

III. Corporate Governance

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Glossary

AEM

Portuguese Issuers Association

ASF

Portuguese Insurance and Pension Funds Supervisory Authority

CMVM

Portuguese Securities Market Commission

Decree-Law 10-A/2020

Decree-Law 10-A/2020 of 13 March, which establishes exceptional and temporary measures regarding the new Coronavirus - COVID-19 situation

ESMA

European Securities and Market Authority

IPCG

Portuguese Institute of Corporate Governance

Law 16/2015

Law 16/2015 of 24 February, which partially transposes Directives 2011/61/EU and 2013/14/EU, revises the legal regime for collective investment undertakings and amends the General Regime for Credit and Financial Institutions and the Portuguese Securities Code

Law 18/2015

Law 18/2015 of 4 March, which, *inter alia*, revises the regime applicable to venture capital funds

RFFP

Legal regime applicable to pension funds (Decree-Law 12/2006 of 20 January, as amended)

RGICSF

General Regime of Credit Institutions and Financial Companies (approved by Decree-Law 298/92 of 31 December, as amended)

RJASR

Legal Licensing Regime for insurers and reinsurers (approved by Law 147/2015 of 9 September, as amended)

SREP

Supervisory review and evaluation process

III. CORPORATE GOVERNANCE

III.A. Background | Auditing

1. In the context of the audit activity, the indirect impact of this situation and the legal framework consequently approved on the performance of the audit services is significant, although there is still no published legislation or regulation directly related to the current Covid-19 pandemic.

2. The CMVM (Portuguese Securities Market Commission) issued, on 20-02-2020, two very important communications in this context:

(i) *CMVM Decisions and recommendations on Covid-19*; and (ii) *Recommendations on the audit activity within the scope of Covid-19*.

III.B. Auditor reporting relating to the last financial year

Without prejudice to changing the end date for holding shareholder meetings for approving annual accounts in 2020⁽¹⁾, it is important for auditors to develop **alternative or supplementary mechanisms to obtain evidence for audit** jointly with the audited entity (especially with the respective supervisory board), particularly in situations in which the current partial compulsory containment – with widespread teleworking and social distancing, with services and commercial and industrial activities closed down or with severely limited access – makes it very difficult to access information and documentation.

In consolidated statutory audit for a group of companies, for the purpose of reviewing the work done by the auditors of the group's components,

the assessment procedures for the works should be reviewed and adapted in order to overcome the limitations referred to above, especially with respect to other jurisdictions subject to similar restrictions or with difficult access to information and documentation.

It is also important to ensure that, in the applicable cases, the description of the “**subsequent events**” the report and accounts for the last financial year includes a reference to the particular situation of the audited entity in light of the current pandemic and the effects on the entity (assessment of the audited entity's continuity as a going concern, identification of its economic perspectives and direct impacts of the spread of SARS Cov-2 on its activity). The said information will ideally be as specific as possible and will mention the current and potential impacts, including a quantitative and qualitative assessment.

Indeed, CMVM draws attention to the following duties:

- “duty to carry out an assessment of the audited entity's business continuity, as well as to identify its economic prospects and the direct impacts of the Covid-19 spread in the exercise of its activity”, considering aspects such as: (i) exposure to high-risk markets or to sectors where the SARS Cov-2 infection has the most notable effects; (ii) interruptions to the economic cycle and limitations on the supply of goods and services; (iii) breaches of contract; and (iv) reduced revenue and liquidity;
- “collaborate with the audited entities in order to identify the impacts and risks that the spread of Covid-19 may cause in their activity and in the financial statements prepared or in progress”. In other words, the audit must, in general terms, aim to carry out: (i) an assessment and a confirmation, jointly with the audited entities, of the adequacy of their disclosures in the financial

⁽¹⁾ For more information on this topic, see below [Chapter XIII.E](#)

statements and the measures taken to respond to the identified risks; and (ii) a reassessment of the main aspects of the auditing work following the rapid changes and impacts arising from Covid-19, within the scope of the applicable domestic and international auditing standards.

