Non-voting Preferred Shares in Portugal: A General Overview

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In this article we intend to provide a general overview of the Portuguese legal framework regarding the non-voting preferred shares (NVPS). We have also highlighted some of the issues and concerns that may be the reason to justify the almost no use of such shares.

Keywords: Non-Voting Preferred Shares, Preferred Dividend, Pre-Emption Right, No-Par Value Shares

1. BACKGROUND AND PURPOSE

Non-voting preferred shares (NVPS) have been in our *radar* since 2015, year in which the Portuguese Commercial Companies Code (PCCC) was amended in order to introduce a new type of NVPS. Since then, we have devoted our attention and analysis to this type of shares, what led us to choose them as the topic of our master's thesis, which was concluded in 2018. Since then, we have published a paper and an E(book) about this very same topic.¹ However, as these two pieces of writing were both written in Portuguese, it is our opinion that the time has come to write another paper – this time in English – in order to give a contribute to the comparative study of this type of shares. The content of this article was, therefore, greatly based on these two previous works.

With this purpose in mind, we will start by explaining the Portuguese legal framework of said shares and, afterwards, we will point out some of the reasons that justify the (almost) no use of these shares by the Portuguese public and private companies organized by shares (*sociedades anónimas*).²

2. THE LEGAL FRAMEWORK UNTIL FEBRUARY 2015

The NVPS have been introduced in the Portuguese legal system by the PCCC that came into force in 1986. The Portuguese legal doctrine was, before the PCCC, naturally aware of the existence of this type of shares but, in the absence of a legal provision foreseeing their admissibility, the prevailing opinion was that public and

private companies organized by shares could not issue shares without voting right.³ In 1986, however, the legislator has clearly stated that «The bylaws may authorize the issuance of NVPS up to an amount representing half of the share capital».⁴ Based on this provision, it is therefore accurate to say that the PCCC does not allow public and private companies organized by shares to issue simple *non-voting shares*.⁵ In fact, the Portuguese framework requires non-voting shares to carry some *privileges* to offset the absence of voting right.

A summary of the rights granted by these shares would be, until 2015, as follows:

- (1) The NVPS grant their owners a priority in the annual dividend and in the reimbursement of the shares – the later in the winding-up process.
- (2) The amount of said preferred dividend must be set out in the company's bylaws but should be, at least, 5% of the nominal value of the shares.
- (3) This *preferred dividend* grants only a payment priority, therefore not being an additional dividend.^{6,7} Hence, the payment of dividends should follow this sequence: (1) NVPS should be paid the preferred dividend; (2) if and additional amount is to be paid, common stock should receive the same amount of dividend; (3) if there are still dividends to be allotted, they should be evenly distributed to (all) the shareholders.

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1 Diogo Pessoa, «Das Ações Preferenciais sem Direito De Voto – Os Aspectos Críticos De Um Regime Imperativo-Rígido», in *Cadernos do Mercado de Valores Mobiliários*, N.º 65 (CMVM 2020), <https://www.cmvm.pt/pt/EstatisticasEstudosEPublicacoes/CadernosDoMercadoDeValoresMobiliarios/Documents/CMVM-CADERNOS-n65.pdf> and Diogo Pessoa, «Das Ações Preferenciais sem Direito de Voto» (Universidade Católica Editora, Lisboa 2021), http://www.uceditora.ucp.pt/site/custom/template/ucptpl_uce.asp?SSPAGEID=2952&lang=1&artigoID=50898.

2 As far as we know, the only listed company that used to have outstanding NVPS has, in 2019, decided to convert said shares into common stock.

3 J. J. Vieira Peres, «Ações Preferenciais sem Voto», in *Revista de Direito e de Estudos Sociais*, Ano XXX (III da 2ª Série), 331–332 (Almedina, Coimbra 1988).

4 Article 341.º, n.º 1 of the PCCC. Loose translation.

5 As admitted in some European countries. See e.g., Art. 2351.º of the Italian Civil Code.

6 This statement did not gather, before 2015, the unanimous consensus of the Portuguese Scholars. Please refer to Carlos Olavo, «O Dividendo Prioritário Nas Ações Preferenciais Sem Voto», in *O Direito*, ano 127, III–IV, 376 (Julho–Dezembro) (Almedina, Coimbra 1995) and to Paulo Olavo Cunha, *Os Direitos Especiais Nas Sociedades Anónimas: As Ações Privilegiadas* 159 (Almedina, Coimbra 1993).

7 The company's bylaws may, however, foresee that this preferred dividend is also an additional dividend. In such a case, after step (1) of the *infra* mentioned sequence, the following step should be the (2).

- (4) The dividend is cumulative – if it is not paid, it should be paid (should the company has distributable profits) within the following three accounting periods.
- (5) If the preferred dividend is not (completely) paid in two consecutive years, these shares will then grant the voting right. In this scenario, the shareholders will keep the *special rights* granted by the NVPS⁸ and, at the same time, the voting right. The voting right will only cease to exist in the fiscal year after the one in which the due amount of dividends is entirely paid.

