- "Subordination contract", if one company submits its management, by contract, to the direction and control of another company (which may or not dominate the former).

- The legal framework for group relationships provides for:

(i) legal power of direction over the management of the subsidiary's business affairs;

(ii) powers of direction in a subordination contract to be set out in that same contract.

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- The protection of subsidiary companies, their minority shareholders and creditors, imposes on the parent company a duty of covering the its subsidiaries' annual losses, a direct joint liability for the settlement of its debts, and a duty to acquire the shareholdings of independent minorities.
- Rules on corporate relationships do not in any away preclude the application of competition rules.

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15.8 Disclosure

- Control relationships (“domínio total”) and group relationships are subject to disclosure through registration with the Companies Registry.
- In fact, the Portuguese Companies Registry Code (“Código do Registo Comercial - CRC”) sets out the general duty of registration with the Companies Registry of any company resolutions referring to the initiation or termination of control relationships (“domínio total”).
- The CRC also imposes on subsidiaries and their parent companies the duty to register group relationships with the Companies Registry, including registration of a subordination contract, subsequent amendments, and termination, in order to properly disclose the relationship in question.

15.9 Conflicts of Interest

- Conflicts of interest may arise between the parent/subsidiary and foreign shareholder/local management. They may be avoided through the application of provisions defining typical situations that would trigger a conflict of interest, setting out the consequent annulment of any acts or contracts carried out in breach of such provisions and resulting in civil liability for the parties involved.

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- Such provisions range from mere procedural techniques - namely, prohibiting a member of the board from taking part in the discussion and voting on matters where there are personal conflicts of interest at stake - to more substantive mechanisms, such as the overall prohibition on self-dealing, that prevent directors from engaging in certain types of transactions, e.g. contracts, loans, securities dealing with the company or affiliated companies and on the exercise of competing activities, unless duly authorised by shareholders.

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- The granting of contracts between members of the board of directors and the company which are beyond the scope of its corporate object(s), or which confer special advantages on any director, will also have to be duly authorised by the board and approved by the fiscal board. Such authorisation must be expressly mentioned in the annual management report.

- The company cannot grant loans to directors, make payments on their behalf, provide guarantees for directors' debts or advance them more than the equivalent of one month's remuneration.

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- Directors are not permitted to carry out activities, in their own name or on behalf of others, nor may they be designated to act for another company in competition with the first company, unless duly authorised by the general meeting.
- Publicly held companies are, in addition, bound by specific corporate governance provisions on disclosure, in their annual corporate governance report, of details concerning any business transaction concluded between the company and the members of its corporate bodies, or shareholders with a qualified shareholding, if the business transaction is considered to be economically significant to the parties involved.

15.10 Financial Assistance

- Article 322 of the Portuguese Companies Code allows financial assistance and provision of guarantees by the subsidiary, in connection with the parent company's debts and vice versa where there is a corporate relationship between the two companies.

15.11 Comfort Letters: The Legal Binding Value

- Comfort letters are not specifically regulated by Portuguese Company Law. Jurisprudence has, however, as regards their contents, distinguished between “weak” and “strong” comfort letters.

- Strong comfort letters, together with declarations, opinions or information, include commitments, obligations or liabilities as regards the parent company, a third company or the subsidiary itself.

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- It is worth noting that Portuguese case law has been consistent in determining that the binding effect of comfort letters is only admitted in exceptional circumstances, where the parent company assumes the binding obligation to produce a certain result.
- This will be the case, for example, if the parent company commits itself to providing the subsidiary with the necessary funds to fulfil its obligations or comply with any of its binding obligations under a certain contract. In these circumstances, the parent company undertakes to maintain the solvency of the subsidiary.

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- Another exceptional circumstance will occur if the comfort letter assumes the binding value of collateral granted by the parent company to the subsidiary, in respect of the fulfilment of certain obligations.
- The abovementioned comfort letter only comprises the binding value of collateral if it complies with the required legal formalities.

- In weak comfort letters, the parent company typically acknowledges and approves a bank loan to be provided to its subsidiary, advises the lender on the type of control it exercises over the subsidiary and guarantees to endeavour that the subsidiary will fulfil its obligations.

- These comfort letters can only be valued in terms of the general duty of bona fide and ultimately may give rise to a pre- or extra-contractual liability on the parent company in accordance with the principle of good faith, as established in Article 227 of the Portuguese Civil Code.

