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Commercial Companies in Portugal

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Introduction

The objective of this chapter is to provide a general and concise analysis of the set of rules applicable to commercial companies in Portugal, with the purpose of offering an overall picture of several relevant topics in this respect.

This chapter first describes the different types of commercial companies in Portugal and the required procedures for their incorporation, followed by a summary of the most important rights and duties of shareholders. Subsequent sections deal with the key features of commercial companies by analyzing the differences and similarities of each type of company and taking a brief look at the various duties and related liabilities of these companies' directors. The discussion then focuses on the most relevant issues concerning affiliated companies, followed by the concluding section, which reviews the key points of shareholder liability in Portugal.

Corporate Structures in Portugal

Types of Commercial Companies

In General

The legal regime applicable to Portuguese commercial companies is largely provided for in the Portuguese Companies Code (PCC)[1] and by the Portuguese Securities Code (PSC).[2]

1 Approved by Decree-Law Number 262/86 of 2 September, and last amended by Decree-Law Number 53/2011 of 13 April.
2 Approved by Decree-Law Number 486/99 of 13 November, and last amended by Decree-Law Number 85/2011 of 29 June.

Pursuant to Article 1 of the PCC, commercial companies are those whose purpose is to exploit commercial activities and which are incorporated as a general incorporated partnership (*sociedade em nome colectivo*), a limited-liability company *(sociedade por quotas*, known as a "quota company"), a public limited company (*sociedade anónima*, known as a "share company"), limited partnership (*sociedade em comandita simples*), or a limited partnership with shares (*sociedade em comandita por acções*).

General Incorporated Partnership

The specific provisions applicable to general partnerships are set out in Articles 175 to 196 of the PCC. The partners of a general partnership are unlimitedly and secondarily liable to the company and jointly and severally liable with each other to the company's creditors. The partnership's name must include the name of one or more of the partners or the expression "*e companhia*".

Quota Company

The specific rules applicable to quota companies are set out in Articles 219 to 270-G of the PCC. This type of company has its share capital divided into quotas and its members (called partners) are liable for the payment of their own contributions and, on a subsidiary basis, jointly liable with the other partners for the payment of their contributions.

The quota company's name must include the name or the corporate name of one, some, or all of its partners; phraseology indicating its corporate purpose; or a combination of the corporate name of one or more of its partners and its purpose, with or without the use of abbreviations. The company's name must include the word "*Limitada*" or the abbreviation "*Lda*." and must not include phraseology indicating a corporate purpose which is not specifically provided for in its articles of association.

Share Company

The specific provisions applicable to a share company are set out in Articles 280 to 464 of the PCC. This type of company has its share capital divided into shares and its members (called shareholders) have their liability limited to their subscribed stake in the share capital.

The corporate name must include the name or corporate name of one or several of the shareholders, particular phraseology, or a combination of the corporate name of one or more of its shareholders and particular phraseology. Without prejudice to these requirements, the company's name should always include the term "*sociedade anónima*" or the abbreviation "*SA*". As in quota companies, the corporate name of a share company may not include phraseology indicating a corporate purpose that is not specifically provided for in its articles of association.

Limited Partnership and Limited Partnership with Shares

The specific provisions applicable to both these sub-types of companies are set out in Articles 465 to 480 of the PCC. These types of companies have a mixed liability regime, as they have partners with limited liability (*comanditários*) who participate in the share capital, and partners with unlimited liability (*comanditados*) whose contribution is made by contributing goods or services and who carry out the company's effective management.

The company's name must include the name or corporate name of at least one of the partners, followed by the term "*em comandita*" or "*& comandita*", "*em comandita por acções*", or "*& comandita por acções*".

From among the various types of companies provided for in the PCC, this chapter focuses only on the salient features of the most relevant types of companies in Portugal: quota companies and share companies. Currently, the limited partnership and the general incorporated partnership have little economic significance.

In fact, pursuant to the results of a study carried out in 2009 by the Portuguese National Institute of Statistics (*Instituto Nacional of Estatística*) on the number of companies incorporated in Portugal according to their legal form, the quota company represented ninety-three per cent of the total number of commercial companies, followed by the share company, representing six per cent of the total number of commercial companies in Portugal.

The choice for either one of these two structures by foreign investors depends on various factors, including the degree of simplicity of the corporate organization and its functioning, the minimum amount of capital to be invested, confidentiality issues as regards the ownership of the registered capital, and rules governing the liability of the members and the transfer of their stakes in the share capital.

Incorporating a Company in Portugal

In General

Before June 2006, the legal regime applicable to the incorporation of commercial companies in Portugal mandatorily required the execution of a deed of incorporation. However, since the entry into force of the amendments to the PCC,[3] Article 7 of the PCC provides that "the articles of association must be set out in writing and the signatures of the parties thereto must be personally witnessed".

Pursuant to Article 7 of the PCC and as a general rule, a written document will be sufficient to incorporate a company in Portugal. However, when a more official procedure is required to transfer assets which partners/shareholders have contributed to the company, the articles of association must adopt the same procedure for the incorporation of the company. For example, take the (not uncommon) situation where the share capital is subscribed for by contributing real estate, which requires the execution of a formal deed. In this case, the company's articles of association at incorporation must be executed by executing a deed of incorporation.

