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CORPORATE, MERGERS AND ACQUISITIONS GROUP

EDITORIAL

Welcome to the latest Aware from the Corporate and Mergers & Acquisitions Group (CMAG) of Abreu Advogados.

In the first article, we cover one of the most currently discussed matters, the privatization of State owned companies under the Stability and Growth Pact for 2010-2013.

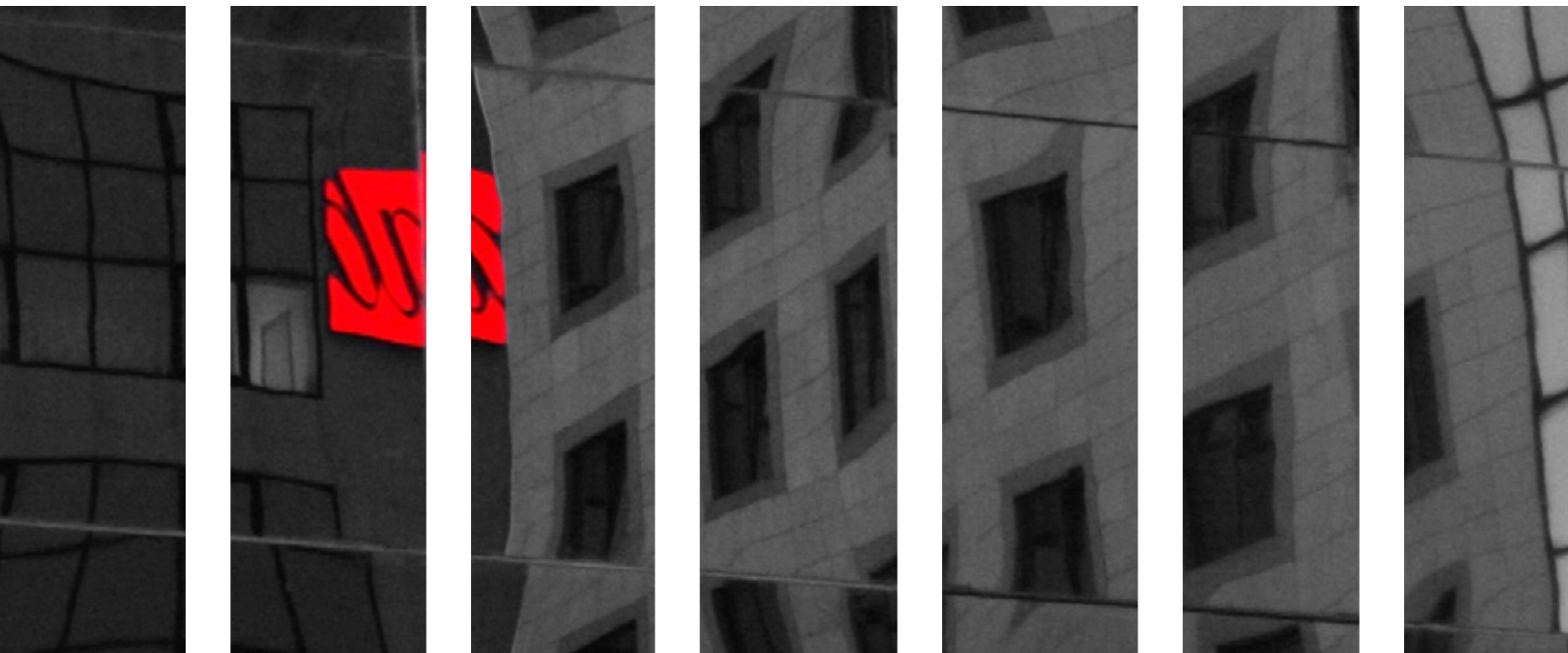
The second article addresses practical issues in relation to the issue of shares in public limited companies and its possible forms of representation.

In the third article we analyse the rules on the modification of bond issues, whose importance has increased significantly due to the current financial and economic crisis.

Finally, in the fourth article, we address the issue of the right to information in commercial companies, a matter around which there are conflicting interests: that of the shareholders who claim information regarding the company, and those of the company, such as the concern with a governance without inappropriate interferences and the confidentiality of certain matters.