3. THE AMENDMENT OF 2015

In 2015, the PCCC was amended to, inter alia, change the legal framework of the NVPS. The most important changes were^{9,10}:

- (1) The minimum preferred dividend was reduced. It must now be, at least, 1% of the nominal value of the shares.
- (2) The legislator clarified¹¹ that the payment of the preferred dividend, should the company have distributable profits, is mandatory. The shareholders may file a claim against the company in order to be paid.
- (3) There is a new framework that can be applied to non-listed NVPS subscribed exclusively by qualified investors. In this case:
 - (a) The preferred dividend can be a *maximum dividend*, meaning that the sequence of dividend payments is not the one described above but instead, after being paid the preferred dividend, these shareholders should not receive any other amount.
 - (b) The preferred dividend may be non-cumulative.

- (c) The number of accounting periods in which the dividend *may* remain unpaid before NVPS must mandatorily grant the voting right (two, by default) may be changed in the bylaws. Said number of accounting periods may not, however, be higher than five.
- (d) The shares may, if that is foreseen in issuance's conditions, be converted into common stock due to a deterioration in the financial situation of the company that affects its ability to pay the preferred dividend.

4. PRELIMINARY CONSIDERATIONS

Based solely on the description provided, some conclusions can be drafted.

Firstly, it becomes obvious that the Portuguese framework of NVPS is extremely rigid. In fact, there is a maximum amount of NVPS that can be issued¹²; the preferred rights granted by these shares are, almost in its entirety, decided by the legislator, leaving almost no room to the companies and their shareholders; and the consequences arising from the non-payment of the preferred dividend are also rigidly decided by the legislator.

Secondly, this rigidity did not cease to exist after the *reform* of 2015.

Finally, while other jurisdictions give more autonomy to listed companies so that they can shape the framework of their NVPS,¹³ the Portuguese legislator decided to follow the opposite path.

Before entering into the second part of this analysis, we therefore want to point out, as of now, that the rigidity of the Portuguese legal framework of NVPS is, in our opinion, the reason number one to explain the lack of success of NVPS in Portugal. The Portuguese legislator is, it seems, more concerned with the allegedly protection

⁸ Preferred dividend and reimbursement.

⁹ For further details, please refer to Daniela Farto Baptista, «Ações Preferenciais sem Voto (em particular, as detidas por investidores qualificados)», in *IV Congresso Direito das Sociedades em Revista* (Almedina, Coimbra 2016); Elda Marques, «As Recentes Alterações ao Regime das Ações Preferenciais – o Decreto-Lei n.º 26/2015, de 6 de fevereiro», in *Direito das Sociedades em Revista*, Ano 7, vol. 13 (Março, Almedina, Coimbra 2015); Elda Marques, «Ações Preferenciais: as alterações introduzidas pelo DL n.º 26/2015, de 6-02», in *E Depois do Código das Sociedades em Comentário* (Aa. Vv. Ed., IDET, Almedina, Coimbra 2016) and Manuel Requicha Ferreira, «Comentário às intervenções 'Ações Preferenciais: Reforma Anunciada' e 'Concorrência de Deveres de Comunicação Relativa à Aquisição de Ações'», in *E Depois do Código das Sociedades em Comentário* (AA. VV. ed., IDET, Almedina, Coimbra 2016).

¹⁰ Elda Marques, «Comentário ao Artigo 341.º», in *Código das Sociedades Comerciais em Comentário* vol. V, 760–768 (2ª ed., AA. Vv. & Jorge M. Coutinho de Abreu (Org.), Almedina, Coimbra 2018) has a widely different understanding of the legal framework of NVPS after 2015. According to this author, when, in 2015, the legislator amended Art. 341.º and wrote, in its number 5 that «NVPS grant, in addition to the patrimonial rights mentioned in the numbers above, every non patrimonial right granted to the ordinary shares, with the exception of the voting right», the legislator wanted to say that NVPS only grant their shareholders the patrimonial rights mentioned in Art. 341.º, nº 1–4. According to this interpretation, these shares would not grant (unless otherwise set out in the bylaws – the author admits this possibility) some patrimonial rights granted, in general, to the other shares – such as the pre-emption right and the right to receive the company's surplus after the winding-up process. We have a completely different view. It is our opinion that the legislator did not want to abolish the existence, by default, of said rights. The used wording was, we agree, very inaccurate, but legal interpretation must pay attention to other important aspects. Moreover, and to mention just one of the consequences of said interpretation, the legislator certainly did not want to abolish the pre-emption right. First of all, because the pre-emption right is not a *patrimonial right*. It has instead a patrimonial and a non-patrimonial component (the later aiming to preserve the *political power* of the shareholder). Lastly, because said change would clearly violate the *infra* mentioned Directive of 2017. In addition, it is also noteworthy that in 2015 the legislator made clear that the NVPS that are not exclusively subscribed by qualified investors and are not unlisted may not foresee that the preferred dividend is also a *maximum dividend*. That being the case, what would be the logic of excluding these shareholders from the winding-up surplus?