The incorporation of a commercial company in Portugal is subject to three constitutional actions. The articles of association of the future company must be executed by means of a private written document, must be registered with the Commercial Registry, and must be published on a website that is accessible to the general public.

The complexity of the requirements related to the several steps that must be completed in order to incorporate a quota company or a share company in Portugal depends on the chosen procedure. The Portuguese legal regime provides for two different possibilities: the normal or traditional procedure and the so-called "On-the-Spot Firm" (*Empresa na Hora*) procedure.

Normal Procedure

Pursuant to the normal procedure to incorporate a company in Portugal, the prospective partners/shareholders (or their representative or lawyer) must first file an application with the National Registry of Corporate Bodies (*Registo Nacional de Pessoas Colectivas* RNPC) in order to obtain a certificate of approval of the company's proposed name.

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3 Decree-Law Number 76-A/2006 of 29 March 2006.

This initial step is intended to prevent the use of a corporate name that could be confused with an existing one. For this purpose, the future partners/shareholders should not only carry out some previous research on whether the intended corporate name already exists and/or could be confused with an existing one, but also propose three different corporate names which are in some way related to the corporate purpose of the company to be incorporated. The certificate of approval of the company's proposed name is valid for three months after it has been issued and includes the allocation of a provisional corporate body identification number, valid for the same period.

Subsequently, the partners/shareholders must prepare the articles of association, establishing the main rules applicable to the operation of the company once it is incorporated. Although the PCC contains a set of provisions that must be included in the articles of association, the partners/shareholders may use their (considerable) discretion in drafting the articles.

Taking into account the importance of the choices made at this stage by the partners/shareholders, it is worth paying due attention to some of the more relevant clauses to be included in the articles of association of the two types of companies.

Article 9 of the PCC provides mandatory clauses that must be included in the articles of association of any type of commercial company:

(1) The identification of all the founding partners/shareholders (whether individuals or corporate bodies);
(2) The type of company;
(3) The corporate name;
(4) The company's purpose;
(5) The company's registered office;
(6) The share capital;
(7) The stake held by each partner/shareholder in the company's share capital and the form of such contribution, as well as any payments made against each stake;
(8) In case of contributions in kind, the respective description and value (contributions in kind must be subject to a report prepared by a statutory auditor with no interest in the company); and
(9) If the financial year differs from the calendar year, the closing date of the accounting year, which must correspond to the last day of the respective calendar month, notwithstanding the provisions of Article 7 of the Corporate Income Tax Code.

Article 199 of the PCC sets out the specific clauses to be included in the articles of association of quota companies. Article 199 states that the articles of association must include the amount of each stake held in the share capital and the name of the respective partner and the amount of capital contribution initially made or deferred by each partner.

Article 272 of the PCC sets out specific clause to be included in the articles of association of share companies. Article 272 prescribes the inclusion of the following information:

(1) The number of shares and, if applicable, the respective par value;
(2) The particular terms and conditions applicable to the transfer of shares, if any;
(3) The classes of shares, expressly indicating the corresponding number of shares and the rights conferred by each class;
(4) Whether the shares are registered or bearer shares and the rules applicable to their conversion;
(5) The amount of paid-up capital and the deferment periods;
(6) The authorization for bond issue, if permitted; and
(7) The management and supervision model that has been adopted.

Article 277 of the PCC also determines that in share companies, prior to the adoption of the articles of association, the shareholders must declare that they have already deposited their respective portions of the share capital in a bank account opened on behalf of the company. However, the same provision allows the deferral of up to seventy per cent of the initial capital contributions.

In quota companies and as a consequence of the amendments introduced to the PCC by Decree-Law Number 33/2011, the partners are currently allowed to defer payment of the share capital until the end of the first financial year.[4]

Once these requisite steps have been completed, the articles of association may then be formally adopted and the commercial register requested to register the company as a "legal entity" for legal purposes. The PCC establishes that:

> "Commercial companies shall be deemed to have legal personality and exist as such as from the date of the definitive registration of the articles of association by means of which they are incorporated, notwithstanding the provisions regarding the incorporation of companies by merger, demerger, or conversion".[5]

4 Companies Code, Articles 202 and 203.
5 Companies Code, Article 5; Commercial Registry Code, Articles 5 and 15.

After the definitive registration at the Commercial Registry Office, the fact of the company's incorporation is published on a website accessible to the general public.

By implementing Decree-Law Number 111/2005 of 8 July, the Portuguese government created a new system for the publication of companies' actions. The new system no longer requires companies' actions to be published in the Portuguese *Official Gazette* (*Diário da República*); instead, such actions are now published online on a website specifically created for this purpose. The publication of the commercial registry and companies' actions is mandatory.[6]

Between July and December 2005, this new system was only applicable to the publication of the companies' actions that were incorporated under the On-the-Spot Firm procedure. Since 1 January 2006, however, this system is applicable to all types of commercial companies incorporated under Portuguese law. This marked an essential step toward modernization of the administrative procedures and leads to a simpler, less expensive, and clearer publication process, making the information on the companies' actions more accessible to all interested parties.

"On-the-Spot Firm" Procedure

As an alternative to the normal procedure, Portuguese law also provides for a simplified method of incorporating either quota or share companies. Under the On-the-Spot Firm procedure, it is possible to incorporate a quota company (both with single or multiple partners) or a share company within a very short period of time (twenty-four hours) and at a single location by following a very simple procedure.

