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Directors' Remuneration in Listed Companies

Portugal*

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Questionnaire

1. General

1.1 Please indicate, as a general reference, the laws, case law, regulations, exchange rules and best practices concerning directors' remuneration in your country with respect to listed companies. Please indicate where these provisions (such as, for example, exchange rules) apply only to domestically-incorporated companies.

The Portuguese framework concerning directors' remuneration is given by the following pieces of legislation:

- Commercial Companies Code – articles 288/1/c)/2; 397/1, 399; 402/2, 429, 440 and 444/1. The rules foreseen in this code apply to both listed and non-listed domestic companies. Generally, one should say that these rules determine who fixes directors' remuneration and the conditions under which shareholders can control the remuneration issues of the company.
- CMVM's Regulation n. 1/2007 – articles 1/1, and 2, Annex (Chapter II, 18, 20 and 21). These rules apply only to companies issuers of shares admitted to trading on a regulated market and subject to Portuguese "lex societatis" and refer to the disclosure obligations concerning remuneration that this specific companies are subject to. These provisions take already into account the European Commission Recommendation n. 2004/913/CE, of 14 of December of 2004, on director's remuneration.
- CMVM "Code on Corporate Governance" of 2007 ("Recommendations on Corporate Governance) – recommendation n. II.5.

The present recommendations are destined to all listed companies independently of its "lex societatis". According to recommendation II.5.1, the remuneration of directors shall be aligned with the interests of the shareholders, meaning that the level of remuneration shall be consistent with the maximization of the long term performance of the company, that the remuneration of directors carrying out executive duties should be based on its performance assessed periodically by the competent body or committee, and that the remuneration of non-executive directors, when not legally imposed, should be set in a fixed amount. On the other hand, recommendations II.5.2, 5.3., and 5.4., provide for the essential guidelines concerning the elaboration, control and appreciation by the General Meeting of Shareholders of the statement on the remuneration policy: in particular, shareholders shall be informed on the proposed criteria and main factors to be used in the assessment of the performance for determining the level (share bonuses; option on share acquisition, annual bonuses or other awards). Finally, according to recommendation II.5.5, the remuneration of the members of the management and supervisory Boards shall be disclosed each year in an individual basis, and information on fixed and variable remuneration must be discriminated as well as any other remuneration received from other companies within the group of companies or companies controlled by shareholders of qualifying holdings

Let us take the opportunity to enlighten that the CMVM's Regulation n. 1/2007, the CMVM "Code on Corporate Governance" (Recommendations on Corporate Governance), as well as the Portuguese Securities Code are available in English at CMVM's website (www.cmvm.pt).

1.2 As to best practices, please specify whether they are described in either a private (voluntary or non-statutory) code or other official report, and whether a "comply or explain" principle is applicable to compliance with the relevant provisions by listed companies. Where the "comply or explain" principle applies, please indicate, where such evidence is available, whether companies generally comply with best practices.

The aforementioned “CMVM Code on Corporate Governance” of 2007 constitutes a best practice code based on OECD Principles on Corporate Governance. It was released in 1999 by the Portuguese Securities Commission (CMVM), under the original title of “CMVM Recommendations of Corporate Governance”.

Listed companies must annually report the extent of compliance with the recommendations and, if they do not, to explain why that is so. Notwithstanding, the nature of the “Code” remains voluntary. The degree of compliance of listed companies with the CMVM’s Code on Corporate Governance is monitored through an annual report. According to the latest report published – entitled “Analysis on Compliance with the CMVM Recommendations on Corporate Governance in 2006” –, the average degree of compliance was of 59.1%, which compares positively with the rate of 52.3% of 2005 and of 42% in its first year of implementation (1999). However, the specific recommendations on directors’ remuneration are amongst the one with a lower score of compliance: according to the above mentioned report, the rules on disclosure of individual remunerations of each member of the board of directors area reached a mere 6.7% rate and the approval of the remuneration policy by the general meeting of shareholder the rate of 26%. According to the report, most part of listed companies disclose the remuneration in an aggregated manner (and not separately for each member).