III.C. Legal and regulatory reports to supervisory authorities ⁽²⁾

On this topic, see [chapter XIII](#).

III.D. Background | Shareholder Meetings

In the context of the current pandemic, companies are faced with various decisions with respect to holding shareholder meetings.

Companies that have not yet issued their notices to convene the annual shareholder meetings are discussing their postponement and those that have already issued such notice are discussing their cancellation or holding the general assembly through telematic means.

Thus, companies should consider their alternatives carefully, within the legal framework provided for in the Portuguese [Companies Code](#) and, when applicable, in the [Portuguese Securities Code](#), ensuring that these less frequent means are adopted in strict compliance with the law and always taking into account in each specific case the general duties applicable to the members of the governing bodies.

Moreover, the choice to hold shareholder meetings remotely gives rise to some additional obligations and concerns, which are discussed below⁽³⁾.

It should also be noted that the solutions in the regime set out in Decree-Law 10-A/2020 (as well as the other solutions established in the Companies Code) are also applicable to shareholder meetings for investment and venture capital funds (pursuant to general cross references in the respective legislation to shareholder meetings in the Portuguese Companies Code – e.g. article 61(3) of the Law 16/2015 of 24 February, as amended, and article 35(1) of Law 18/2015 of 4 March, as amended), as well as to any entity to which the Portuguese Companies Code or, in particular, the regime for shareholder meetings set forth therein applies to.

III.E. Cancellation and postponement of Shareholder Meetings

[Decree-Law 10-A/2020](#), which set forth “temporary exceptional measures relating to the new Coronavirus - COVID-19 epidemiological situation”, provided, *inter alia*, **the extension of deadlines for holding the shareholder meetings of companies until 30 June 2020** (without, in any case, changing the four-month deadline for publishing the annual accounts and report applicable to the entities subject to article 245 of the Portuguese Securities Code).

Thus, companies and their shareholders have been afforded more time to hold their annual general meeting, mandatory under article 376 of the Companies Code; as such, companies can consider postponing the meeting until a later date.

If the shareholder meeting has already been called and it is considered convenient to cancel it, the following notes should be considered:

- (i) The cancellation notice must be published by the same means as the notice to convene (e.g. the Ministry of Justice publications website);
- (ii) The notice must also be published on website of such company, as well as on the

⁽²⁾ Specifically on the banking sector, see [legal alert](#) published by [Morais Leitão](#) on 18-03-2020.

⁽³⁾ Without prejudice to considering the postponement or suspension in each specific case and always having in mind compliance with the applicable legal framework.

- relevant tab of the CMVM's information dissemination system, if applicable;
- (iii) The cancellation of the general meeting must be carried out by the person who issued the respective notice to convene – in principle, the chairman of the shareholder meeting – at the request of the signatories of the request to convene (in principle, the board of directors, which is responsible for requesting to convene the annual general meeting) and of the proposals submitted to the shareholder meeting, and must indicate the grounds for such cancellation;
 - (iv) The cancellation of the shareholder meeting does not exempt the company from compliance with all deadlines and requirements set forth in the Portuguese Companies Code and, if applicable, in the Portuguese Securities Code, for the purposes of convening and holding the meeting (except in the cases provided for in article 54 of the Companies Code – unanimous resolutions in writing and universal shareholder meetings).

Companies should also consider, when determining the date to hold the shareholder meeting and in accordance with the CMVM guidelines (see [chapter XIII](#)) whether to hold the shareholder meeting remotely or not. In such case, companies must comply with the legal provisions applicable to these situations, as explained in [chapter III.F](#).

III.F. Holding Shareholder Meetings remotely via telematic means

As it is widely known, companies may, if possible, resort to the method of unanimous resolutions in writing and voting by proxy, voting by correspondence and voting via electronic means, as allowed by the Portuguese Companies Code and by the respective articles of association, in order to minimise the physical presence of shareholders at the meeting. In the cases where it can be implemented, these methods

are simple to execute, and are an effective alternative to the issues associated with holding shareholder meetings via telematic means.