15.12 Minority Shareholders Rights

- The legal framework provided by Portuguese Company and Securities Law sets out the protection of minority shareholders rights through various provisions that bind the parent company as a controlling shareholder.

16. Mergers & Acquisitions

16.1 Portuguese Legal Framework

- The central corporate document in a merger procedure is the merger project, which must be jointly prepared by the boards of directors of the companies involved, addressing any potential issues, including the references required by law.

- It must also mention the reasons behind, the objectives and the conditions of the proposed merger. It must contain all the details concerning the involved companies (such as their corporate names, head offices, share capital, company registration number, if they own any shares of the other company, last annual reports). In addition it must explain all the measures to protect the rights of stakeholders to the companies' profits and the measures to protect the companies' creditors.

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- Measures to ensure the protection of shareholder and creditor interests and the economic and financial advantages arising out of the proposed merger should also be clearly set out in the document.
- The merger project must be submitted for approval to the relevant supervisory authorities, which must issue an opinion on the methods followed in order to arrive at the proposed prices of the shares to be exchanged. Such entities are entitled to require all relevant information and proceed with all the necessary examinations before submitting this opinion in a report.

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- Further to registration of the merger project with the competent authorities (Companies Registry), the merger is subject to approval by general meeting at each of the companies concerned. At this stage, if a new company has been incorporated, the respective private document will be executed and signed before a notary public, and registered with the Companies Registry.
- Following registration of the merger project, the companies involved in the merger will publicise and make available to all shareholders the merger project and all related documentation.

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- Creditors may oppose the merger within one month thereafter, on the grounds of potential prejudice of their rights. The general meeting to discuss and approve the merger project must be held within one month following notice of the proposed merger.

- The scope of disclosure to shareholders of information on any possible M&A transactions includes relevant information to be made available at the general meeting rather than as potentially sensitive information on the negotiation process itself. Effectively in a merger process:

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(i) Companies are required to make all preparatory information for general meetings available to shareholders 15 days before the general meeting takes place;

(ii) Shareholders are also entitled to request the disclosure of detailed information on the items discussed at the general meeting;

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(iii) Shareholders with stakes equal to or greater than 10% of the share capital may request, in writing, from the company's board of directors or executive board of directors, written disclosure of information on corporate issues. The company's board of directors and executive board of directors may not refuse such disclosure wherever the information requested is expressly intended for the purposes of assessing management performance.

- The merger or acquisition of publicly held companies is subject to further regulation by the applicable Portuguese Securities provisions.

17. Sale of a Business at Auction

17.1 Definition and Objectives of an Auction

- An auction may be defined as a bidding mechanism exercised through centralised proceedings for the exposure of purchase and sale orders to all market participants simultaneously.

- The advantages of auctions include speed of sale, information gained about buyers' valuations and the prevention of dishonest dealing between the seller's agent and the buyer.

- The seller may also gain a number of further benefits from the auction process, namely the potential to reach more buyers, higher price, better terms of sale, and more control over the schedule.

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- However, the downside of auctions may become apparent when:

(a) For sellers:

- The business is not suitable for sale by auction, for instance when there are only one or two potential buyers.
- The structure of the business is particularly complicated or there are significant external factors affecting the transaction.
- There are prohibitively high costs involved.

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- It inevitably interrupts the normal operation of the business and may lead to the permanent loss of customers and key staff. Moreover if the sale is not completed, the company's name may be damaged.

- Bidders are not serious in their intentions and are only interested in discovering data about a competitor.

(b) For bidders:

- They are forced to pay a higher price for the target.
- They are unsuccessful.
- They have no contractual protection.
- They incur greater risks in the acquisition of the target as a result of scarcity of information.

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17.2 Auction Process Stages

- The timing and order of the different auction process stages differ from transaction to transaction but will almost invariably include the following:
- ✓ The distribution of an information memorandum to prospective bidders.
- ✓ A first round of “indicative” bidding.
- ✓ A due diligence investigation and review of draft sale documentation by bidders.
- ✓ A second round of bidding from a limited number of bidders.
- ✓ Negotiations with one or more bidders, leading to conclusion of the sale.

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- When preparing an auction, the seller must first establish its team. For this purpose, it will generally use an investment hank or other financial adviser to prepare an information memorandum and to conduct the sale.
- Subsequently, the seller needs to identify likely bidders and what particular constraints will affect each of them. Antitrust issues should also be taken into consideration during such analysis.