Enjoy your reading,

The CMAG Team



THE STRUCTURAL MEASURES PRECEDING PRIVATISATIONS

Mafalda Teixeira de Abreu (Senior Asssociate Lawyer)

In the context of the globalisation of the economic crisis, the Portuguese Government approved the Stability and Growth Pact for 2010-2013[1], (hereinafter "PEC"), which requires the privatisation of several State owned (wholly or partially) companies. This initiative was reinforced by the intervention of the *Troika* in Portugal, forcing Portugal to commit to sell TAP, REN and EDP.

In fact, the sale of State-owned companies and State-controlled companies will generate additional revenue which will, to a certain extent, help the Government to tackle national debt[2]. This measure is both necessary and critical to the Portuguese Economy.

According to the PEC, nearly twenty companies will be privatised, ranging from bottleneck sectors to those which are more profit-oriented, such as the Transport, Energy, Defence and Banking sectors.

TAP – Transportes Aéreos Portugueses (national airline company), ANA – Aeroportos de Portugal (development and management of airports), REN – Rede Eléctrica Nacional (gas and electricity utility) and the insurance area of the CGD Bank are some of the companies that the Government will be privatising in the short run.

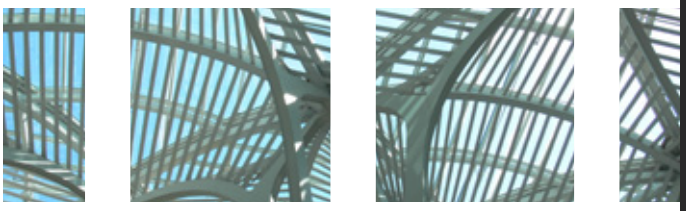
The key (and preliminary) question of how these companies and utilities will be made attractive to private investors remains.

In fact, although there is a framework law on privatisations, the terms and conditions under which privatisations will be carried out are to be set in *ad hoc* Tender Documents to be approved on a case-by-case basis. This flexibility allows the Government to adapt the privatisation process to the market offer and the different players involved.

Each privatisation process will most likely be monitored by a special committee, to be set up for the purpose of providing technical support and overseeing each stage of the process.

As a first step, the target-company is evaluated: financial statements, business plans, management reports and net equity value are some of the aspects to be taken into account. The evaluation must be carried out by two independent entities. In the light of this analysis, it should be easier to set the scope of the privatisation and anticipate whether or not these companies will attract private investment.

Secondly, if necessary, the target-company is converted into a public limited company subject to new articles of association. The company emerging from this conversion will however inherit every aspect of the former public company, including its rights and obligations.



The third step is the definition of the sale process, which can be either a sale of shares or a capital increase, and the choice of the sale procedure, preferably by public tender or public offering.

If the national interest or the economic-financial situation of the target-company so recommend, the Government may decide to privatise through restricted tender limited to eligible bidders or through a direct sale (the procedure recently adopted for BPN[3], EDP and REN). In such scenarios, some restrictions are usually imposed on future transfers of acquired shares.

In short, and regardless of the procedure that will be adopted, we anticipate that the proceeds to be obtained from the forthcoming privatisation will be a real breath of fresh air to public finances.

1. Approved by the Council of Ministers on March 13, 2010 and published in the Official Journal on April 7, 2010.
2. The funds provided by the enterprise to Government through an indirect sale may take various forms other than cash.
3. Banco Português de Negócios, S. A.

PRACTICAL ISSUES RELATING TO SHARES OF PUBLIC LIMITED COMPANIES

Rui Peixoto Duarte(Partner)

Introduction

In Portugal, the main issues relating to the shares of commercial companies are governed by the Commercial Companies Code (CC) and the Securities Code (SC).

In public limited companies the capital is divided into shares (Article 271 CC). In addition to being a unit of ownership, the share is also the instrument that enables a shareholder to participate in the life of the company by carrying rights, such as the right to share in the profits, the right to vote at general meetings, the right to obtain information and the right to be appointed member of the corporate bodies, and obligations, such as the obligation to make capital contributions and the responsibility to share in the losses (Articles 20 to 24 of the CC).

Shares qualify as securities (Article 1 of the SC). A share will only be deemed a security when all the legal formalities have been complied with (Article 47 of SC). However, the status of shareholder arises upon the incorporation of the company and it is not dependant on the delivery of share certificates or registration of the shares in an individual book-entry account (Article 274 of the CC).