¹¹ We say clarify because, in our opinion, this was not an innovation.

¹² Half of the share capital.

¹³ As an example, please refer to Art. 499.º of the Spanish *Ley de Sociedades de Capital*. In Italy, the coordination between the *azioni di risparmio* (issued by listed companies) and the non-voting shares foreseen in the civil code also give rise to some difficulties, as – it seems – the framework of the *azioni di risparmio* requires these shares to grant some privileges, while the civil code does not have such a requirement. For further developments, please refer to Gianni Mignone, *Le Azioni di Risparmio nel Nuovo Diritto Societario* 122 ss (2013), <https://iris.unito.it/retrieve/handle/2318/139944/22544/MIGNONE%20G.%2C%20Le%20azioni%20di%20risparmio%20nel%20nuovo%20diritto%20societario%2C%20versione%20dell%27autore.pdf>.

of shareholders (therefore imposing rigid rights and safeguards), ignoring that, most of the times, shareholders and companies are better positioned to take care of their own interests.

Having this in mind, let us proceed.

5. THE PRE-EMPTION RIGHT IN FUTURE SHARE CAPITAL INCREASES

The first noteworthy problem linked to the Portuguese legal framework of NVPS is the legal framework of the pre-emption right in future share capital increases.

As it happens within the twenty-seven European Union Member States, the pre-emption right is, at a great level, shaped by the former Second European Directive on Company Law, whose content can now be found in the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (Directive of 2017). As per Article 72.^o of said Directive, «1. Whenever the capital is increased by consideration in cash, the shares shall be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares». Moreover, it can also be read in this article that «The right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. This may, however, be done by decision of the general meeting». The problem that may arise when one links this framework with NVPS is crystal clear: If the purpose of this type of shares is to allow the company to gather additional funds from shareholders without changing the *control of the company*, should one have to grant a pre-emptive right to non-voting shareholders when the company needs to increase its share capital by issuing new common stock, the *status quo* may be affected.¹⁴

The first solution – and the more logical one, in our opinion – would be to exclude, in the bylaws, such a right when it comes to NVPS. This option seems, however, to be excluded by the Directive, as all restrictions to this right must be decided on a case-to-case basis.

Having (probably) this in mind, and despite not allowing this previous solution, the Directive did not ignore the need to *segment* the pre-emption right. In fact, in the same article of the Directive it can be read that:

« 2. The laws of a Member State:

- (a) need not apply paragraph 1 to shares which carry a limited right to participate in distributions within the meaning of Article 56 and/or in the company's assets in the event of liquidation; or
- (b) may permit, where the subscribed capital of a company having several classes of shares carrying different rights with regard to

voting, or participation in distributions within the meaning of Article 56 or in assets in the event of liquidation, is increased by issuing new shares in only one of these classes, the right of pre-emption of shareholders of the other classes to be exercised only after the exercise of this right by the shareholders of the class in which the new shares are being issued.

The second hypothesis clearly admitted by the European Directive allows a pre-emption right based on the class of shares held by the shareholders. Let us now see the Portuguese framework.

Article 302.^o, n. ^o 2 of the PCCC states that: «The shares granting the same rights form a class of shares».¹⁵ Therefore, if, in a company, there are NVPS (with the very same rights among them) and common shares, there are, in this company, two classes of shares. As we understand the part «carrying different rights» mentioned in the Directive as meaning *different from each other* – not different from the common shares – this means that common shares and NVPS are two different classes of shares for this purpose and the Member States may, therefore, foresee a pre-emption right framework based on the class of shares.

The Portuguese legislator (tried) to foresee such a framework. In fact, Article 458.^o, n. ^o 1 of the PCCC states that: «In the event of a share capital increase through additional cash contributions, the shareholders at the time when said share capital increase was decided may subscribe the new shares with preference (...)».¹⁶ This being said, however, the number 4 of this article states that «If a company has several classes of shares, all the shareholders have the same pre-emptive right in the subscription of new shares (common or not), but if the new shares to be issued are equal to any existing special class¹⁷ of shares, the holders of shares belonging to that class shall have a first degree pre-emptive right, having the other shareholders a second-degree pre-emptive right in the remaining shares».¹⁸

What clearly arises from this wording is that the Portuguese legislator foresaw a class-based pre-emption right **only when** the new shares to be issued belong to a previous **non-common class** of shares. As a consequence, should the company need to issue new common shares, the previous NVPS will have a pre-emptive right in the very same conditions as the common shares. As explained, this result is at odds with the rationality behind this type of shares.

5.1. Solutions Suggested by the Scholars

This problem is not new. In fact, Portuguese scholars have, long time ago, identified this problematic situation, which they have tried to solve in different ways. Before entering in such an analysis, it is however noteworthy that the Portuguese legislation did not seem to

14 One can reply that that the General Meeting has the power to suppress said pre-emption right. However, (1) it requires a qualified majority; (2) we find difficult to accept the suppression of the pre-emption right affecting only the non-voting shareholders when the law grants this right to every shareholder, regardless of their type of shares.