First, it is necessary to choose one of the pre-approved corporate names provided in a list which is available online[7] and at the On-the-Spot Firm desks available at the commercial registry offices, the Company Stores (*Lojas da Empresa*), the Registries of Specialized Jurisdiction, and the Citizen Stores (*Lojas do Cidadão*). The company's chosen name will only be allocated once it is incorporated, as the law does not allow prior reservation of corporate names. As an alternative to choosing from the pre-approved names, the future

6 Companies Code, Articles 166 and 167; Commercial Registry Code, Article 70; see http://www.mj.gov.pt/publicacoes, regulated by Ordinance Number 590-A/2005 of 14 July.

7 See http://www.empresanahora.mj.pt.

partners/shareholders also may use the normal certificate of approval of corporate name previously issued by the RNPC.

Second, it will be necessary to select one of the pre-approved standard drafts of articles of association, also available on the *Empresa na Hora* website and at the On-the-Spot Firm desks where the company's articles of association will be prepared and the registration of the company will be carried out. The partners/shareholders immediately receive a certified copy of the company's articles of association, the access code to the commercial registry certificate, the access code to the company's electronic card, and the company's social security number.

Shareholders' Duties and Rights

Duties

Article 20 of the PCC provides for the general duties applicable to the shareholders of commercial companies in Portugal in terms of the obligation to pay the initial capital contribution and the obligation to share in any of the company's losses.[8]

In general, the PCC allows initial capital contributions in commercial companies to be made in cash, in kind, or in services. However, with regard to both quota companies and share companies, the PCC specifically prohibits initial capital contributions consisting of services.[9] As a result, the payment of the initial capital contributions may only be made either in cash or in kind (in respect of assets).

Pursuant to Article 28 of the PCC, contributions in kind are subject to a valuation report prepared by a statutory auditor with no interest in the company, who is appointed by means of a shareholders' resolution. The partner to whom the contribution in kind relates is prohibited from voting on the resolution.

Regarding the time frame applicable to initial capital contributions, Article 26 of the PCC states that, as a general rule, initial capital contributions must be made prior to the formalization of the articles of association. However, two exceptions are permitted: first, in the case of quota companies, the partners may defer their respective contributions until the end of the company's first financial year; second, in the case of share companies, when the initial capital contributions are

8 For the sake of simplifying the text and avoiding repetition, all references to the shareholders of share companies in this section also extend to the partners of quota companies, unless specified otherwise.

9 Companies Code, Articles 202(1) and 277(1).

made in cash, the shareholders may agree on the deferral of the payment of up to seventy per cent of the initial capital contribution.

Within this context, essential amendments have recently been introduced to the PCC. Decree-Law Number 33/2011 of 7 March, which entered into force on 6 April 2011, implemented measures intended to simplify procedures for the incorporation of quota companies (either with one or multiple members), by allowing the partners to freely define the share capital amount of the company and therefore eliminating the former obligation to incorporate a quota company with the minimum share capital of EUR 5,000.

This regulation also includes the possibility to defer payment of the initial capital contributions until the end of the company's first financial year. The primary objectives of these measures are the promotion of entrepreneurship, cost reduction, and greater transparency of the companies' accounts.

Rights

In General

Article 21 of the PCC and Article 55 of the PSC establish the major powers and rights of shareholders of Portuguese commercial companies. These can be grouped into two areas: participation rights and economic rights.

Participation Rights

Participation rights include a set of rights which allow shareholders to participate in the company's activity and organization. These include, among others, the power to convene, attend, and intervene in shareholders' meetings;[10] the right to request and obtain information on the company's activity and financial situation;[11] the right to appoint and to be appointed to the company's management and supervisory bodies; and the power to propose, to vote,[12] and to contest corporate resolutions.[13]

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10 According to the Companies Code, Article 248(5), which is only applicable to quota companies, the partners may not be prevented from attending the general meetings, even if they are prohibited from voting.

11 Companies Code, Articles 214 and 288, applicable to quota companies and share companies, respectively.

12 Companies Code, Articles 250 and 384.

13 Companies Code, Articles 59 and 60.

Regarding the right to information, the applicable provisions of the PCC (Article 214 on quota companies and Article 288 on share companies) provide for the minimum content of this right to information. Its characteristics are quite different for quota companies and share companies. For quota companies, it is a right fully granted to all the partners. For share companies, this right depends on the percentage of the shareholding and on the fulfillment of certain requirements, including demonstrating the existence of a justified reason.[14]

Economic Rights

The categorization of economic rights is due to the fact that, by exercising those rights, the shareholders are entitled to their respective share in the funds of the company. In this respect, the PCC provides for the general right to share in the company's income, including the right to demand distribution of dividends,[15] the right to a share in the company's liquidation proceeds,[16] and the preemptive right to purchase new shares issued by the company.[17]

Notwithstanding the general applicability to both quota and share companies, the scope and the boundaries of each of these rights largely depend on which type of company is being analyzed.

Special Rights

Within the scope of shareholders' rights, it is essential to take into consideration the provisions of the PCC on special shareholders' rights. These special rights are corporate advantages or privileges which are not provided for under the general regime and may be created only by including a provision in the articles of association.

