CSDDD as the Culmination of CSR Tensions:

Reassessing Article 64 of

the Portuguese Commercial Companies Code

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Não sou nada.
Nunca serei nada.
Não posso querer ser nada.
À parte isso, tenho em mim todos os sonhos do mundo.
(…)

Tabacaria, de Fernando Pessoa

ABSTRACT

The problem the present Dissertation focuses on is: “Is the wording of Article 64 of the Portuguese Companies Commercial Code still up to date in light of the CSDDD, as the culmination of CSR tensions?”. To this end, through dogmatic-legal research, we have seen how Corporate Social Responsibility (CSR) summons ideological tensions, both from an economic and law point of view, but with a tangible legislative growth that has brought the figure of the stakeholder into the legal debate. Taking the CSDDD as the culmination of these tensions, we conclude that the Portuguese duty of Loyalty would benefit from a reform adjusted to the reality of large companies that have been experiencing the emergence of this hybrid CSR paradigm.

RESUMO

A presente Dissertação procura focar-se na questão jurídica: “Estará a letra da lei do Artigo 64º do Código das Sociedades Comerciais Português ainda atualizada à luz da CSDDD, como culminar das tensões da RSE?”. Para o efeito, através de investigação dogmático-jurídica, verificámos como a Responsabilidade Social das Empresas (RSE) suscita tensões ideológicas, tanto do ponto de vista económico como jurídico, mas com um crescimento legislativo tangível que trouxe a figura da parte interessada para o debate jurídico. Tomando a CSDDD como o culminar dessas tensões, concluímos que o dever de lealdade português beneficiaria de uma reforma ajustada à realidade das grandes empresas que têm vivido o surgimento deste paradigma híbrido de RSE.

KEYWORDS: *corporate social responsibility (CSR); shareholder; stakeholder; directors; due diligence; duty of care; duty of loyalty; liability*

LIST OF ABBREVIATIONS

BJR	Business Judgement Rule
CMVM	Comissão do Mercado de Valores Mobiliários
COP21	21st Conference of the Parties
CSDDD	Corporate Sustainability Due Diligence Directive
CSR	Corporate Social Responsibility
CSRD	Corporate Sustainability Reporting Directive
EC	European Commission
ECB	European Central Bank
EESC	European Economic and Social Committee
EU	European Union
ILO	International Labour Organization
LkSG	Lieferkettensorfgfaltspflichtengesetz
NGO	Non-Governmental Organization
NYSE	New York Stock Exchange
OECD	Organization for Economic Co-operation and Development
PCCC	Portuguese Commercial Companies Code
PRI	Principles for Responsible Investment
RSB	Regulatory Scrutiny Board
SDGs	Sustainable Development Goals
TFEU	Treaty on the Functioning of the EU
UN	United Nations
UNGP	United Nations Guiding Principles

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1. Introduction

CSR is a subject that came to us, in theory, in the 19th century, almost as a heightened awareness following the labour movement in post-industrial society. With the consolidation of workers' participation in companies and their dignified status beyond that of mere “labour,” we are seeing the growth of a new figure: the stakeholder.

The uncompromising nature of the company in pursuing profit is due to this legal entity's economic understanding of the primacy of shareholders, i.e., the owners of the company to whom its directors are accountable for management decisions. It was therefore to be expected that the emergence of a doctrine calling for corporate responsibility towards society in a way that directly affects its nature - were it not for the substantial increase in compliance and operational adjustment costs - would create strong divisions.

Nevertheless, the concept of CSR has evolved from a purely theoretical concept to a legislative one, with particular emphasis in the EU. Although for many years it was only soft law, today we already have hard law working on the impact of business activity on the environment and human rights. The most recent is the CSDDD: even though it is binding law, its interpretation presupposes the systematic and teleological understanding that only soft law on CSR issued in recent decades allows, reinforcing the idea that CSR is now a hybrid concept.

The relevance of CSDDD is not limited to updating the concept of CSR, but rather because it is the culmination of tensions between shareholder primacy and stakeholder theory. While the EU embraces this new management philosophy to transition from a linear economy to a circular economy, directors continue to comply with the corporate law governing the company and regulating their fiduciary duties. But if the management autonomy granted to a director by the shareholder is based on trust, where is the current understanding of what it means to honour that trust when conflicting obligations arise?