15 Loose translation, *supra* n. 4.

16 *Ibid.*

17 With *special class* we mean non-common shares.

18 Loose translation, *supra* n. 4.

give any relevance to such a problem when, in 2015, the legal framework of NVPS was amended.

The solutions suggested by the Portuguese doctrine may, in our opinion, be divided in two groups. The first type of solutions may also solve the problem should the company decide to issue (only) more common shares. The second group provide a solution only if the company issues, simultaneously, common and NVPS. Let us start by the first group.

Osório de Castro¹⁹ has suggested the following interpretation: Should a company have outstanding NVPS, the common shares would also form a *special* class of shares. In fact, if the shares granting special rights form a special class of shares, the common shares in such a company should also have the same treatment. Why? Because they grant their holders a special right – the right to have a voting power that is higher than the proportion of share capital represented by them – e.g., if a company has 50% of common shares and 50% of NVPS, a voting share gives its holder a voting power that is twice the percentage of capital represented by such share. Should one consider that, for this purpose, common shares also form a special class of shares, the problem would cease to exist. In fact, and under said interpretation, should a company issue new common shares, the previous common shareholders – and only them – would have a first-degree pre-emptive right.

This solution is, in our opinion, *contra legem*. Let us see why:

The common shares form a class of shares. That is a direct consequence of Article 302.º, n.º 2 that we have already mentioned.

The common shares do not form, however, a **special class of shares**. In fact, the special classes of shares are formed by the shares that grant rights different **than the ones set forth, by the law, to common stock**. It is not the case here. In fact, the Portuguese legislator, when addressing the *meetings of shareholders holding a special class of shares* has clearly stated that «There are no *special meetings* of common stockholders»²⁰ and the reason to do so is crystal clear: Common shares do not form a special class of shares. As this solution is based on the fact that common stock should be treated, for this purpose, as a special class of shares, we cannot, therefore, support it.

The second group of suggestions is based on an interpretation of the legal provision under analysis according to which if the company issues, simultaneously, common and non-voting shares, the pre-emption right should be granted separately to the holders of both types of shares. The grounds to make such a suggestion vary from author to author.²¹

This solution does not have our support. In fact, it does not solve the problem of these companies. According to this solution, and in order to avoid a change of the *controlling powers*, the company would need to issue, in the same proportion as before, NVPS and common stock, what would not be a problem if the Portuguese law did not require each and every NVPS to grant the right to a preferred dividend. By adopting this solution, we would be demanding that a company, when in need to increase its share capital, also increases the preferred dividends²² to be paid in order to avoid changing the *controlling powers*. This is not an acceptable solution.

5.2. Our Suggestion

It is our opinion that – when using this possibility given by the European Directive, the Portuguese legislator was not accurate in the wording used to do so. As explained, this problem arises from fact that the Portuguese wording requires the new shares to be issued to belong to an already existent *special class of shares*, instead of simply requiring them to belong to an already existent class of shares. Therefore, we think that the Portuguese wording should be interpreted bearing in mind the inspiration source of said framework (the European Directive), having the reader the need to correct, through interpretation, the wording chosen by the Portuguese legislator. By doing so, and by claiming that a first-degree pre-emptive right based on the class of shares should be granted, the problem may be attenuated.

6. THE MANDATORY ATTRIBUTION OF THE VOTING RIGHT

As explained, the mandatory attribution of the voting right after a certain period of non-payment of the preferred dividend is foreseen in the PCCC.²³ In a superficial analysis, this may seem a fair solution. In fact, if the law foresees that a mandatory preferred dividend is to be paid to these shareholders,²⁴ it makes sense that, after a certain period of non-payment, these shareholders must get back their voting right. The fact is, however, that this remedy may end up causing serious harm to the shareholders it supposedly aims to protect. Let us see why:

Let us take, as an example, a listed company with 10,000,000 outstanding ordinary shares and 10,000,000 outstanding NVPS.

One shareholder holds 4,000,000 ordinary shares and 6,500,000 NVPS.

19 Carlos Osório De Castro, «Ações Preferenciais sem Voto», in *Problemas do Direito das Sociedades* 297–300 (Aa. Vv. ed., IDET, Almedina, Coimbra 2008).

20 Article 389.º, n.º 3. Loose translation, *supra* n. 4.

21 Peres, *supra* n. 3, at 391 ss; Elda Marques, «Comentário ao Artigo 341.º», in *Código das Sociedades Comerciais em Comentário* vol. V, 631 (Aa. Vv. & Jorge M. Coutinho de Abreu (Org.), Almedina, Coimbra 2012).

22 What is even worse if one considers, as it seems to us, that this preferred dividend should, under IAS 32, be treated as a liability. Please note that, according to the Portuguese framework, if there are enough distributable profits to pay the preferred dividend, such payment is mandatory, meaning that the company/shareholders cannot decide not to do so.

23 This is not a Portuguese innovation. Please refer to Arts 99.º of *Ley de Sociedades de Capital* and 140.º of the German AktG.