Special rights are therefore mandatorily granted by the company's articles of association. These privileges may include, among others, the right to vote on a resolution regarding the appointment of directors, the right to purchase new shares to be issued by the company, and the right to obtain a special share in the distribution of the company's income or the company's liquidation proceeds.

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14 The Companies Code, Articles 289 and 290, also establish the provisions applicable to the information right exercised prior to and during general meetings.
15 Companies Code, Article 22.
16 Companies Code, Articles 21(1) and 16(4).
17 Companies Code, Articles 266 and 458.

Despite omitting a definition, Article 24 of the PCC specifically refers to special rights by clearly allowing their creation and setting out the requirements for their assignment, restriction, or exclusion. Furthermore, the PCC stipulates that in quota companies (and except if otherwise agreed), special rights pertaining to economic powers may be transferred along with the respective quota, while the participation rights are non-transferable. In share companies, these special rights may only be granted to classes of shares and will always be transferred together with those shares.

Pursuant to Article 24(5) and (6) of the PCC, special rights may not be excluded or restricted without the consent of the respective shareholder, unless so required by legal provision or a clause of the articles of association. In the case of share companies, this consent must be granted by a resolution taken at a special meeting of the shareholders of the relevant class of shares.

Characteristic Features of Commercial Companies

Quota Companies

Number of Partners

Pursuant to Article 7 of the PCC and as a general rule, quota companies must be incorporated by at least two partners. The same provision also allows for the possibility to incorporate a company with a single partner, either an individual or a company, who will hold the entire registered capital.

This is a sub-type of quota companies called "single-partner company" (*sociedade unipessoal*). The rules applicable to this sub-type are set out in Articles 270-A to 270-G of the PCC.

Liability

The partners are not liable to the creditors of the company, only to the company itself. Each partner is liable for the payment of its own contributions and, on a subsidiary basis, is jointly liable with the other partners for the payment of their contributions.

However, the PCC states that the articles of association may stipulate that one or more of the partners will be liable not only to the company, but also to the creditors of the company, up to a given amount. This liability may be jointly or severally with the company, as further determined in the articles of association. Once a partner has settled any of the company's debts, he will have a claim against the company for recourse (but not against the other partners) for the full amount paid, unless otherwise provided for in the articles of association.

Registered Capital

Until 6 April 2011, the minimum registered capital for quota companies was 5,000.[18] However, due to the enactment of Decree-Law Number 33/2011, it became possible for the partners to not only freely agree on the amount of the company's share capital, but also to defer the payment of their initial capital contributions until the end of the company's first financial year.

The registered capital is divided into quotas, which may have equal or different nominal values, but may never be of an amount lower than 1 each.[19] Quotas are always registered, in the sense that the names of those who hold them must be noted in the articles of association and in the company's commercial registry certificate.[20]

Transfer of Quotas

Pursuant to Article 228 of the PCC, quotas must be transferred by means of a registered written agreement.[21] The company's articles of association may set out the restrictions or requirements applicable to the transfer of quotas or with regard to any eventual preemption rights granted to the other partners or to the company itself.

The transfer of quotas is not recognized by the company until it has given its consent to the transfer, which must be given by the partners in a general meeting. The company's consent is not required if the transfer takes place among existing partners or between a partner and his spouse or direct relatives. Notwithstanding this provision, the articles of association may exclude the company from granting consent in general or in certain special situations.

18 Fifty per cent of the initial capital entries in cash could be deferred for a maximum period of five years, provided that the minimum amount of 5,000 was fully paid up (either in cash or in kind).

19 Companies Code, Article 219(3).

20 The names of quota holders also must be noted in any subsequent agreement or resolution by which the quotas are transferred or if the registered capital is increased.

21 Commercial Registry Code, Article 3.

Management and Supervisory Bodies

Quota companies are managed and represented by one or more directors, who may be appointed from among the partners or may be an external third person, provided that these have full legal capacity. The directors' appointment may be made in the articles of association or by means of a partners' resolution.

The articles of association may prescribe that the company's management will be entrusted to all the partners. In that case, this will not apply to those partners who have subsequently become partners of the company. The obligation of the directors to carry out their duties will continue until the term of office is terminated, either by removal or resignation.

The company's articles of association may provide for the creation of a supervisory board, which is governed by the provisions applicable to share companies in that respect.

Quota companies that do not have a supervisory board must appoint a statutory auditor to supervise the accounts if, during two consecutive years, at least two of three thresholds are exceeded: a total balance sheet value of 1,500,000; net sales and other profits of 3,000,000; and an average of fifty employees. If two of these thresholds are met, the appointment of a statutory auditor only ceases to be mandatory if the company creates a supervisory board.

Partners' General Meetings

The general meeting of partners may be convened by any of the directors by means of registered letter sent at least fifteen days in advance, unless other formalities or a longer period is prescribed by law or the articles of association. Any partner may request the convening of a general meeting. No partner may be prevented — not even by means of a provision in the articles of association — from participating in a general meeting, even if this partner is prohibited from exercising his voting rights.

Pursuant to Article 246 of the PCC, there are certain matters regarding the operation of the company which are necessarily subject to resolutions approved at a general meeting. These matters include, among others:

(1) Additional capital calls and reimbursements;
(2) Amortization of quotas, acquisition of the company's own quotas, sale of own quotas, and encumbrance of own quotas, and consent for the division or transfer of quotas;

(3) Exclusion of partners from the company;
(4) Removal of directors and supervisory board members from office;
(5) Approval of the management report and annual accounts, the allocation of profits, and the apportionment of losses; and
(6) Amendments to the articles of association.