The shares and relevant amount owned by a shareholder is the power such shareholder has in the company. In practice, the dynamics for power control in commercial companies is closely linked to the number of shares held by its members.

The following are some basic concepts worth bearing in mind with regards to shares of public limited companies:

Registered shares/bearer shares

Article 299 of CC provides that companies may have shares in registered or bearer form, unless otherwise required by law or by the articles of association.

Shares take the form of *registered shares* for as long as they have not been paid up in full or if the articles of association impose restrictions on their free transfer, and also when the articles of association require that shareholders make supplementary payments of capital to the company.

Registered shares offer the issuer the advantage of always knowing who the relevant owners are. In the absence of any provision to the contrary contained in the articles of association or decision of the issuer, shares shall be *registered shares* (Article 52 of the SC). When all the shares of the company are in *registered* form, the General Meeting of Shareholders may be convened by certified mail, or by electronic mail with read receipt if so authorised beforehand by the shareholders (Article 377 CC).

As far as *bearer shares* are concerned there is no way of knowing constantly the identity of the respective holders (Article 52 of the SC).

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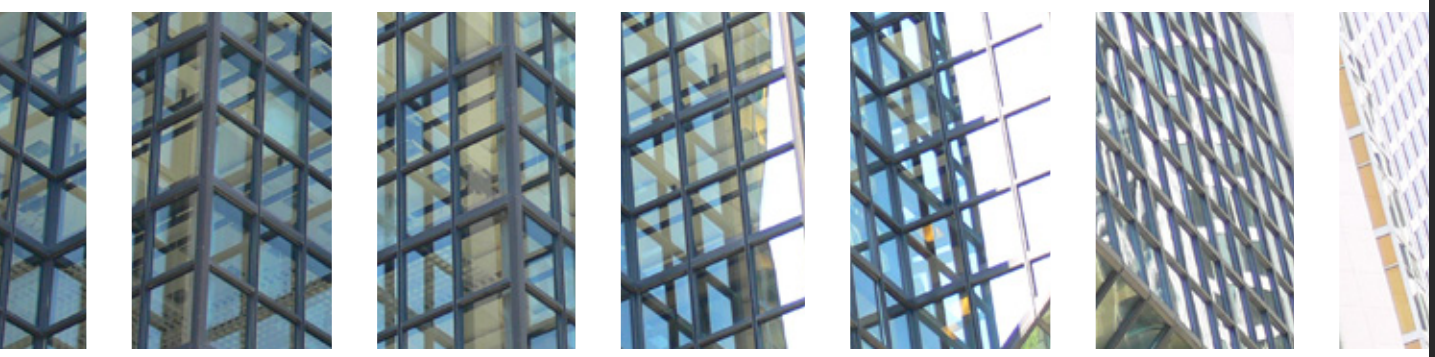


PRACTICAL ISSUES RELATING TO SHARES OF PUBLIC LIMITED COMPANIES

(CONTINUATION)

Unless forbidden by law, by the articles of association or by the conditions of the share issue, *bearer* shares may be converted into registered shares, and registered shares may be converted into bearer shares, at the expense of the shareholder.

Certificated shares / book-entry shares

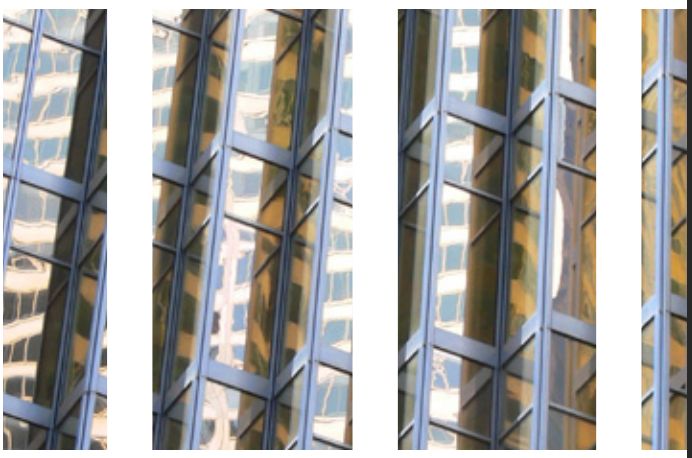
Shares may be represented in paper form by a stock certificate, which is the traditional form of share representation, and still prevailing in many companies whose capital is not disseminated and admitted to trading on a regulated market. This representation of shares is known as *certificated* form.