In its turn, article 377 (6b) of the Portuguese Companies Code sets forth that shareholder meetings can be held “**unless otherwise provided in the articles of association, via telematic means. The company must ensure the authenticity of the declarations and the security of the communications, and must record its content and the respective participants**”.

If companies intend to choose to use these means – which is recommended by the CMVM (see, in this regard, [chapter III.G](#)) – the chosen means must be able to ensure (i) the authenticity and security of the communications and (ii) the full recording of the meeting, its content and the respective participants.

In this context, the use of telematic means and the concern with recording the participation was also strengthened by Law 1-A/2020, which in its article 5 sets forth that “Remote participation via telematic means, especially through videoconferencing or teleconferencing by the members of collegiate bodies of public or private entities in the respective meetings, does not pose an obstacle to the regular functioning of the body, namely with regard to quorum and resolutions; the manner of participation must, however, be recorded in the respective minutes”. One of the ways to hold the meeting remotely is through videoconference, in such a way that allows (i) the proper identification of the shareholders present at the meeting, (ii) participation, discussion and voting in a similar way to meetings with physical attendance and (iii) the full recording of its content. Companies must confirm the operational and technical viability of such alternative.

Essentially two alternatives are recommended, to be detailed in the notice to convene:

- (i) **Online meeting (or mixed meeting):** physical meeting for shareholders who still wish to attend in person (especially if they lack access to videoconference systems) combined with permission for the remaining shareholders to attend and participate through a videoconference system;
- (ii) **Virtual meeting:** meeting held exclusively via videoconference. In this case (and in the case of those who attend via videoconference as described in point (i)), the following is necessary under the law:
 - a. ensure that all shareholders can fully participate in the meeting, allowing them to pose questions, make proposals and vote;
 - b. guarantee the security of the videoconference and confirm the role and identity of the participants in the meeting – for example, through the allocation of a username and password or authentication of their identities through a website set up for this purpose;
 - c. ensure the recording of the meeting, in order to be able to register the meeting's content.

When selecting the intended type of meeting and, above all, in light of the circumstances and shareholder structure of each company, the possibility that there are shareholders who lack access to videoconference systems which allow proper participation in the general meeting should be considered. Thus, the mixed meeting will be the best alternative to address this concern to the broadest extent.

None of these mechanisms precludes voting by correspondence and voting via telematic means (already widely implemented in Portuguese companies). Companies, regardless of whether they hold a virtual or mixed meeting, may and should suggest that their shareholders use these means, which are not typically used by the shareholders but that are equally effective in

order to avoid physical meetings. Priority should, however, be given to **electronic** voting, insofar as it is possible to ensure conditions of security, authenticity and confidentiality, in order to avoid potential failures of the postal service.

All the information and details referred to above should be carefully considered and outlined in the notices to convene, always ensuring that shareholders are properly informed about the alternatives for participation and voting in the respective shareholder meetings.

III.G. Common understanding of CMVM, IPCG and AEM

On 20 March 2020, the CMVM, IPCG and AEM issued a [common understanding](#) in relation to holding shareholder meetings during the current pandemic.

These entities consider that “alternative ways to hold general meetings that allow the exercise of shareholders’ rights to be compatible with high standards of safety, health and well-being of all those involved should be favoured”.

Notwithstanding the exceptional measures adopted by the Portuguese Government (regarding cancellation and postponement of shareholder meetings, see [Chapter III.E](#)), these entities have addressed, in particular, holding general meetings via telematic means, mixed shareholder meetings, in addition to other measures, as stated below.

HOLDING SHAREHOLDER MEETINGS REMOTELY VIA TELEMATIC MEANS

Holding shareholder meetings via telematic means is, in this context, **a highly-recommended solution** (unless otherwise provided in the articles of association) **and the one that**, among the available possibilities, **ensures greater compatibility of the interests at stake.**

CMVM, IPCG and AEM also understand that, although the possibility of participating in the shareholder meeting remotely via telematic means is typically disclosed to shareholders in the respective notice to convene, in the current circumstances, and “for the benefit of the shareholders and others involved in the company’s life, **the possibility of recourse to telematic means should not be ruled out** if the possibility is disclosed up until the date the meeting is held, by the same means used to issue the notice to convene, **even if the original notice to convene did not mention that possibility**”.