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- Likewise, the acquirer should carry out a thorough investigation into the target's business, at an early stage, in order to identify and address potential issues such as possible claims and other contingent liabilities.
- Proper due diligence is also fundamental to ensure that the information memorandum does not omit or misrepresent any key information.
- The information memorandum is one of the key elements of the auction process. It is, in essence, a document of sale and therefore should comprise all information on the target that is required to elicit meaningful bids.

17.3 Portuguese Legal Framework

- In Portugal there are no specific provisions to regulate the sale of a business by auction.
- There are, however, several provisions regulating the sale of businesses. These lay out principles applicable to auctions, namely regarding pre-contractual duties and the principle of *bona fide*.
- These are contained in the Portuguese Civil Code, the Companies Code and, in the case of publicly held companies, in the Securities Code.

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- Practice has also given rise to a standard set of rules. In fact, some of the auction rules are often contained in a confidentiality letter that comprises deadlines, if one or two bidding rounds will occur, and what bid the seller expects from the potential bidder.
- As aforementioned, the company will often contact an investment bank which serves as an intermediary.
- Under the terms of the contract, the bank will usually be obliged to identify potential buyers with whom it will handle the negotiations.

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- The bank will also define a sales strategy, evaluate the company to be sold, collect and prepare the information requested by potential buyers, assist shareholders in analysing the bids and even take charge of the formal procedures necessary to conclude the contract.

- Public procurement rules may also be relevant in some situations, especially in the sale of government-owned or government-controlled companies.

- The sale of public companies in Portugal by auction is regulated by the Portuguese Securities Code. These rules are designed to ensure the fair and equitable treatment of all shareholders in relation to takeovers and especially to provide an orderly framework within which takeovers are conducted.

17.4 Shareholder and Stakeholder Interests

- In an auction, as in any other type of deal, the interests of both shareholders and stakeholders usually coincide. “What is good for stakeholders is usually also good for shareholders”.
- Stakeholder interests also come into play since not only can they benefit but also suffer with the sale of the company. In fact, when a company is sold the company remains largely unaffected by the acquisition: its underlying assets and liabilities will continue to belong to the company. All rights and liabilities of the target company will continue to be enforceable by or against it.

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- However, decisions taken on the follow up of the auction sale may affect existing stakeholders.
- Decisions to scale down a company’s operations may require management to liquidate operating assets through auction, thereby causing partial termination with possible adverse effects on stakeholders.
- Employees may be laid off, creditors’ debts may become riskier, suppliers may be denied a valuable business partner, and communities may lose corporate headquarters or corporate operations, and so forth.

18. Corporate Acquisitions: The Specific Case of Management Buyouts and Leveraged Buyouts

18.1 Scope of MBOs and LBOs

- The as yet largely unregulated corporate financing schemes known as Management Buyouts (MBOs) and Leveraged Buyouts (LBOs), consist of the acquisition of financially troubled yet economically viable companies. Such acquisitions are normally carried out by either of the following means:

(a) A financial consolidation contract between a financially troubled company and credit institutions and other interested parties. The objective is to improve the company's financial status by rescheduling debts, granting additional financing or increasing the share capital;

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(b) A corporate restructuring contract between the abovementioned parties, but with the objective of recovering the company's profitability by restructuring it through disposal of the company's assets or businesses, by modifying its legal status, or through its merger or demerger.

- MBOs and LBOs are regulated by Decree-Law 81/98 of 2 April, and the abovementioned contracts are overseen by the Instituto Português de Apoio às Pequenas e Médias Empresas e ao Investimento (the Portuguese public institute responsible for supporting small and medium-sized enterprises).

18.2 Acquirers

- MBOs under Decree-Law 81/98 are promoted by company directors, with or without a direct connection to the company, or by company employees. The SPV for the MBO i.e., the company that will formally acquire or merge with the company targeted by the MBO is not subject to any specific requirements.

- Typically, the former is created solely for the purposes of the MBO. Ideally, however, it should be incorporated as a pure holding company ("Sociedade Gestora de Participações Sociais SGPS"), since only such corporate structures may have as their exclusive corporate object, the acquisition and management of holdings in other companies.

18.3 Financial Leverage

- The financial leverage of MBOs carried out under the terms of Decree-Law 81/98 is not regulated but is nonetheless implicitly referred to by Decree-Law 81/98, since it states that the target company may assume the debt incurred by its directors in the acquisition process, if the amount of such debt is expressly mentioned in the financial consolidation contract and if it is approved by a special shareholders meeting resolution, approved without opposition by at least 25% of the voting rights.