As a general rule, the general meeting's resolutions are approved by the majority of votes cast (not including abstentions), unless otherwise provided for by law or in the articles of association. Resolutions subject to certain statutory qualified majorities include resolutions on amendments to the company's articles of association (e.g., regarding a capital increase) as well as resolutions on the merger, demerger, conversion, or winding-up and liquidation of a company. These resolutions can only be approved by a majority of three-quarters (seventy-five per cent) of the registered capital.

Distribution of Profits

Unless otherwise provided for in the company's articles of association or approved by a majority of three-quarters (seventy-five per cent) of the registered capital, quota companies must pay out at least fifty per cent of the annual distributable profits. One of the most important legal requirements in this respect is the obligation to set up a reserve of five per cent of the annual profits until the aggregate amount reaches an amount equal to twenty per cent of the registered share capital.

Pursuant to Article 218 of the PCC, the provisions on share companies concerning the legal reserve[22] also are applicable to quota companies. However, the minimum amount of the legal reserve for quota companies must never be less than 2,500.

Share Companies

In General

The regime applicable to share companies tends to be more complex than that for quota companies.

Number of Shareholders

Share companies must have, in principle, five shareholders (individuals or companies). There are two exceptions to this general rule. Companies

22 Companies Code, Articles 295 and 296.

in which the Portuguese state, directly or indirectly through the intermediation of state-sector companies or other equivalent entities, holds the majority of the capital may be incorporated with only two partners. The second exception is for companies incorporated by a single company holding the entire share capital within the context of a relationship of control.

Registered Capital

The minimum registered capital required for a share company is EUR 50,000, divided into shares that may be registered shares (*nominativas*) or bearer shares (*ao portador*),[23] and represented by certificates (*tituladas*) or in book-entry form (*escriturais*).[24] Shareholders are allowed to defer payment of up to seventy per cent of the initial cash contributions in respect of the registered share capital for a maximum period of five years.

Several changes were implemented in the Portuguese legal regime as a result of Decree-Law Number 49/2010 of 19 May. This regulation resulted in amendments to thirteen provisions of the PCC, with the objective of establishing the admissibility of "no-par value shares" in share companies in Portugal. The most important principles relating to the use of no-par value shares are voluntary nature, exclusivity, and equivalence.

In terms of voluntary nature,[25] the shareholders are allowed to decide whether they intend to incorporate a company with par value shares or no-par value shares, as the Portuguese legislator decided to maintain both regimes. According to the principle of exclusivity,[26] the simultaneous coexistence of no-par value shares and par value shares is not permitted in the same share company. According to the principle of equivalence, no-par value shares function and are treated in the same way as par value shares as regards their rights and obligations.

Transfer of Shares

Pursuant to Article 328 of the PCC and as a general rule, there are no restrictions applicable to the transfer of shares, unless otherwise provided for in the articles of association. In principle, the non-transferring

23 Companies Code, Article 299.
24 Securities Code, Article 46.
25 Companies Code, Article 276(1).
26 Companies Code, Article 276(2).

shareholders have no rights in relation to the transfer of the relevant shares, except if preemptive rights arise from any shareholders' agreement or from the company's articles of association.

The transfer of shares is not subject to any specific (contractual) form, and the relevant procedure depends on which type of shares have been issued by the company. While bearer shares are transferred by handing over the share certificate to the transferee, registered shares are transferred by means of a declaration of transfer, written on the share certificate in favor of the transferee. The company must be informed for registration purposes. The transfer of book-entry shares is carried out by their registration in the transferee's account.

Liability

The liability of shareholders in a share company is limited to the payment of the subscribed stake in the share capital.

Management and Supervisory Bodies

Pursuant to Article 405 of the PCC, the board of directors is entrusted with the management of the company and has exclusive and full powers to represent the company. The number of members of the board of directors is provided for in the company's articles of association.

A share company whose registered share capital does not exceed 200,000 may appoint a sole director instead of a board of directors.[27] The directors may be shareholders or external third parties, provided they are individuals with full legal capacity. If a company is appointed as director, it must elect an individual to perform its term of office on its behalf.

The board of directors must resolve on any matters concerning the management of the company that are listed in Article 406 of the PCC, which include:

(1) Appointment of the chairman of the board of directors;
(2) Cooptation of directors;
(3) Requesting the convening of general meetings of shareholders;
(4) Preparation and submission of annual reports and accounts;
(5) Acquisition or sale and encumbrance of real estate belonging to the company;

27 Companies Code, Articles 278(2) and 390(2).

(6) Change of registered office address; and
(7) Capital increases, under the terms provided by the articles of association.

There are three types of management and supervisory models provided for in Article 78 of the PCC that are applicable to share companies: the traditional model, the Anglo-Saxon model, and the German model. The traditional model consists of the board of directors (or sole director) and a sole supervisor (or supervisory board). This structure is traditionally used in Portugal and is common to almost all share companies. The Anglo-Saxon model is made up of the board of directors, with an audit committee and a statutory auditor. The German model is made up of the board of executive directors, a general and supervisory board, and a statutory auditor.