24 Should the company have distributable profits.

Under the Portuguese Securities Code,²⁵ a shareholder that holds more than a third or a half of the voting rights in a (listed) company is required by law to start a public offer in order to acquire the remaining shares. The difference between these two thresholds (one third or a half) is that the shareholder with more than a third but less than a half of the voting rights may prove that it does not control the company. Let us suppose that this was what happened in our example.

If the company ceases to pay the preferred dividend during a certain amount of time, this shareholder will have 10,500,000 of the 20,000,000 votes, therefore having more than half of the voting rights, what forces the start of a public offer, unless, under certain conditions, the shareholder undertakes to sell the shares that are above this threshold.

It seems obvious to us that this is not the intention of the remedy granted by the law. In fact, it seems illogical that such a remedy may end up harming the shareholder, and that is why we think that this remedy should be seen as a possibility granted to these shareholders but that can be waived by them.²⁶

7. THE LIMITATION OF THE SPECIAL RIGHTS GRANTED BY THE NVPS

Another topic that must be addressed is the possibility (and the process) of limiting the preferred rights granted by these shares (a priority in the dividend and in the reimbursement).

Article 24.º of the PCCC states that: «4. The special rights may not be suppressed or limited without the consent of the beneficiaries unless the law or the bylaws state otherwise. 5. In public and private companies organized by shares, said consent should be given by a resolution approved in a special meeting of the holders of such shares».²⁷

This framework, apparently simple, may cause several problems. Let us address some of them.

Menezes Cordeiro²⁸ has suggested the adoption of a distinction – based on the German doctrine – between direct and indirect limitations to the special rights. The direct limitations would (in simplistic terms) be the ones that intend to limit such rights, the indirect ones would be the ones that have any other purpose or intention, resulting such a limitation as a consequence.

We do not support such a distinction. It is our opinion that any resolution as per which the access to the preferred dividend or reimbursement is limited or suppressed must gather the approval of the holders of these shares.

A very good example of a resolution that may have other purpose but that limits the special rights of the NVPS is the reduction of share capital as a consequence of losses.

Let us see why.

7.1. The Reduction of Share Capital Due to Losses

One of the critical situations in which a conflict between the company's best interests and the NVPS' preferred rights may arise is the share capital reduction due to losses.

As the Portuguese legal framework did not set forth a special right to be protected in such an event,²⁹ the doubt emerges.

First of all, it must be said that this issue only exists when such reduction is carried out through the reduction of the nominal value of the shares³⁰ or, if by an extinction of shares, if it is not limited to ordinary shares. Let us assume that the reduction will be performed through the reduction of the nominal value of the shares.

As we have seen, the minimum amount of the preferred dividend is a percentage of the nominal value of each share. Moreover, and as far as we know, it is normally set out in the bylaws in the same way (a percentage of the nominal value). The preferred reimbursement, as seen, follows the same criterion (the nominal value). This being said, it seems clear to us that if the nominal value of the shares decreases, the amount of the preferred rights will also be reduced, what, in our opinion,³¹ is a limitation of the preferred rights, therefore requiring the consent of the shareholders. It is our opinion, therefore, that such an operation should be consented by the holders of NVPS, unless:

- (1) the amount of the privileges is redefined accordingly – for example, if the nominal value of the shares is reduced to its half, the bylaws may be amended to foresee that the preferred dividend and reimbursement should be increased in 100%.
- (2) The amount of the reduction surpasses the losses so that the company may, with the differential amount, issue new NVPS to put NVPS' holders in the same position as before.

Despite the fact that the Portuguese legislator did not foresee a privilege to operate in such an event, it is our opinion that said intention can be deducted from the priority in reimbursement. In fact, the *rationale* behind said mandatory privilege is, without any doubt, to reduce the *risk* these shareholders face – if they have a priority in the reimbursement, it means that their risk of bearing losses is lower. If one considers the share capital reduction – even

25 Article 187.º.

26 The other option, that we also find admissible, is to foresee, in the company's bylaws, a clause stating that «should the NVPS start to grant voting rights, a vote ceiling should exist, under which (...)». This possibility, however, is also, in our opinion, an argument to support that this remedy should not be given if that is against the shareholder's will.

27 Loose translation, *supra* n. 4.

28 António Menezes Cordeiro, «Acções Preferenciais sem Voto», in *Revista da Ordem dos Advogados*, Ano 60, vol. III, 1051 (dezembro 2000).

29 For the Spanish *Privilegio en caso de reducción de capital por pérdidas*, please see Art. 100.º of *Ley de Sociedades de Capital*.

30 That, under the Portuguese Law, must be the same in every single share, regardless of their class.

31 As we do not agree with the distinction between direct/indirect limitations, as explained.

due to losses – as a sort of *partial liquidation* of the company,³² it becomes logical to protect the NVPS in such an event. Should we not follow this interpretation, let us see how the risk could easily be shifted:

Company A has 1,000,000 outstanding shares (500,000 NVPS, 500,000 common stock), with a nominal value of 1 EUR. Let us assume that, after paying all the debts, the amount to be reimbursed to the shareholders is 500,000 EUR. Should this happen in a winding-up process and, due to the priority, the NVPS' would bear no loss – they will be paid (the) 500,000 EUR.