1.3 Please describe in summary: the institutional structure for adopting executive remuneration rules or best practice codes; and any major proposals for reform concerning directors’ remuneration.

Any modification to the rules on executive remuneration foreseen in the Portuguese Companies Code depends of a legislative impulse of the Government, as it would imply the elaboration and publication of a Decree-Law.

On the other hand, CMVM’s Code on Corporate Governance in order to be altered would not require a formal legislative procedure. This best practice code represents an independent initiative of CMVM under its legal attributions.

2. Disclosure

2.1 Are listed companies required to publish a remuneration report, indicating the details of the compensation paid to the members of the Board of Directors? How often must it be published and where is it retrievable?

According to article 245-A of the Portuguese Securities Code, listed companies subject to Portuguese “lex societatis” are required to publish a *report on corporate governance*, to be presented either as a chapter of the annual management report of the company in question, drawn up specifically for that purpose, or in the form of an appendix to the said annual management report. According to CMVM Regulation n. 1/2007, one of the chapters of this report shall include details the policy remuneration of the members of the board of directors as a whole for the financial year in question, the composition of the remuneration committee, and several information on the individual or collective remuneration of members of the boards of directors. Additionally, under article 288/1/c) of Companies Code, any shareholder holding, at least, 1% of the company’s share capital is entitled to consult the global amount of the remunerations that were paid to the members of the board of directors during the last three exercises.

2.2 Must these reports be submitted, or are recommended to be, to a Securities Market Regulator or to a public authority responsible for collecting these documents?

Yes. According to article 245 of the Portuguese Securities Code, the annual report and, as a consequence, the report on corporate governance (including the remuneration details) shall be

relayed to CMVM and to the managing entity of the stock exchange as soon as they are placed at the disposal of the shareholders.

2.3 What information on directors' remuneration, individually and collectively, and on the remuneration committee, must be included, or is recommended to be included as best practice, in the financial reports? Please include in your answer any specific requirements which apply to particular elements of remuneration, such as stock options, bonuses, and termination payments.

According to article 2 of CMVM's Regulation n. 1/2007, listed companies issuing shares admitted to trading on a regulated market must submit information to the CMVM related to plans for the allotment of shares and/or stock options among employees and/or members of the Board of Directors in the 15 days which precede the respective approval. The latter should include justification of the adoption of the plan, the category and number of persons included in the plan, conditions attached to allotment, criteria related to the price of shares and the exercise price for options, the term for exercise of options, the number of shares to be issued and characteristics of the same, the existence of incentives to purchase shares and/or stock options and the competence of the board of directors with respect to the carrying out or alteration of the plan.

In addition, according to Chapter II of the Annex of the aforementioned Regulation n. 1/2007, the report on corporate governance shall describe the policy remuneration of the members of the board of directors, including the as a whole for the financial year in question, the composition of the remuneration committee, and the several information on the individual or collective remuneration of members of the boards of directors, including its alignment with the interests of the shareholders and the evaluation of their performance, distinguishing between executive and non-executive members, as well as a summary of the corporate policy concerning the compensations of directors negotiated in a contractual basis in the case of dismissal and others forms of payment associated with the anticipated termination of mandates (point 18). The report shall also include the information on the remuneration, individual or collective, of the members of the board of directors, including the amount of the fixed and variable parts of the said remuneration, the distinction between the amounts received by executive and non-executive members, the information on the criteria underlying any rights concerning shares, share options, or variable amounts of the remuneration, the information on the relationship between remuneration and performance, information on the system of annual premiums and other non monetary benefits, the remuneration paid on profits, the compensations paid or due to former executive directors, any amounts paid by other affiliated corporations, and the description of any regimes of pension and anticipated reform of directors (20). Finally, the report shall indicate the amounts to be paid to directors after the termination of their mandates, when these amounts exceed the double of their fixed monthly remuneration (21).

2.4 Is timely disclosure required with respect to stock options, their vesting, exercise, and the sale of the relevant shares to third parties?

Yes. There are two main set of provisions to consider on this issue.