The supervision of companies adopting the traditional model is carried out by a sole supervisor (either a statutory auditor or a company of statutory auditors) or a supervisory board, or by a supervisory board and a statutory auditor or a company of statutory auditors who are not members of that corporate body.

The supervision system by a supervisory board and a statutory auditor or a company of statutory auditors is mandatory for companies that issue shares or other securities admitted to trading on a regulated market. It also is mandatory for companies that are not wholly owned by another company using the traditional model and that exceed two of three thresholds for two consecutive years: total balance sheet of 100,000,000; net sales and other profits of 150,000,000; and an average of 150 employees.

The sole supervisor or the supervisory board undertakes:

(1) Supervision of the company's management;
(2) Monitoring compliance with the law and the company's articles of association;
(3) Verification of the accuracy of the books, accounting records, and supporting documentation;
(4) Verification of the accuracy of the accounting documentation; and
(5) Fulfillment of any other duties allocated by law or the company's articles of association.

Shareholders' General Meetings

The shareholders' general meeting is to be convened by its chairman or, in special cases, by the audit committee, the general and supervisory board, the supervisory board, or the courts. The general meeting also may be convened upon the request of one or more shareholders that hold, by themselves or grouped for this purpose, at least five per cent of the share capital. This request should be addressed, in writing, to the chairman of the general meeting, indicating the precise matters to be included in the agenda and justifying the need for the meeting.

The notice of the general meeting must be published, except when the articles of association require other means of communication. In addition, if all the company's shares are registered, publication may be replaced with registered letters or, in relation to shareholders who give their prior consent, by e-mail with receipt of delivery.

Unless otherwise provided for in the company's articles of association, each share corresponds to one vote. Nevertheless, the company's articles of association may establish that one vote corresponds to a certain number of shares, provided that all the shares issued by the company are taken into consideration and that one vote corresponds to the minimum amount of at least 1,000 of share capital. The articles also may establish that votes cast in excess of a certain number are not to be taken into account if cast by a single shareholder on his own behalf or also as proxy for another shareholder.

Pursuant to Article 386 of the PCC and as a general rule, the resolutions of the general meeting are approved by the majority of the votes cast (not including abstentions), regardless of the percentage of share capital represented at the meeting, unless otherwise stipulated by law or in the company's articles of association.

However, for certain matters — such as the amendment of the articles of association, the merger, demerger, conversion, or dissolution of the company, or other matters for which a qualified majority is legally required — the resolutions may only be approved at first call if shareholders representing at least one-third of the share capital are present or represented at the meeting.

With respect to resolutions on these matters, the PCC stipulates that a minimum number of votes, corresponding to a certain percentage of the share capital, must be present or duly represented on the date and time scheduled for the general meeting (first call), so that the meeting can be validly held and its resolutions validly approved (*constitutive quorum*). In order to avoid unnecessary repetition of the procedures to convene the general meeting, it is permitted to schedule, in the same notice of the general meeting, an alternative later date and time for the general meeting to be held (second call).

At second call, the general meeting may take decisions regardless of the percentage of shareholders attending the meeting. However, resolutions taken on such matters must be approved by two-thirds of the votes cast.

Shareholders attending a general meeting have the right to obtain accurate, complete, and explanatory information which enables them to form an informed opinion on the matters to be resolved at the meeting.[28] The request for this information may only be refused if it would cause serious harm to the company or result in a breach of confidentiality requirements imposed by law.

Distribution of Profits

Unless stipulated otherwise in the company's articles of association or approved by a majority of three-quarters (seventy-five per cent) of the registered share capital, a share company must pay out at least fifty per cent of the annual distributable profits.

As in quota companies, one of the most important legal requirements for share companies is the requirement to withhold a reserve of five per cent of the annual profits until an aggregate amount equal to twenty per cent of the registered share capital is reached. The company's articles of association may prescribe a higher minimum threshold for the legal reserve.

Directors' Duties

In General

According to the applicable provisions of the PCC, directors of Portuguese commercial companies have the fiduciary duty to act in good faith and in the best interest of the company, taking into consideration the interests of shareholders, employees, clients, and creditors. Directors are liable for damage caused to the company by their acts or omissions in breach of any legal or contractual duties and are required to prove the damage has not been caused willfully or negligently.

Directors must comply with several corporate duties, including (but not limited to) a duty of diligence, a duty to prepare and submit annual

28 Companies Code, Article 290.

management reports and annual accounts, the duty of non-competition, the duty to provide shareholders with all relevant information, and the duty to comply with the resolutions of the general meeting.

Duty of Diligence

The duty of diligence can be divided into a duty of care and a duty of loyalty. Under the duty of care, a director must demonstrate technical competence and knowledge of the company's activity adequate for the discharge of his duties, while applying the diligence required of a judicious and organized director.

Under the duty of loyalty, a director must act in the best interest of the company, taking into account the long-term interests of the shareholders and also considering the interest of the other parties, such as the company's employees, clients, and creditors.

Duty to Prepare Annual Management Report and Annual Accounts

The duty to prepare and submit the annual management report and the annual accounts (balance sheets and other accounting documents relative to the preceding fiscal year) to the relevant corporate bodies is set out in the applicable provisions of the law.