In any case, in order to minimise potential litigation risks and without prejudice to a specific assessment of the changes and the interests at stake, in this context it is relevant to consider: (i) the period that should elapse between the date of publication of the amendment/rectification of the notice to convene and the date of the meeting and/or (ii) the envisaged changes in order to add new means to participate, without removing the means contained in the initial notice to convene.

HOLDING OF MIXED SHAREHOLDER MEETINGS

If it is not operationally possible to hold a telematic shareholder meeting, these entities recommend the adoption of the mixed-meeting model – **combining personal attendance and remote participation** – including, for example:

- (i) **Partial recourse** to digital and interactive means of communication, such as **videoconferencing**, allowing interaction between participants in the meeting held by distance communication means;
- (ii) **Promotion of digital transmission and remote viewing means** such as webcasts **or the provision of decentralised physical spaces with video access to the meeting place**, thus allowing the shareholders to combine representation or voting by correspondence and effectively

accompanying the discussion at the shareholder meeting. This method avoids the need for people to travel *en masse* to the place where the shareholder meeting will be held and, therefore, the associated contagion risks.

ADDITIONAL MEASURES

The CMVM, IPCG and AEM also recommend that, in any of the cases described above, the following measures be adopted to the extent possible:

- (iii) **Provide information prior to the shareholder meeting exclusively on the company’s website and**, when applicable, **on the CMVM’s Information Dissemination System** in order to minimise visits to the company’s headquarters to obtain such information;
- (iv) **Exercise of voting rights**, as well as the exercise of information rights and other communications relevant in this context, **by email**, thus avoiding the risks of contagion and potential delays inherent to postal communication;
- (v) **That the measures to be adopted by the chairman of the shareholder meeting afford a high level of certainty and security as to the reliability of such records** (attendance lists), to be specified in the notice to convene in case there is a need for the shareholder to perform any additional action for such purpose.

MAIN CHALLENGES TO HOLDING SHAREHOLDER MEETINGS

Topic	Risks	Background/Recommendations
<ul style="list-style-type: none"> • Cancellation of shareholder meetings 	<ul style="list-style-type: none"> • Unlawful cancellation of the meeting; • Violation of the shareholders' rights; • Others to be considered according to the specific agenda of each meeting and the subsequent resolutions to be adopted (shareholder or creditor litigation). 	<ul style="list-style-type: none"> • Disclosure of the cancellation notice by the same means as the notice to convene; • Disclosure of the cancellation notice on the company's website and on the CMVM's Information Dissemination System, if applicable; • Cancellation at the request of the signatories of the notice to convene and of the submitted proposals; • Compliance with all the deadlines and weighting of the application of general duties of the members of the governing bodies in each specific case.
<ul style="list-style-type: none"> • Holding shareholder meetings remotely 	<ul style="list-style-type: none"> • Unlawful notice of the meeting; • Violation of shareholders' right to take part in the general meeting of shareholders in terms of participation, discussion and voting; • Violation of the rules on security, authenticity, shareholder identification and recording; • Consequent invalidity of the adopted resolutions, (mainly shareholder litigation). 	<ul style="list-style-type: none"> • Online meeting (or mixed meeting): physical meeting combined with allowing for the remaining shareholders to attend and participate through a videoconference system; • Virtual meeting: meeting held exclusively via videoconference system; • In the cases of videoconferencing: <ul style="list-style-type: none"> • ensure that all shareholders can participate; • ensure confirmation of all participants' identities; • ensure full recording; • The possibility that some shareholders lack access to videoconference systems that allow their proper participation in the shareholder meeting should be considered; • Companies should inform their shareholders about the preferential use of voting by correspondence and electronic voting; • As referred by the CMVM, AEM and IPCG, and under the exceptional regime, companies that have already issued a notice to convene may consider the use of telematic means, carefully considering the timing and means of disclosing the amendment to the notice to convene and the setting up of new means of participation for this purpose.

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