As such, the legal issue addressed in this dissertation is: “Is the wording of Article 64 of the PCCC still up to date in light of the CSDDD as the culmination of CSR tensions?”. The objectives of this dissertation are to understand the implications of the evolution of

CSR doctrine, analyse the materiality of CSDDD as the culmination of CSR tensions in light of the obligations and responsibilities it imposes on the directors of the companies concerned, and analyse the tradition of Article 64 (and, by extension, Article 72 of the PCCC) to see whether it will withstand the force of these new winds.

To this end, the chosen methodology involves dogmatic-legal research, with sources varying according to the topic. For CSR, doctrinal works on the subject and EU soft law and hard law were analysed. For the CSDDD, even though the main source was the Directive itself, it is also worth mentioning EC's reports and official communications, opinions from European institutional bodies, and the national laws of the two largest European economic powers on the subject, for background and brief comparison purposes. Finally, the analysis of Article 64 and Article 72 is based on Portuguese doctrine, mainly in the areas of civil law and corporate law, in addition to official documentation from the CMVM. There are also references in case law to cases that have changed the paradigm internationally, but it is recognized in advance that there is not many relevant corporate litigation that is both in the public domain and of significant size in the Portuguese context.

2. Corporate Social Responsibility

a. The Economic Ideologies underlying Shareholder Primacy and Stakeholder Theory

"*It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest*.[1]"

Management decisions and its regulation exist in a symbiotic relationship fuelled by society's understanding of what the social interest is. According to an approach more

[1] SMITH, Adam (1904): "An Inquiry into the Nature and Causes of the Wealth of Nations", London, Methuen, Vol. 1.

geared towards shareholder primacy or stakeholder theory, the understanding of what CSR is and should be is defined - whether a purely voluntary role or a range of obligations for which companies must be held accountable in the event of non-compliance - and, depending on which one dominates social consciousness and has more political power, it can be discovered the future legislative landscape.

The quote from Adam Smith is not innocent, as it is the doctrine of economic liberalism followed by Milton Friedman, defender of shareholder (or stockholder) primacy. The to-be Nobel Prize winner was only seven years old when the case law *Dodge v. Ford Motor Co.* was the affirmation of this same principle: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes[2]."

It is in very similar terms that Friedman argues that, as an executive is an employee of the company's owners, he or she has a responsibility to his or her employers to manage the business in accordance with their wishes, which generally requires "(…) to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom[3]." Archie B. Carroll, however, counterargues that they are not so far apart in agreeing on the essential nature of complying with CSR, since "Friedman's argument loses some of its punch, however, when you consider his assertion in its totality. (…) Most people focus on the first part of Friedman's quote, but not the second part. It seems clear from this statement that profits, conformity to the law, and ethical custom embrace three components of the CSR pyramid - economic, legal and ethical. That only leaves the philanthropic component for Friedman to reject.[4]".

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[2] *Dodge v. Ford Motor Co*., 204 Mich. 459 (1919), 507, available at Caselaw Access Project, Harvard Law School: https://case.law/caselaw/?reporter=mich&volume=204&case=0459-01#p507

[3] FRIEDMAN, Milton (1970): "The Social Responsibility of Business is to Increase its Profits", The New York Times Magazine, September 13, 1970. Copyright @ 1970 by The New York Times Company.

[4] CARROLL, Archie B. (1991), "The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders", in *Business Horizons*, July/August Edition, p. 43

Although Carroll represents the CSR doctrine that began with Howard Bowen in 1953, the underlying economic thinking had years of theoretical development, with authors such as John Stuart Mill shaping it: “If the produce is to be used or consumed in the form of bread, it (…) must suffice to remunerate all these labourers, and several others; ‘such as’ the carpenters and bricklayers (…); the hedgers and ditchers (…); the ‘miners and smelters’ who extracted or prepared the iron of which the plough and other ‘instruments’ were made[5].”

The tensions extend themselves to the reality of the competitive market: Friedman defends that the practical application of the CSR doctrine “(…) "involves the acceptance of the socialist view that political mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scarce resources to alternative uses[6]”. This inherent fragility reveals itself in numerous barriers, such as, when CSR is invoked to justify wage restraint, union leaders often oppose more to government interference in the market than business leaders themselves and CSR turns every private company’s director, unaware of how best to pursue the social good, to an unelected public official who is obliged to pursue it[7]. Howard Bowen agrees that there are vulnerabilities, among which the author highlights the problem of supporting the rising costs of the production, as there are three options: whether shareholders through a deduction from their profits, consumers through price increases, or workers through lower wages - a systemic challenge whose solution would require unrealistic joint action by the market, since even legal conduct is often circumvented by less ethical competitors[8].