18.4 MBOs of Public Companies

- MBOs of public companies require a takeover bid, to be carried out on the stock exchange in accordance with the Securities Code requirements on takeover bids and previously registered with the Stock Market Supervisory Authority ("Comissão de Mercado de Valores Mobiliários - CMVM").

19.E-Management

- At the turn of the new millennium, electronic commerce became an inescapable reality of daily life. It influences not only the way businesses relate to each other in business-to-business transactions (B2B), but also how they relate to their consumers, in business-to-consumer (B2C) transactions: in effect, globalisation at the click of a mouse.

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- The Portuguese lawmaker 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 April 17th 1997 by the Portuguese Council of Ministers.

- The National Initiative for Electronic Commerce was created in 1998.

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

19.1 Internal Operation of a Company

19.1.1 General Meetings

- The disclosure of preparatory documents for general meetings, for shareholders with at least 1% of the company's share capital, can either be sent by e-mail or made accessible through the company's website.

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- Notices for a general meeting can be effected by way of electronic means as can participation in general meetings and board of directors meetings, provided there is no specific prohibition set forth in the articles of association. However, the company must ensure the authenticity, integrity and confidentiality of any such communications or information passed in this way.

- Voting by electronic means at general meetings is permitted, although it presupposes the promotion and development of adequate technical resources.

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- Such practices have been considered an important tool in the promotion of corporate governance standards by the Portuguese Stock Market Supervisory Authority (“Comissão do Mercado de Valores Mobiliários - CMVM”) which issued, in 1999, recommendations aimed at fostering and providing the possibility of casting absentee votes by electronic means. Since then, several Portuguese listed companies have encouraged shareholders to vote electronically.

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

- The use of using electronic means of communication goes in tandem with the objective of fostering shareholder participation in the company's decision making process.

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- Likewise, a proxy to vote at a general meeting may be granted by remote electronic communication. As provided for by the general rules on participating and voting by proxy in a general meeting, the proxy must be granted by a written document addressed to the chairman of the meeting and signed by the shareholder (Article 380 (2) of the Portuguese Companies (Code).
- Pursuant to Article 3 of Decree-Law 290-D/99 of 2 August, as amended, incorporating European Parliament and Council Directive 1999/93/EC of 13 December 1999 into the Portuguese legal framework, an electronic document must satisfy the legal requirements of the written form, in the same way as declaration or statement.

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- Furthermore, Article 7 states that an advanced electronic signature must satisfy 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 have been sent and received by the addressee if sent to and received by an electronic mail account agreed by the relevant parties (Article 6 of Decree-Law 290-D/99, as amended).

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- Thus, insofar as the company allocates an electronic mail address for the purposes of communicating with shareholders, and the abovementioned document is sent by electronic means, addressed to the chairman of the meeting and authenticated by an advanced electronic signature, such an electronic document is deemed to have the same legal effect as a signed letter.

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- Members of the board of directors may also be represented by proxy if authorised by the company’s articles of association, and if the is granted to another member of the board. The mandate should be granted by a letter addressed to the chairman of the meeting.
- There are no specific provisions to provide for the representation by proxy of supervisory board members.
- Auditors’ reports, as well as proposals and other legally required documents to be submitted for approval at a general meeting, may be disclosed to investors by electronic means.

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- It is common practice among 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 listed Portuguese companies that publish this type of information on their websites include Portugal Telecom (http://www.telecom.pt/), EDP (hltp://www.edp.pt), and Sonae (http://www.sonae.pt).

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

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- Finally, 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 hoards meetings may either be posted on the company's website or sent to shareholders, directors and supervisory board members by e-mail.

- 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 anti resolutions, among other types of information relevant to investors, posted on its website.

19.1.2 Corporate Websites

- Pursuant to Article 3-A of CMVM Regulation 7/2001, as amended by CMVM Regulation 11/2003, by Regulation 10/2005 and Regulation 3/2006 companies listed and admitted to trading on a regulated market, whether located or operating in Portugal, are required to have an updated and easily accessible website. It must contain the following information:

- Indication of corporate name;
- Confirmation of public company status;
- Head office address;
- The local Companies Registry where they are registered and the registration number;

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- Tax registration number;
- Share capital;
- If the company is in liquidation, mentioning of such fact;
- Articles of association;
- Identification of members of the board of directors and other corporate bodies, as well as permanent representatives in charge of liaising with the market;
- Contact details of the investor relations department;
- Financial reports for the previous two years;

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- Calendar of the company's events for the following six months, including, inter alia, the dates of 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 schedule date of the general meeting; and
- Notices of the general meeting, circulated during the thirty-day period prior to the meeting.