But let us now assume that before the winding-up process the company reduces, due to losses, its share capital to 500,000 EUR, reducing the nominal value of each share to its half. If, afterwards, the liquidation takes place, the NVPS' holders will receive the full amount of the (new) nominal value of their shares (250,000 EUR) and the rest must be given to the other shareholders.

Based on the *rationale* behind the priority in the reimbursement, we therefore think that the limitation of the NVPS' privileges as a consequence of a share capital reduction must be consented by the shareholders.³³

8. THE PARTICIPATION OF NVPS' HOLDERS IN THE COMPANY'S RESERVES AND THE SHARE CAPITAL INCREASE USING RESERVES

The articulation between the NVPS legal framework and the company's reserves may give rise to some important issues. Let us analyse two of them.

As we have explained, the preferred dividend it is not (necessarily) an additional dividend, what means that, should the company have enough distributable profits, the shareholders should all receive the same amount of dividend. However, it may happen that – after the payment of the preferred dividend, the other shareholders decide not to pay any further dividends in order to keep the money in the company. If this is case, one must be cautious when it comes to the distribution of said reserves. In fact, if the preferred dividend was paid, the non-voting shareholders have not contributed (or have contributed to a smaller amount) to said reserves. Should these reserves be allocated to the shareholders based on the percentage of share capital held, this would make the preferred dividend (at least in part) an additional dividend.³⁴ The foreseeable effect of such a framework is to lead the common stock

shareholders to pay themselves a dividend at least in the same amount in order to avoid *losing money*. This is, we think, a perverse incentive that may avoid the necessary capitalization of the company.

Having this in mind, and despite having never seen any reference to this topic in the Portuguese legal doctrine, it is our opinion that the company's bylaws may foresee that the distribution of the reserves is to be made based on the contribution of each class of shares to said reserve, i.e., if the NVPS have been paid dividends and the common stock did not, said difference should be relevant when calculating the contribution of each class of shares to the reserves.

The other problematic issue we found was the articulation between the NVPS framework and the share capital increase using the company's reserves.

Under the Portuguese Law,³⁵ this share capital increase may occur through two different processes. The first one is through the increase of the nominal value of the shares (that must be the same in every share), the second one is by issuing new shares.

Should the increase of the nominal value take place, it is our opinion that – as the nominal value of the NVPS increases – the privileges of these shares will also increase (therefore forcing the company to pay a higher preferred dividend). Should new NVPS be issued, the amount of the privileges will also increase, as new NVPS are now outstanding.

It was suggested, by the Portuguese legal doctrine,³⁶ that in such an event, the special rights of the NVPS should be automatically adapted to the new nominal value, therefore remaining, in the end, unchanged – for example, if the nominal value of the shares increases 100%, the percentage of the preferred dividend should be adapted to its half. We do not agree with such a view as: (1) this adaptation has not legal support; (2) this adaptation may lead us to violate the minimum privileges imposed by law. In fact, if the preferred dividend is already set at 1% of the nominal value, if said nominal value doubles after the share capital increase, the preferred dividend could not be set at 0.5%.

As we reject said options, we suggest, instead, two possible solutions to avoid the increase of the preferred dividend.

The first one is to accept the possibility of issuing new common shares to give to the holders of NVPS.³⁷ This proposal does not violate any PCCC provision and is, therefore, a possibility. As,

32 Rui Pinto Duarte, «A Redução de Capital Social «para libertação de excesso»», in *Direito das Sociedades em Revista*, Ano 6, vol. 12, 120–121 (Almedina, Coimbra 2014) uses this expression, but referring to a share capital decrease due to excessive capital.

33 The same should happen, in our opinion, in the event of a share capital reduction due to an excess of capital. In fact, even if the amount of said reduction is distributed to the shareholders (what neutralizes the impact on the preferred reimbursement), the fact is that the preferred dividend decreases and i.e., in our opinion, enough to require the consent of the affected shareholders.

34 Let us imagine a company in which 50% of the shares are NVPS and the other 50% are ordinary shares. The annual profit was 1,000,000 EUR and the preferred dividend was in the amount of 200,000 EUR. The voting shareholders decided to keep the remaining 800,000 EUR in the company. If this reserve is later distributed to the shareholders based on the percentage of share capital they hold, the NVPS will receive 400,000 EUR and the common stock 400,000 EUR. Overall, the non-voting shareholders will receive 600,000 EUR and the common shareholders 400,000 EUR.

35 Article 92.º, n.º 4 of the PCCC.

36 Castro, *supra* n. 19, at 295. Having, apparently, the same opinion, João Ferreira Rebelo, «As Acções Preferenciais sem Voto no Ordenamento Jurídico Português», in *Direito das Sociedades em Revista*, Ano 3, vol. 6, 246 ss. (Outubro, Almedina, Coimbra 2011).