Book-entry shares are dematerialized and entered in an account. This account can be opened: with a financial dealer, integrated in a centralized system; with the financial dealer appointed by the issuer; or in an account with the issuer or financial dealer that represents the shareholder (Article 61 of SC). The shares admitted to trading on a regulated market must be recorded in a centralized system. Book-entry bearer shares which are not recorded in a centralized system must be recorded with a single financial dealer. Registered book-entry shares not recorded in a centralized system or with a single financial dealer are recorded with the issuer or financial dealer acting as the representative of the issuer.

The share register must contain the identity of the issuer, the name, head office, company registration office where its recorded, company number, full specifications of the share, type and rights attached, form of representation, nominal value, number of shares held, date of first registration of legal title or delivery of certificates, serial number and rights attached in case of certificated shares, name of the original shareholder, and name of shareholder in case of registered shares.

Unless forbidden by the articles of association, the company may decide, at its expense, to convert certificated shares into book-entry shares and vice versa, setting a deadline for conversion to take place.

Certificated shares are converted into book-entry shares upon being entered in the register, after the deadline for delivery of the certificates to be converted. Book entry shares are converted into certificated shares once the relevant certificates become available for delivery and the converted values are destroyed or cancelled on the date of conversion (Article 49 of SC).



The obligation to issue shares

Pursuant to Article 304(3) of the CC, share certificates should be delivered to their owners within six months following the registration of the articles of association or the capital increase. It means that after the incorporation and registration of the company, the directors shall issue and deliver the shares to shareholders. It is not uncommon for us to find incorporated and registered companies which have still not issued nor delivered their shares to the shareholders. Such situations may pose difficulties to a shareholder wishing to exercise his corporate rights or to transfer his shares.

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PRACTICAL ISSUES RELATING TO SHARES OF PUBLIC LIMITED COMPANIES

(CONTINUATION)

The obligation to issue shares lies with the Board of Directors. The failure to do so is a breach of a statutory duty (Article 64 CC), and the Board of Directors can be held accountable. The company may decide to remove the defaulting directors from office and claim compensation for losses sustained (Article 75 CC). In case this is not resolved by the company, the aggrieved shareholder may act accordingly, provided he owns not less than 5% of the capital, or 2% for issuers of shares admitted to trading on a regulated market, bringing a civil liability action against the directors seeking compensation on behalf of the company for the losses sustained, if the company has still not done so (Article 77 CC). The shareholder can also file his own legal action (Article 79 of the CC) for damages.

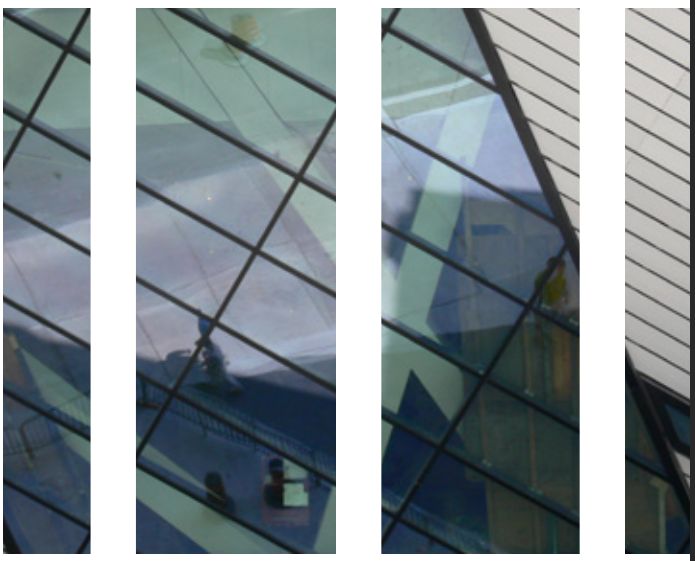
The Commercial Court is the competent court to hear the aforementioned actions since it is a question of breach of corporate rights.

