TRENDING TOPIC

#1 — APR. 19

DIRECTIVE

Shareholder Rights Directive II

Participation, information and transparency

Directive 2007/36/EC ("First Shareholder Rights Directive") was approved in 2007. Its aim was to guarantee minimum rights to shareholders of listed companies in the European Union. Among other changes to the then existing legislation, the First Shareholders Rights Directive included additional requirements for disclosure of preparatory information for the general meeting. It also included measures to make it easier to vote by correspondence and by proxy agent, and it eliminated the obligation of blocking of shares to participate and vote in the general meeting.

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Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 ("Shareholder Rights Directive II" or "SRD II") amends the First Shareholder Rights Directive by strengthening certain rights of shareholders and seeking to encourage their involvement in the management of companies. It focuses on the long term and on sustainability.

SRD II addresses, in particular, the identification of shareholders, the communication of information, making it easier for shareholders to exercise their rights, transparency of institutional investors, asset managers and proxy advisers in voting matters, directors' remuneration and related-party transactions. The Directive has to be implemented into national law by Member States by 10 June 2019.

At the national level, a bill already exists to implement the Directive (the "Bill"), This Bill was available for public consultation until last November and the report on it has been published. The report summarises the comments received and accepts some of the suggested changes. The public consultation documentation can be seen here.

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Identification of shareholders, simplification of the exercise of shareholders' rights and communication of information

The Directive addresses the identification of shareholders, communication of information and making it easier for shareholders to exercise their rights. It seeks to create mechanisms that make it easier for listed companies to know who their shareholders are. This is essential for direct interaction between the company and its shareholders and, in turn, for them to be involved in the life of company and to be able to exercise their rights as shareholders effectively.

The Directive also tackles the issue of shares being held through complex chains of financial intermediaries that make it difficult to identify the ultimate shareholder. This is particularly so in cross-border contexts and when shares are held by "professional shareholders". The result is that it is harder for shareholders in these situations to exercise their rights, including access to information and voting rights.

The Bill creates a right for companies to ask the body that manages the centralised system for information on the identity of its shareholders, the number of shares held and the date since which they have been held. The managing body then asks the financial intermediaries for this information, which must be provided immediately.

Under Portuguese law, the shareholder is considered to be the holder of the individual security registration account with a financial intermediary participating in the centralised securities registration system. In other words, the shareholder is the one whose name appears in the individual registration account with the first financial intermediary participating in the centralised registration system. This is known as the "first layer" rule. Therefore, for these purposes, the holders of shares through chains of financial intermediaries are not taken into account

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The Bill thus extends duties of identification and some associated rights only to the shareholders registered in the way describe above. As mentioned in some comments on the Bill during the public consultation, this means the efforts to identify the effective involvement of long-term shareholders appears doomed to fail, at least partially. The reason for this is that, for the purposes of Portuguese law, chains of financial intermediaries, are not formally considered to be shareholders. Therefore, the register does not contain the information to be communicated to company when it requests identification of shareholders in the terms described above.

The report on the Bill states that *"although we can understand and agree with the statement that the scope of the Directive would be more easily assured with the harmonisation of the national rules on ownership of securities, this was not the choice taken by the European legislature ..."*.

We understand the choice of the Portuguese legislature in the specific context of implementing the Directive. However, we believe that safeguarding the rights of "indirect" shareholders should be considered more globally, particularly in situations of shareholding through chains of intermediaries and the ways to encourage the involvement of shareholders in the management of listed companies.

Directors' remuneration

The Directive reinforces the principle of the shareholders' "say-on-pay" of directors and makes it a requirement for them to comment on the remuneration policy and on the annual remuneration report. The Directive also increases transparency through the list of the minimum information that must be disclosed in these two documents. It also establishes certain principles to be taken into account in the directors' remuneration policy, including their contribution to the business strategy of the company, for its long-term interests and its sustainability.

Under the Bill, these remuneration issues will give rise to new articles 26-A to 26-F of the Portuguese Securities Code. However, Portuguese law currently has rules that require the disclosure in the accounts of the company and in the corporate governance report of information on the remuneration policy and on the amounts paid to directors. These rules are reinforced by recommendations in this respect in the Corporate Governance Code of the Portuguese Institute of Corporate Governance.

As a result, we believe the impact of the Directive in this respect is not very substantial. It simply increases some duties of disclosure and makes some recommendatory rules mandatory. It does not disrupt the rules currently in force.

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Transparency of institutional investors, asset managers and proxy advisers in relation to voting de votação (proxy advisors)

The Directive establishes that institutional investors and asset managers must draw up and disclose: (i) its policy to integrate the involvement of shareholders into its involvement strategy, (ii) how this policy was applied, including information on how they voted in the most important votes and their use of proxy adviser services in respect of voting.

The Directive also increases transparency in relation to proxy advisers in the field of voting. In particular, it requires them to adopt and implement a code of conduct, and to report publicly on the application of this code. In addition, they must also disclose information about the preparation of their studies and on possible conflicts of interests.

The Bill provides for the inclusion of a new chapter in the Securities Code (Articles 251-A and following) which includes these matters. Although there are already regulations on some of these issues, there is now greater transparency in respect of their activities, and institutional investors and voting proxy advisers are now on the list of entities supervised by the CMVM (the Portuguese securities market commission).

"The Directive includes obligations regarding the disclosure of relevant transactions with related parties, in some cases, not later than the moment at which they are carried out."

Related-party transactions

The Directive includes obligations regarding the disclosure of relevant transactions with related parties, in some cases, not later than the moment at which they are carried out. The information disclosed must include the identification of the related party and the value of the transaction, as well as any other information that may be needed to assess whether it is fair and reasonable (a valuation report may also be required).

Another requirement of the Directive is that these transactions must be approved by certain corporate bodies and that conflicts of interest must be avoided. This is to be achieved, in particular, by ensuring that the related parties do not play any role, among others, in the drafting of the report justifying the transaction.

In this case, the Bill also adds the necessary provisions to the Securities Code (article 249-B and following), and the threshold of 2.5% of the consolidated assets of the company has been established to trigger the obligation to disclose transactions. When it comes to disclosing transactions with related parties, regulations are already in force and it is already mandatory to disclose certain information in the accounts and in the corporate governance report (in the latter case, this can be by reference). When applicable taking into account their relevance, these transactions are also covered by the privileged information rules.

The Corporate Governance Code of the Portuguese Institute of Corporate Governance complements this legislation with recommendations. In particular, it addresses conflicts of interest and the decision-making process in respect of this type of transaction. These recommendations are very much in line with the Directive. Thus, although there is some increase in transparency with respect to related-party transactions, it seems to us that the vast majority of companies listed today are fully prepared to deal with the changes resulting from the implementation of the Directive. ■