According to article 447 of the Portuguese Commercial Companies, the members of the organs of management of any corporation (be listed or not) has to disclose and inform the corporation itself of the number of shares owned, as well as of any acquisitions, burdens and sales with respect to the shares of the corporation and of other affiliated corporations; besides, this duty of disclosure also includes any promises, option, repurchase, or any other agreements producing a similar effect.

On the other hand, the Portuguese Securities Code and the CMVM's Regulation n. 1/2007 also contains important rules which, however, are applicable only to listed companies. According to art. 248-B of the Securities Code, the CMVM must be informed of any transactions concerning the listed shares (or other related financial instruments) by members of the board of directors of the

company issuing the shares in question (or of any related persons to the members). The information shall be made by the respective author within five working days of the date of verification of the relevant transactions, and shall indicate several elements, such as the legal nature of the event leading to the acquisition or disposal, the date and place on which the said event was verified, the price for purchase or disposal of the shares in question, and so on. According to art. 3/4 of the CMVM's Regulation n. 1/2007, each member of the corporate organs shall inform the corporation, within five working days after the date of their nomination or of the issue of shares, about the number of shares and the number of votes that he owns by members of the board of directors of the parent company of the issuer of the shares in question; by companies controlled by one of the above-referred persons; and persons acting on behalf of the above-mentioned persons.

2.5 What are the rules on disclosure of share transactions executed by the company's insiders (such as directors, officers, auditors, etc)?

See above 2.4.

2.6 What information on directors' remuneration must be included in public offer prospectuses and listing particulars?

There are no rules on the content of public offer prospectus requiring specific information on director's remuneration. However, there are some legal provisions on directors remuneration concerning the public offers prospectuses. According to articles 134/1/c and 236/2/c of the Code of Securities, there is a exemption of prospectus concerning public offers for distribution of securities to existing or former directors or employees by their employer which has securities already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.

3. Remuneration of the Board of Directors

3.1 Who fixes the board of directors' remuneration? What are the relevant procedures? (In two-tier systems, please refer to the supervisory board.)

The procedure for adopting executive remuneration depends on the corporate management structure. According to the Commercial Companies Code (article 278), the management and control of the company can be structured along one of the three following models: the classical model (which includes a board of directors and a board of auditors), the dual or German model (which includes an executive board of directors, a supervisory board and a statutory auditor), and the American-English model (which includes a board of directors, an audit committee and a statutory auditor).

When the corporation adopts the classical or the American-English model, article 399 of the Commercial Companies Code foresees that the remuneration of all the members of the board (including executive directors) shall be approved by the shareholders, in a general meeting, or by a special shareholder's committee constituted to the effect.

In case the corporation adopts the so-called dual or German model, article 429 of the Commercial Companies Code states the remuneration of the members of the management board is determined by the supervisory board or by a special committee constituted by it, unless the statutes of the corporation attribute such power to the shareholders' general meeting. In what concerns the remuneration of the members of the supervisory board, article 440 foresees that members the supervisory board are not necessarily paid. Whenever such retribution is established in the articles of association, the rules of article 399 apply.

3.2 Are there provisions and/or practices as to the amount of the remuneration and its distribution (for example, as to whether distribution should be proportionate) among board members? What types of remuneration are allowed?

According to art. 399/2 of the Commercial Companies Code, a part of the remuneration can consist in a percentage of the corporate annual profits. According to II.5.5. of the CMVM “Code on Corporate Governance”, the remuneration of the members of the management and supervisory boards shall be disclosed each year on an individual basis, and information on fixed and variable remuneration must be discriminated as well as any other remuneration received from other companies within the group of companies or companies controlled by shareholders of qualifying holdings.

3.3 Are personal loans to the company’s directors and officers allowed?

No. Article 397 of the Commercial Companies Code prohibits companies from extended loans or any kind of credit facility to members of the board of directors.

4. Executive Directors’ Remuneration

4.1 Who fixes the executive directors’ remuneration? What are the relevant procedures? Are shareholders required to approve directors’ remuneration, the remuneration policy, or the remuneration report (see question 2) on an annual or other basis? (In two-tier systems, please refer to the management board.)