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- The aim of the provisions is to improve the 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 improving 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.

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- 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.
- In accordance with the equivalence principle, the information disclosed via the Internet must he complete, accurate, true, objective and lawful. Entities which disclose information via the Internet are responsible for its contents.

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- In this regard, CMVM recommends a set of procedures designed to guarantee the adequacy and reliability of information addressed to Portuguese residents, so that it complies with adequate security measures to protect the integrity and authenticity of the information posted on the website, as well as the e-mail address provided for the purposes of facilitating contacts between the entity responsible for maintaining the website and the addressees.
- Non-listed companies are also advised to have a website displaying the information mentioned above.

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- For certain types of information, posting on the company's website can be sufficient. Article 1 of CMVM Regulation 4/2004 permits listed companies, which are located or operating in Portugal and which have been admitted to trading on the Portuguese regulated market, to publish their financial reports by electronic means of communication, among others, if these reports are readily accessible to investors through the companies' websites and that CMVM is notified of this fact.

- In fact, pursuant to new amendments of the applicable provisions of the Portuguese Companies Code, firms originally bound to publish certain acts and contracts in the Portuguese Official Gazette (Diário da República), are now permitted to post them on the website allocated for this purpose by the Ministry of Justice.

19.2 External Relations

19.2.1 Acknowledgement of Electronic Documents

- A declaration made by electronic means or a document drawn up in electronic form will be deemed to comply with the legal requirement of the written form in the same manner as a declaration or statement satisfies the Civil law requirements of the written form.

- 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.

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- Therefore, electronic documents will be deemed to have the full probative force of a private signed document, when they bear an advanced electronic signature pursuant to a qualified certificate issued by an accredited certification service provider (Articles 3 (1), (2) and 7 of Decree-Law 290-D/99, as amended).
- If an electronic document or electronic declaration cannot be represented in written format, it shall have the same full probative force as a mechanical reproduction of facts, provided it bears an advanced electronic signature based on a qualified certificate issued by an accredited certification service provider and the other party does not contest its accuracy (Article 3 (3) of Decree-Law 290-D/99 and Article 368 of the Portuguese Civil Code).

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

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

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- The general provisions of Portuguese contract law are fully applicable to these contracts. The underlying principles are twofold: firstly the principle of freedom to conclude contracts by electronic means (Article 25) and secondly the principle of freedom of form which secures the effectiveness of these contracts. Exception is made for contracts requiring specific legal formalities.

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- Real estate agreements (except lease agreements), family and succession matters, as well as those matters whose perfection effectively depends on intervention by a court of law or some other public authority, may not be concluded by electronic means.
- It should be pointed out that no one is obliged to enter into agreements by electronic means unless otherwise previously agreed.
- The provisions regulating contracts concluded by electronic means are fairly flexible in promoting and fostering the spread of such practices.

19.2.2 Company Communications with Shareholders, Clients and the Authorities

- The Portuguese legal framework is coming to grips with new technologies and adopting new measures aimed at cutting red tape and speeding up proceedings. In fact, the use of remote electronic means of communication is of outstanding importance in implementing these measures. It is a prerogative at the disposal of companies with regards to financial services.

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- In effect, financial intermediaries may receive orders for securities subscriptions or other transactions from investors and also transmit them to the negotiation system via electronic means of communication. In communications with CMVM the use of electronic means (using the extranet with access to intermediaries for the purposes of communicating with the supervisory authority), as regards, among other data, statistical information on the volume of transactions, is mandatory.
- Notifications to CMVM of acquisitions or disposals of shares, or other securities giving rights to their subscription, that are listed in a regulated market are mandatorily effected by electronic means.

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- Registration of share issues may be carried out by electronic means.

- 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-harmonised collective investment institutions, may also be carried out through remote electronic means of communication (Decree-Law 323/99 of 13 August, implemented by CMVM Regulation 24/99).

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- Corporate documents can be filed with the competent authorities by using remote electronic means of communication. In effect, companies may be incorporated by electronic means, through the Centre for the Incorporation of Companies and Other Formalities, simplifying the procedures for incorporat-ing a company in Portugal.

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