37 This solution is only possible when the share capital is increased by issuing new shares.

however, this would lead to the attribution of voting rights (whose avoidance is exactly the key point of NVPS), it does not seem satisfactory.

The second is to allow the company's bylaws to foresee that, should a share capital increase of this type occur, the NVPS may be excluded from such an increase, being, instead, paid in cash.

9. THE NVPS AND THE NO-PAR VALUE SHARES ('SWNV')³⁸

The last topic we intend to analyse is the articulation between these two types of shares (that may, and that is when the questions and doubts arise) coexist.

First of all, we shall explain the Portuguese legal framework of the SWNV.

9.1. The SWNV in Portugal

Before the Decree-Law n.º 49/2010, from the 19th of May, the rule, in the Portuguese legal system, was that the shares issued by the Portuguese public and private companies organized by shares should have a nominal (par) value (which, as said, should be the same for each and every share, regardless of their class or issuance date).

However, as Paulo Olavo Cunha³⁹ explains, by then – and in the context of the severe financial crisis that affected Portugal (and, broadly, the world), some of the Portuguese listed companies have faced a difficult situation: Whilst not having losses on their balance sheets, the market value of their shares was lower than the nominal value of said shares. This situation, in a rigid nominal value system, had a clear consequence: Should any of these companies want to increase their share capital by issuing new shares to *new coming shareholders*, a serious difficulty would arise: As the par value system does not allow shares to be issued for a consideration that is below their par, the prospective shareholders would not be available to subscribe these shares by a price that was higher than the price in the stock market (they would be, in fact, paying more for the very same thing).

The situation was not, it must be said, insuperable. In fact, the company could reduce its share capital (without performing any distribution to shareholders) – and, therefore, the nominal value of

the shares – and, by doing so, new shares could be issued for a lower price. However, and as it happens in other EU Member States, the share capital reductions are surrounded by extra safeguards and requisites that aim to protect the company's creditors. The nominal value system would, therefore, make this a long and expensive process.

The Portuguese legislator, to bring some flexibility to these companies, decided to allow no-par value shares, without, however, abolishing the existence of share capital – mandatory as per the Directive of 2017.

As a consequence, and since 2010, the Portuguese public and private companies organized by shares may freely choose to have par value or no-par value shares (they may not, however, coexist in the same company).

In order to put such a framework in practice, the legislator has used two different new concepts: Valor de emissão⁴⁰ (VE) and valor contabilístico⁴¹ (VC). Despite some inconsistencies in the abovementioned Decree-Law, the first concept is relevant for financial purposes, the second one for internal organization purposes.

As mentioned, and under the Directive of 2017, shares cannot be issued for a *price* lower than their par value. When it comes to SWNV, said par value is replaced by VE. This value must be the same for every share issued in each issuance but may vary from one issuance to another. In fact, while VE may vary according to each issuance, VC is always the same for every share. VE can be obtained as follows: increase in the share capital in an issuance divided by the number of shares issued in said issuance. VC, on the other hand, is obtained by dividing the share capital by the number of outstanding shares (therefore being the same for each and every share, regardless of its issuance).⁴²

In 2010, the legislator, to adapt the PCCC to the SWNV, has amended the framework of NVPS. The changes were, overall, the following:

The minimum preferred dividend (1%) is calculated using VE;
The amount of the reimbursement with priority is equal to VE.

These amendments gave rise to additional questions and concerns, which we intend to address.

38 The most commonly used concept is No-par value shares. However, as the abbreviation NPVS would be extremely similar to NVPS that we have been using, we have decided, for clarity purposes, to use SWNV that stands for shares without nominal value. For further developments regarding SWNV, please refer to Paulo De Tarso Domingues, *O Financiamento Societário pelos Sócios* (Almedina, Coimbra 2021); Maria Miguel Carvalho & Paulo de Tarso Domingues (Org), *Capital Social Livre e Acções sem Valor Nominal* (Almedina, Coimbra 2011) and Paulo de Tarso Domingues, *No Par Value Shares in the Portuguese Legal System*, 13 Eur. Bus. Org. L. Rev. (2012), <https://doi.org/10.1017/S1566752912000067>.

39 Paulo Olavo Cunha, «Aspectos Críticos da Aplicação do Regime das Acções sem Valor Nominal», in *Capital Social Livre e Acções sem Valor Nominal* 141 (Maria Miguel Carvalho & Paulo De Tarso Domingues (Org), Almedina, Coimbra 2011).

40 In a literal translation: Issue value.

41 In a literal translation: Accountable value.

42 It is not clear to us that this framework does not violate Art. 47.º of the Directive of 2017: «Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par». In fact, it will depend on if this 'accountable par' should be considered as the accountable par of a specific issuance of shares – in which case the Portuguese framework is admissible – or as the accountable par for all the shares – in which case the Portuguese framework clearly violates this provision, as the PCCC clearly allows the existence of different (higher or lower) VE's. According to the European Model Companies Act – General Comments to Ch. 5, at 79, however, it seems that the first interpretation should be the right one.