See above 3.1.

In addition, please note that according to article 376 of the Commercial Companies Code the annual report (hence, the report on corporate governance) elaborated by the management is subject to shareholder approval.

4.2 Is the board required, or recommended as best practice, to create a remuneration committee?

No. Regarding corporations adopting the classical model, the remuneration of all the members of the board of directors (including executive directors) shall be approved by the shareholders, in a general meeting, or by a special shareholder’s committee (art. 399 of the Commercial Companies Code). Concerning corporations adopting the so-called dual model, the remuneration of the members of the executive board of directors is determined either by the supervisory board or by a special committee constituted by it, unless otherwise provided for in the articles of association. Regarding the distribution of the remuneration among directors, the recommendation II.5.1 of the CMVM’s “Code on Corporate Governance” states that the remuneration of directors carrying out executive duties should be based on its performance assessed periodically by the competent body or committee, and that the remuneration of non-executive directors, when not legally imposed, should be set as a fixed amount.

If yes, please specify:

(i) the committee’s composition (if independent directors should be appointed to this committee, please give the relevant definition and indicate whether any special procedures apply to the appointment of independent non-executive directors)

(ii) the committee’s competences and which company body it reports to

(iii) how the committee operates

4.3 Which types of remuneration are permitted? In answering, please consider each of the following:

- (a) bonuses
- (b) stock options, including discounted stock options
- (c) stock grants
- (d) profit sharing
- (e) benefits in kind

Under Portuguese company law all the above-mentioned types of remuneration are allowed.

4.4 Are there specific rules, including shareholder approval requirements, as to these different types of remuneration?

No.

4.5 Are there any restrictions on how payments are made?

Yes. Articles 399/2 and 429 of Commercial Companies Code while determining that director's remuneration can consist partially in a percentage of the company's profit, also establish that in such event the global percentage destined to director's remuneration shall be authorised by a specific clause of the articles of association. An additional restriction is provided for in article 399/3: from the calculation of the global percentage of the profit destined to the variable remuneration of directors are excluded the amounts allocated to company reserves as well as any part of the profit that, under the law, cannot be distributed among shareholders.

4.6 Are there any specific requirements for termination payments made on loss of office, whether through dismissal, retirement, on a takeover, or otherwise?

Yes. According to article 403/5 of the Commercial Companies Code, the dismissal without cause entitles the dismissed director to an indemnity which is determined following the criteria provided for by the articles of association or according to the general principles of law: in any event, the indemnity cannot exceed the amount of the remuneration he would presumably earn until the end of the term of office. This rule is applicable to all the existing legal models (cf. article 430/2).

4.7 Are there any specific requirements concerning directors' service contracts with respect to, for example, their duration and disclosure?

Yes. According to articles 391/2 and 425/2 of the Commercial Companies Code, the duration of the mandate of members of the board of directors is fixed in the articles of association, but cannot exceed four years. According to articles 398 and 428 of the Commercial Companies Code, during their mandates, the same directors cannot hold any parallel labour contract or service contract with its corporation or other affiliated corporations (article 398/1), neither engage in any outside and competing business activity without prior authorisation of the shareholders (article 398/3) or, in case of corporations with a dual structure, without prior consent of the supervisory board (article 428). Finally, articles 397 and 428 of the Commercial Companies Code rule on potential conflicts of interests of the members of the board of directors: according to those provisions, all the agreements entered into between the company and members of the board, directly or indirectly, are null and void, unless prior deliberation of the board itself, in which the interested director is unable to vote, and a previous favorable opinion of the board of auditors.

5. Non-executive Directors' Remuneration

5.1 Are non-executive directors separately paid for their participation in committees of the board of directors? Do any restrictions apply to the payment of non-executive directors' *via* stock options?

There are no specific legal rules or recommendations applicable to these topics.

5.2 May a company make payments to non-executive directors, additional to their directors' fees, for services, such as legal or brokerage services, outside the usual scope of directors' duties?

Please see above 4.7.