What can a shareholder wishing to transfer his non-issued shares do? Does he have to wait for the outcome of the legal proceedings ordering the directors to issue the shares?

The law is silent on this point. Some advocate it is possible by applying the regime of assignation of debts (Article 577 of the Civil Code), others argue that it would be best to apply the rules governing the assignment of quota in a private limited company by writing down such agreement, taking into account the statutory provisions that impose restrictions on the transfer of shares, in case of registered shares.

It is worth noting that the transfer of shares involves tax obligations, particularly those set forth in Article 138 of the Individual Income Tax Code, which requires both sellers and purchasers to submit an official form to the Tax Authorities (Form 4) within 30 days of the transaction, whenever the same was not been made through a financial dealer.

Tax laws even require that the purchasers of shares can only exercise the rights attached to their shares, directly or through a financial institution, after having evidenced before the competent entity that Form 4 was submitted or that the acquisition was made through the financial dealer.



Both the shareholder and the financial dealer are required to produce such evidence, failing which the public prosecution office may forbid the exercise of said rights and subject to the provisions of General Regime of Tax Infractions.

Since this matter is not directly governed by the CC, it is being discussed whether or not this provision has consequences on the exercise of corporate rights by the shareholder before the company.

The letter of the law is clear and expressly states that compliance with these tax obligations is a condition for the exercise of the corporate rights by the shareholder. Based on these precepts, corporate bodies thus have legal authority to refuse the exercise of corporate rights in case this tax obligation is not met.

We look forward to having court rulings on this matter.

AMENDMENT OF THE TERMS AND CONDITIONS OF BOND ISSUES

Nuno Barbosa (Partner)

It is common knowledge that bond issues are one of the main methods of financing public limited companies. Through a bond issue, companies raise capital by issuing debt. Or, pursuant to the law, the company issues "negotiable securities which, in the same issue, confer credit claims for the same nominal value".

As regards the credits of the bondholder entitling to cash payments, as a rule, bonds give bondholders the right to demand the return of the nominal value on maturity and to receive regular interest payments. However, given the scope of this legal provision, it is possible for bonds to have a wide range of configurations.

Thus, capital repayment may be made with a premium, meaning that the amount returned to the bondholder will exceed the principal paid by the bondholder to the company. Furthermore, the premium may be fixed or variable, depending on the company's profits. Typically, bonds also carry coupons payable at specified dates, to be calculated by applying a fixed or variable interest rate to the nominal value of the bond. There is another type of bonds giving the holder the possibility of converting its creditor position into a partner position – the so-called convertible bonds and bonds attaching warrants, which constitute *l'épreuve prénuptiale* between the bondholder and the company.

One peculiar characteristic of bond loans, and often unknown to bondholders, is the possibility of the conditions of the bond loan being modified, as long as a specific percentage of bondholders so consent. In other words, the issuer may, throughout the term of the loan, propose amendments to the loan conditions and those amendments are fully binding on all the bondholders, including on those who have been silent or have voted against it, provided that such amendments are passed at a bondholders meeting convened to that affect by the requisite majority of bondholders. The amendment is passed on first call by half of the votes corresponding to all the bondholders and on second call by two thirds of votes cast.

At a time when we are facing one the worst economic and financial crisis ever, an increasing number of bondholders meetings are passing resolutions amending the terms and conditions of bond issues. It is therefore relevant to know the borderline of the powers of bondholders meetings in respect of amendments to bondholders' positions. Will it be the main conditions of its credit? Will it be the integrity of the right to repayment? Will these amendments be substantial? Is there any limit? Will it be almost everything or almost nothing?