The management report must contain, at a minimum, an accurate and clear statement on the progression of the company's business and of the performance and status of the company, as well as a description of the major risks and uncertainties which the company faces. This description must be based on a balanced and broad analysis of the progression of the company's business, its results and status, all in accordance with the dimension and complexity of its activity.

To the extent necessary to understand the progression of the business and the performance or status of the company, the analysis must include financial matters and, if appropriate, reference to the performance of the company in non-financial matters relevant to its activities, including information on environmental issues and matters relating to the employees of the company. The management report also must include a well-founded proposal regarding the allocation of the company's income.

If these duties are not complied with within two months from the legal period for the submission of the accounts (three months from the end of the company's fiscal year, although that period is extended to five months if the company is required to submit consolidated accounts), any shareholder of the company may file a petition at the relevant court requesting an inquiry.

Duty of Non-Competition

Except if duly authorized by the shareholders, a director may not perform, either personally or on behalf of third parties, any activity competing with the company, or exercise functions in a competitor company, or be appointed on behalf of or in representation of a competitor company. The non-competition obligation of directors is provided for in Article 254 of the PCC for quota companies and in Article 398 of the PCC for share companies.

In quota companies, a director may not perform, either personally or on behalf of third parties, any activities within the scope of the objectives of the company, unless duly authorized by the partners.

In share companies, during the term of office for which he is appointed, a director may not perform, within the company or within any company with which it is in a controlling or group relationship, any temporary or permanent functions under the terms of an employment agreement, whether on a subordinated or independent basis. Moreover, a director is not permitted to enter into any agreements regarding the provision of services in this respect upon cessation of his function as a director of the company. A breach of these provisions incurs the director's obligation to indemnify the company and is deemed just cause for dismissal.

Duty to Inform Shareholders

This entails the duty to provide shareholders with clear, accurate, and complete information regarding the management of the company, as well as to make available to the shareholders at the company's registered office all the books, accounting documentation, and any other documents related to the company's activity and assets.

Duty to Comply with Resolutions

This is the duty to comply with and to execute any resolutions approved by the shareholders' general meetings.

Directors' Civil Liability

Liability for Damage to the Company

The directors are liable to the company for damage caused by their actions or omissions in breach of their legal or contractual duties. This liability ceases to exist if a director can prove that his conduct was not malicious or negligent and if the director is able to prove that he acted in an informed manner, free of any personal interests, and according to rational business-related criteria.

Directors who did not attend a particular board of directors' meeting cannot be held liable for any damage arising from a resolution approved at the meeting. In addition, directors voting against a particular board resolution also cannot be held liable for any damage resulting from adopting the resolution. However, directors who could have opposed the resolution which resulted in their liability for damage caused but who failed to do so may be held jointly and severally liable for those acts which they could have opposed.

A director will not be liable to the company if the director's action or omission occurs as a result of a shareholders' resolution, even if that resolution is voidable.

The law determines that the liability of directors is joint and several. They are deemed equally at fault, unless proven otherwise. Directors that compensate the company for damage caused are entitled to the right of recourse from the remaining directors according to the scale of their fault and the consequences of their conduct.

Liability toward Company's Creditors

Directors may be held personally liable toward the company's creditors for the company's failure to pay its debts, if the company's assets are deemed insufficient to cover its debts as a result of willful or negligent breach of legal or contractual rules regarding creditor protection. However, there is no legal assumption of the directors' fault, and the burden of proof therefore falls on the company's creditors.

Liability for Damage Caused to Shareholders and Third Parties

Directors also can be held liable to partners/shareholders of the company and to third parties for any direct damage of a personal or material nature caused by their misconduct during their term of office.

Groups of Companies

Affiliated Companies

In General

The provisions regarding company groups and inter-company relationships are mostly set out in Articles 481 to 508-E of the PCC (Title VI) and are based on the concept of "affiliated companies" (*sociedades coligadas*).

Although the PCC does not provide a definition of this concept, it describes the four types of affiliated relationships that can be created between companies: relationship of simple participation, relationship of mutual participation, control relationship, and group relationship.

Relationship of Simple Participation

A relationship of simple participation is set out in Articles 483 and 484 of the PCC and occurs when a company holds at least ten per cent of the share capital of another company.

Relationship of Mutual Participation

A relationship of mutual participation, provided for in Article 485 of the PCC, occurs when each of two companies holds at least ten per cent of the share capital of the other.

Control Relationship

A control relationship is set out in Articles 486 and 487 of the PCC and occurs when one company is able to exercise, directly or indirectly, a controlling influence over another.

The law presumes that a controlling influence occurs when the controlling company holds the majority of the capital, the majority of the voting rights, or the right to appoint the majority of the members of the management or supervisory bodies of the controlled company.

Group Relationship

The PCC sets out three types of mechanisms for the creation and organization of a group relationship: groups incorporated by means of total control, pursuant to Articles 488–491 of the PCC; groups incorporated by means of the execution of a horizontal group agreement, pursuant to Articles 492 of the PCC; and groups incorporated by means of a subordination agreement, pursuant to Articles 493 to 508 of the PCC.

Scope of Application

Pursuant to Article 481 of the PCC, the application of the rules on affiliated companies, provided for in Title VI of the PCC, depends on certain requirements being met.