9.2. The Priority in the Reimbursement

As per Article 341.º, n.º 2 of the PCCC the reimbursement with priority, in these shares, is based on the VE of said shares. This is not a wise solution.

In fact, Article 156.º, n.º 2 foresees the framework applicable to the reimbursement of shares, after the winding-up of a company. It states that: «The remaining assets are used, firstly, to reimburse the (effectively performed) contributions of the shareholders; said amount is the portion of capital allotted to each shareholder».⁴³ It becomes obvious that said article should have been amended (but it was not) in 2010, in order to be adapted to the existence of SWNV. As a consequence, the question arises: should the shareholders be reimbursed based on the VE (the (effectively performed) contributions of the shareholders) or the VC (portion of capital allotted to each shareholder)? It is our opinion that the second is the correct option. In fact, the whole idea behind the SWNV is to allow the company to issue shares for a different price in order to have some flexibility to adapt to different *market values*. The goal was, in fact, to allow the company to issue shares granting the very same rights for different prices. Should the shares grant different rights, their price would be different, and the purpose of this framework would not be achieved.⁴⁴ Having this in mind, it is clear that the reimbursement of said shares should be based on the VC⁴⁵ – meaning that each share should be given the same amount of reimbursement. This means, in our opinion, that the preferred reimbursement should be calculated using the same criterion – VC and not VE. In fact, in a nominal value system, the criterion for the preferred reimbursement follows the nominal value – that is also the same for every share –, as it should. This very unfortunate choice of the legislator forces us to consider that any issuance of NVPS granting the same special rights but with different VE must give rise to a different class of shares. In our opinion, it is a system that does not make sense. One can say that this option has the advantage of bringing foreseeability to the NVPS holders, as they are able to know, from the beginning, the amount of their privilege, but this would be a simplistic analysis. In fact, we think that should the amount of the VC decrease as a consequence of another issuance of shares with a lower VE, this matter should be addressed as a limitation to the special rights of the NVPS, with the proper safeguards granted by the law. On the other hand, should the VC of the

NVPS increase – what should cause an increase in the amount of reimbursement – the reimbursement with priority should also be increased.

9.3. The Maximum Amount of NVPS

The last noteworthy aspect regards the abovementioned Article 341.º that foresees that each company may only issue NVPS up to the amount of half its share capital.⁴⁶ The law does not state, however, which is the relevant concept when it comes to ascertain said limit in the SWNV. Should it be the VE or the VC? It is our opinion that relevance should be given to VC, instead of VE. In fact, the Portuguese doctrine⁴⁷ points out that the reason that justifies said limit is the purpose of ensuring that the *risk* the shareholders face is not totally at odds with their voting power (i.e., a shareholder that invests 1% of the share capital amount cannot have 100% of the voting rights). If that is the case, it is our opinion that the *risk* incurred by the shareholders must be ascertained based on their treatment in a winding-up scenario. In such a situation – as we have seen – the reimbursement is based on the VC, not on the VE. Therefore, it is our opinion that, based on the argument traditional used by the doctrine,⁴⁸ said limit must be calculated using VC.

10. CONCLUSION

As we have mentioned, the NVPS have rarely been used, since their adoption by the Portuguese law. There are several reasons to justify such an absence of use – some of them totally unrelated with its legal framework for corporate law purposes (for example, the negative discrimination of preferred dividends when compared to interests).

It is our opinion, however, that the most important factor is its poor legal framework (from a corporate law perspective), derived from the fact that the legislator has not devoted the necessary attention to such financial instrument.

Our main purpose is not, however, to criticize the Portuguese legislator. In fact, and as mentioned, we intend to provide a general overview of the Portuguese legal framework of NVPS and, in addition, to highlight some of the most difficult issues and problems attached to said framework, in order to contribute to comparative assessments of this type of shares.

⁴³ Loose translation, *supra* n. 4.

⁴⁴ Suppose that Company A has a share capital of 1,000,000 EUR and 1,000,000 outstanding shares. The VE and VC of said shares is, in this moment, 1 EUR. If the market value of said shares is 0.5 EUR per share, the whole idea of SWNV is to allow the company to issue shares for a price of 0.5 EUR. This logic, however, assumes that the rights granted by these new shares are the same as the ones granted by the older shares. Should that not be the case, the system would not work. Moreover, should that not be the case, each and every issuance of shares should give rise to a different class of shares, as their rights upon liquidation would not be the same.

⁴⁵ As it happens, e.g., with the participation in the profits.

⁴⁶ Meaning that if a company has voting shares with 1 EUR of nominal value and a share capital of 1,000,000 EUR, it can issue up to 1,000,000 EUR of NVPS, therefore having a share capital of 2,000,000 EUR, half of which in NVPS.

⁴⁷ Jorge Manuel Coutinho de Abreu, *Curso de Direito Comercial* vol. II, 216 (Almedina, Coimbra 2015); Marques, *supra* n. 10, at 714.

⁴⁸ That, however, does not deserve our acceptance. It is our opinion that such a limit should be abolished.

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