

# A paradigm shift in Portuguese bank culture

Francisco da Cunha Matos writes on the necessary change in the paradigm of bank culture in order to restore the trust between clients and bank institutions



FRANCISCO DA CUNHA MATOS  
Associate PLMJ Restructuring  
& Financial Litigation

**A** field of extremely high importance in a bank's governance is the problem related to culture and integrity, and its being taken into account in an effective way in the entire organisation. This can be difficult to achieve since the notion is not inbuilt in the organisation and the leaders do not give it much attention.

Values such as: knowledge, qualification, courage, control and risk management, common strategy control, control of star performers, the group itself and the corporations that belong to it, as well as the equitable remuneration, cannot be imposed from the outside if they are not already accepted by the individuals that manage and supervise the Bank, and consequently spread by them throughout the entire organisation.

The culture of integrity and commitment must start from top to bottom and it shall settle in six pillars that must work as the basis of a good governance system:

- (i) To know the **business**;
- (ii) To know the **structure**;
- (iii) To know the **merchandise**;
- (iv) To know the **employees**;
- (v) To know the **clients**; and
- (vi) To know the **rules**.

Regarding the existence, in the banking industry, of complex or opaque corporation structures, the Basel Committee for Bank Supervision clarified that the Administration Board and the people with management duties must know and understand the operational structure of a bank that functions by appealing to special vehicles or similar

structures, or which, in some jurisdictions that establish an obstacle to the transparency do not follow the international banking standards. In such cases the Administration Board and the people with management duties must understand the purpose, the structure and the particular risks involved in the operations and must also find out how to mitigate the identified risks (*"understand-your-structure"*).

Regarding the bank industry's perception, the Basel Committee for Bank Supervision considers that the corporate governance is *"the way a bank's business and activities are administrated or managed"* by the corresponding entities with management and supervision duties. It is also the way in which they align corporate behavior and the activities with the general expectation that banks must operate in a prudent, safe and meticulous way, combined with integrity and compliance with the applicable legislation and regulations.

Large, complex and opaque structures demand a much harder effort in order to maintain and implement the integrity culture, because difficulties can arise easily, reopening the question of how to treat the so-called structures which are described as *"too big to fail, too big to manage"*.

In order to achieve a change of behavior it will probably be necessary to start applying effective and efficient sanctions, a subject that the European Commission arises expressly in its *Green Paper COM (2010)284*

*final*). Considering, however, that any reinforcement of the civil or criminal liability regarding the corporation's managers must be carefully analyzed.

Most of the organisations express concerns regarding adopting measures and ethical principles, besides legislation and other regulations. Nevertheless, some corporations apply a set of rules concerning the goals they want to implement, in order to create a sense of trust in the general public, and for such a purpose they decide to describe the amounts and the strategy they want to achieve in the long and short term in their annual reports and on their websites. However, this declaration of will



and intent to eliminate the loss of confidence incurred in the meanwhile is not enough by itself. Indeed, the demonstration of the effective defense and implementation of the principles and values emerging from the official documents is an urgency.

The intervention of the Bank of Portugal in the governance of banks in crisis, practicing powers of destitution, replacement of directors and disposition of assets and liabilities, alienated the shareholders from the decision procedures.

On the way to achieving the announced need of promotion of an amended culture paradigm, we consider that the creation of corporate-banking mechanisms to stimulate the intervention of the stockholders in the management of credit institutes in crisis is thoroughly pertinent.

Therefore, the need to trigger the intervention of stockholders in a responsible manner in corporate governance is an absolute requirement. Simultaneously, there is the necessity of a proper representation of the external interests of that governance.

The question of the participation of stockholders and the consideration of long-term and external interests is mainly a feature of the internal and organisational corporate status. In fact, we do not foresee how to convince the stockholders to participate in the company's life and contemplate long-term interests, except for by introduction of benefits for their participation, through a proper internal organisation and the procedures' streamlining, in the interest of an easier, more attractive, less expensive and, consequently, more interesting intervention, improving the company's internal performance.

In the Portuguese Law, the bank-company stockholder's special condition, linked to the existence of special duties, is perfectly expressed. Article 199 of the Legal Framework of Credit Institutions and Financial Companies, although not imposing a general duty implies a special duty of general participation in the company's life. Fulfilling it, at least on the financial support plan, is not coercive, because there is no

clarified derogation from the principle of contribution's limitations incorporated in the Company Act. And the duty will not bind all the stockholders equally, but only the ones whose participation has a relevant dimension for the company's management.

The distribution of specific contours of power between executive and non-executive bodies must be reasonable, with a clarified identification of an enlarged scope of matters which have to be reported. As a matter of fact, the enforcement of the powers of a non-executive body that comes directly from the stockholders can be decisive for the introduction of powers in the scope of high management and strategic supervision – a possibly superior dimension than the company's usual business. This will be seen in the variety of the bodies' powers, like that of the general and supervision council, or of the non-executive director's board, as explained above.

In this regard, it is desired that, concerning the issue of the relatively undetermined high management, the companies that adopt the dualistic model (the idea may be used, *mutatis mutandis*, in other models) should include in their legal status rules that provide for fundamental strategic decisions, including singular operations, besides a system of authorisation or approval by the general and supervision council of all decisions – always having in mind a participation in the decision and not an overlap. ■

“

**LARGE, COMPLEX AND OPAQUE STRUCTURES DEMAND A MUCH HARDER EFFORT IN ORDER TO MAINTAIN AND IMPLEMENT THE INTEGRITY CULTURE**

”

”