On the one hand, the application of these rules depends on the types of companies concerned, as these provisions are only applicable if the companies involved are quota companies, share companies, or limited partnerships with shares. The other types of companies are expressly excluded from the scope of this set of rules. On the other hand, the provisions regarding affiliated companies are only applicable to relationships established between companies with their registered office located in Portugal.

Shareholders' Liabilities

In General

Pursuant to Portuguese legislation, the general applicable rule regarding shareholder liability is the same as the rule applicable to the limited liability of quota companies and share companies. According to the general rule, shareholders only bear the risk of liability up to the amount equal to the amount of capital they invested in the company.[29]

However, as an exception to the general rule and with a view to reducing costs that may arise by reason of this general rule, the PCC established a few mechanisms through which the allocation of liabilities to the shareholders is exceptionally permitted. The primary features of these mechanisms are briefly summarized in this section.

Joint and Several Liability

The provisions of Article 83 of the PCC set out the liability of the shareholders as a result of the so-called *culpa in eligendo* principle or

29 For the sake of simplifying the text and avoiding repetitions, all references to the shareholders of the share companies in this section also extend to the partners of quota companies, except when specified otherwise.

responsibility for negligence in appointing an inappropriate person as a member of a corporate body.

Consequently, Article 83(1) of the PCC applies to any shareholder who, acting alone or together with others with whom he has executed a shareholders' agreement, is entitled to the right to appoint a director (either an individual or a legal entity) without first having to discuss the appointment with the other shareholders. Such a shareholder will be jointly liable with the appointed director if that director is held liable to the company or the shareholders and provided that the negligence in the appointment by the shareholder is the cause of the liability.

Article 83(3) of the PCC applies to any shareholder who, as a result of the number of votes he is entitled to cast, either acting alone or jointly with others with whom he has executed a shareholders' agreement, is entitled to the right to appoint a member of the management or the supervisory board. Such a shareholder will be jointly liable with the person appointed, when negligence in the appointment by the shareholder is the cause of the liability, provided that the board member is held liable to the company or its shareholders and that the resolution was adopted because of the votes cast by that shareholder.

Article 83(4) of the PCC applies to a shareholder who is entitled to the right to remove a director or a member of the supervisory board. If such a shareholder, by using his influence in this respect, causes that board member to perform or fail to perform certain actions, he will be jointly liable with that person, provided that the board member is held liable to the company or its shareholders for those actions or omissions.

Liability of Sole Shareholder

Article 84 of the PCC establishes a mechanism that allows the allocation of liability to a shareholder of a company, provided three requirements are fulfilled: first, the affiliated company is wholly owned by a single shareholder; second, the affiliated company is declared insolvent; and, third, there is a breach of the rules regarding the segregation of the company's and the shareholder's assets. In general, this scenario is deemed to allow "lifting the corporate veil", which determines the secondary liability of the company's shareholder.

Liability of Parent Company

Under the regime applicable to affiliated companies, the PCC also includes a mechanism, set out in Article 501, which causes the parent company to be held accountable for all the liabilities incurred by its subsidiary. Despite falling within the scope of the provisions regarding groups of companies incorporated by means of the execution of a subordination agreement,[30] Article 501 of the PCC also is applicable to groups of companies incorporated by means of total control,[31] as a result of a direct reference to Article 491 of the PCC.

Pursuant to Article 501 of the PCC, the liability of the controlling company is subject to the fulfillment of four requirements.[32] These requirements are:

(1) The existence of a situation of total control or subordination regarding the debts of the controlled company;
(2) That the debts have been incurred before or after the acquisition of control by the controlling company, but only up to the time such control ceases;
(3) The controlled company is in a state of default; and
(4) Thirty days have elapsed as from the date of the state of default being declared.

This mechanism only applies to companies with their registered office in Portugal. Therefore, all group relationships, where at least one of the companies involved has its registered office outside Portugal, are automatically excluded from the application of this regime.

Conclusion

Bearing in mind that the scope of this chapter was to provide a broad picture of the characteristic features of commercial companies in Portugal, several topics have been left out of this analysis. Nevertheless, this chapter is intended to provide a guide to the most relevant features by taking a general approach to explaining the set of rules applicable to the commercial companies in Portugal.

In each of the sections, this chapter has focused on the characteristic features of the two types of companies most commonly used in Portugal and which are economically the more relevant types of company: quota companies and share companies. In this respect, the decision to

30 Companies Code, Articles 493 *et seq*.
31 Companies Code, Articles 488–491.
32 These were the grounds on which a Portuguese court recently decided to condemn a holding company to pay a large sum (approximately 60,000,000), based on liability pursuant to the Companies Code, Article 501 (*ex vi* Article 491).

use either one of these two types of companies will necessarily depend on various factors, including the degree of complexity of the corporate organization, the minimum amount of capital to be invested, and the rules governing the liability of the various interested parties and the transfer of their participatory stake.

This analysis demonstrates that the quota company has a more personal dynamic and is a less complex structure in terms of the organization of its corporate bodies and the number of members required. The share company is typically a more complex structure with regard to the organization and functioning of its corporate bodies, with three types of management and supervision models available to its shareholders. As a general rule, share transfers are less restricted when compared to quota companies, which results in a higher level of liquidity for stakes in share companies.

This chapter discusses the primary similarities and differences of these two commonly used types of companies in Portugal in order to provide a basis for any decision regarding the type of company that might best suit an investor's needs.