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AMENDMENT OF THE TERMS AND CONDITIONS OF BOND ISSUES

(CONTINUATION)

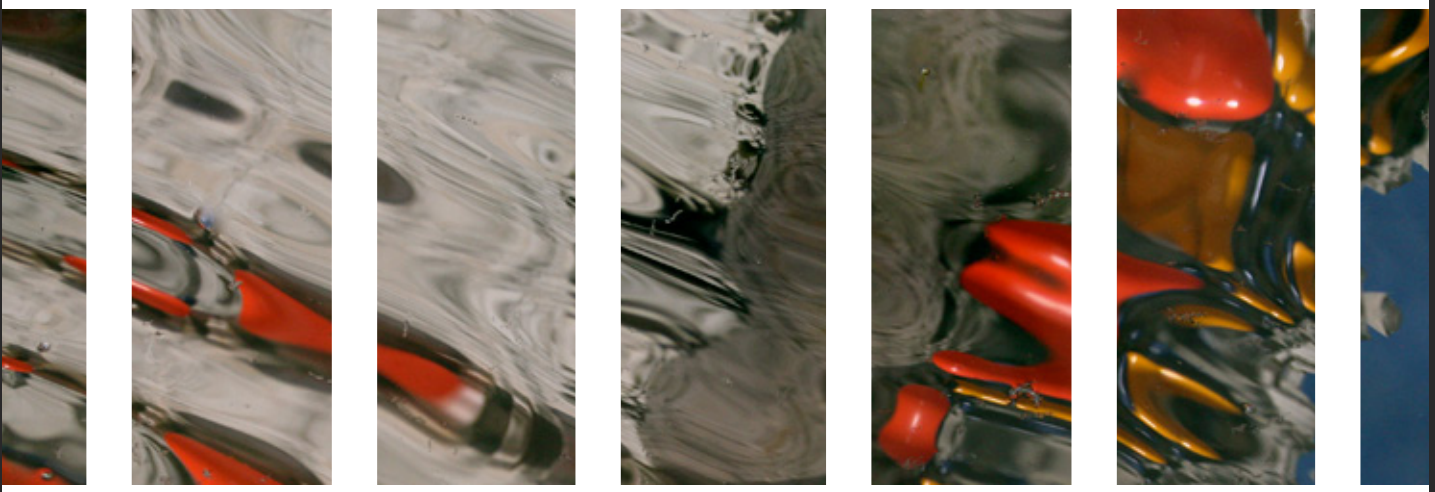
The gaps between opposing positions are widened: on the one hand, the absolute impossibility of the meeting resolving on credit value reduction and, on the other hand an entirely opposing position whereby the rights of bondholders can be removed. There are other positions defending that when the law refers to "amendment of the conditions of the credits" it implicitly excludes its competence to waive and reduce rights (both in quantity and quality) and to forgive debts.

It is also being argued that the meeting cannot impose on bondholders any suppression, reduction or negative amendment of the agreed return, and can only intervene to suppress or change guarantees or the maturity term. Less restrictive positions accept the possibility of resolutions, passed with a majority vote, decreasing the interest rate and amending the amortisation plan, advocating however that the right to repayment cannot be eliminated, even if partially, and that the conversion of bonds into shares cannot be imposed. The opposing position defends that any bond condition may be amended, including the "forgiveness" of part of the debt, provided that the resolution respects a triple legal limit: absence of increase of charges on bondholders; equal treatment and common interest.

In the light of the first of these limits, a resolution requiring bondholders to make additional contributions to the company or whose effect is to put more burden on their benefits is invalid. The second limit is that the amendment of the conditions of the loan needs not to be equal for all. Two or more amendments to the loan by the bondholders meeting are perfectly acceptable, provided bondholders may choose the one that suits them best. Finally, the resolution should serve the common interest and, in that sense, the amendments should reflect what is less burdensome to the bondholders.

In other words: the resolution safeguards the common interest when the loss arising thereout for the bondholders is less than the loss they would sustain had the resolution not been passed.

We hope this interpretative framework may prove useful in the analysis of the different situations arising out of amendments to the conditions of the bonds being requested by Issuers.



THE RIGHT TO INFORMATION IN COMMERCIAL COMPANIES

Susana Canas (Associate Lawyer)

In the internal and external relations of commercial companies, the flow of information being provided by the governing or supervisory bodies to the partners, whether individually or collectively, or by a corporate body to another corporate body, or to the public or third parties, is increasing each day.

The problems arising out with these exchanges of information often go beyond the specific case from which they emerged, calling for a careful consideration on the key aspects of the relationship between company and partner.

Although the right to information is not an essential feature of the articles of association (the law does not qualify it as an autonomous legal mechanism but rather as a right that is accessory to other rights, which is granted to enable the full exercise of these rights), it ensures the minimum requirement of operation of the company.

The information is closely linked with the right of supervision of corporate practice, within the limits of the law and of the articles of association, yet this is not its sole purpose, as supervision is often followed by a power to act or a duty to report.

Article 21(1)c) of the Companies Code (hereinafter "CC") generically provides for a right of partners to information, which is governed by its own regulation, depending on the type of company involved, the company being require to establish the specific content and control of the right to information.

This right has a correlation which is inversely proportional to the size of the corporate structures to which it relates: it narrows as the universe of the structures widens. The right to information is a far-reaching right within partnerships. It is subject to contractual restrictions in private limited companies and well-delimited through stricter regulations in public limited companies.

In general, however, both article 214 (private limited companies), and article 290 (public limited companies) of the CC, require the information provided to be **true**, meaning that it must be-accurate and not misleading; **complete**, containing the necessary elements to fully meet the information request and finally, **elucidative**, that is, clarifying doubts or explaining facts, reasons or justifications.

The right to information can be divided in four different areas[1]: the right to obtain information, the right to consult corporate books and documents, the right to inspect corporate assets and, on a different level, the right to seek judicial inquiry.

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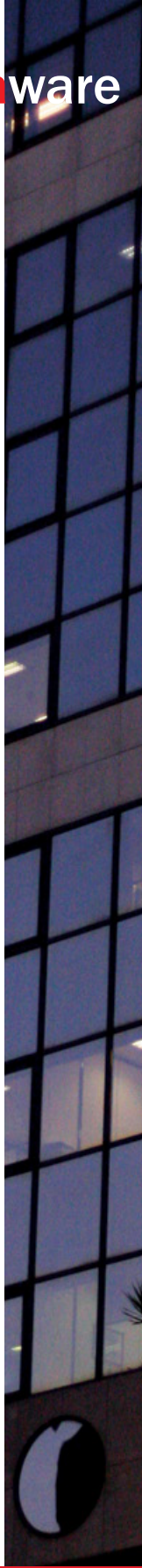
1. *Sic* Carlos Maria Pinheiro Torres in O Direito à Informação nas Sociedades Comerciais, 1998, page. 121.



THE RIGHT TO INFORMATION IN COMMERCIAL COMPANIES

(CONTINUATION)

Faced with a request for information by a partner, the company may **lawful deny** such information, should the intended use not fall within the purposes of the company, the request be made with the intent of harming the company or the disclosure of the requested information breach the duty of confidentiality imposed by law to protect the interest of third parties. According to RAÚL VENTURA[2] the refusal to provide information is legitimate *"whenever there is reasonable likelihood that the information will be misused"* following an objective assessment. Also according to RAÚL VENTURA[3] , the *"purposes unrelated to the company are not only the purposes which are not the purposes of the company but also the purposes that are unrelated to the capacity of partner"*.

On the other hand, unlawful refusal of information shall occur when the body responsible for providing the same denies disclosure of such information in breach of the law and the articles of association or the information provided is false, incomplete or non-explanatory.

In cases where the refusal is unlawful, the partner may request a judicial inquiry. In private limited companies, the partners may also *cause* a resolution to be passed by the partners permitting the disclosure of the requested information.

In cases where the information is requested for the purpose of preparing the partner to vote a corporate resolution, the refusal to provide such information may render the resolution invalid. As stated in recent case ruling of the Supreme Court of Justice of 16.03.2011[4], *"the annulment should only be considered when the lack of information has actually mislead the will of the partner regarding the subject-matter of the resolution: the failure to provide information must have influenced directly and decisively the resolution, for having prevented the voting partner to decide in possession of the relevant information".*

It is essential to understand the scope, extent and limitation of the right to information, around which there are conflicting interests: that of the current or future partners who claim information regarding the company, and those of the company, which is the concern for a corporate governance without inappropriate interferences and the obligation to maintain information confidential, and as such the commitment to a balanced sacrifice of interests imposed on the company and partners is crucial for a healthy corporate life.

2. *Cfr.* Sociedades por Quotas, Vol. I, page. 312.
3. *Cfr.* Sociedades por Quotas, Vol. I, pages. 281 and following.
4. Lawsuit number 1560/08.3TBOAZ.P1.S1, 2nd Section of the Supreme Court of Justice.

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