Nevertheless, this market behaviour is not seen as something immutable: Bowen brings us a competitive market perspective compatible with CSR through the comparative metaphor between the “marginal farmer” and the “prosperous farmer”. While the first one has elementary concerns - such as paying debts and feeding his family -, which do not allow for social concerns related to his employees, the “prosperous farmer” has the ability

[5] STUART MIL, John (1848): “Principles of Political Economy with Some of Their Applications to Social Philosophy”, p. 32
[6] *Idem, ibidem*
[7] FRIEDMAN, Milton (1970): “The Social Responsibility of Business is to Increase its Profits”, The New York Times Magazine, September 13, 1970. Copyright @ 1970 by The New York Times Company.
[8] BOWEN, Bowen (1953): “Social Responsibilities of the Businessman” pg. 107-115

to do so. The option of complying with social obligations will result in higher costs in the short-term, but not to the extent that it leads to bankruptcy or loss of competitiveness; in the long-term, the high standards of treatment guaranteed by the "prosperous farmer" will affect the survival or costs of the "marginal farmer", as the most efficient workers will be attracted by better employment conditions and the least efficient - and also the most unhappy - will be the remnants of the labour force available on the market. The idea that a competitive industry only has to produce goods and services as its sole outcome is reinforced as unfounded, when business practice has already benefited greatly from improvements in the standard of treatment accepted by society - e.g., fewer working hours, better lighting, and cleaner bathrooms have improved efficiency and reduced labour costs[9].

Thus, the Stakeholder Theory emerges through the mind of Edward Freeman. Knowing that the concept has evolved and is now enshrined in the EU, we can recognize in advance that Friedman's perspective has not fully taken hold. Even so, it cannot be overlooked that, after celebrating the first two decades of his work, Freeman carried out an exercise in self-criticism. The author acknowledged that the writing approach expressed a tension between management thinking and academic thinking in an unproductive way, and that it underestimated elements - such as objectives, values, and ethics - in what he calls "business strategy". It must have been for this very reason that Freeman felt compelled to clarify numerous misconceptions about what the Stakeholder Theory is, more specifically denying the following myths: that "(1) Stakeholders are critics and other non-business entities; (2) There is a conflict between shareholders and other stakeholders; and (3) The concept of stakeholders can and should be used to form a new theory of the firm that is not that of shareholders[10]."

It remains for us to understand, now, where Friedman and Freeman fit into the practical life of European companies.

[9] BOWEN, Bowen (1953): "Social Responsibilities of the Businessman" pg. 107-115
[10] FREEMAN, Edward R. (2004): "The Stakeholder Approach Revisited", p. 231

b. The Symmetrical Growth of the Stakeholder Figure

Several authors have attempted to define CSR[11], with Alexander Dahlsrud standing out with his 2006 study in which he analysed 37 different definitions of CSR, without exhausting them[12]. In the work that earned him the title of "father of CSR", Howard Bowen set the social responsibilities of businessmen as the obligations to pursue policies, make decisions and follow lines of action that converge with the objectives and values of the society, designating "public responsibility", "social obligations" and "business morality"[13] as synonyms for the CSR doctrine.

Twenty years later, Keith Davis understood that the definition already included "(…) the firm's consideration of, and response to, issues beyond the narrow economic, technical, and legal requirements of the firm. It is the firm's obligation to evaluate in its decision-making process the effects of its decisions on the external social system in a manner that will accomplish social benefits along with the traditional economic gains which the firm seeks.[14]".

The stratification of CSR into four strands - economic, legal, ethical and philanthropic - was authored by Archie B. Carroll, leading to the construction of his widely cited CSR Pyramid[15]. The segmentation of a fundamentally qualitative concept, followed by the subsequent step of grading it - note that a survey asked 241 executives to rate the four components by degree of importance, which resulted in the economic aspect scoring 3.5, the legal aspect 2.54, the ethical aspect 2.22 and the philanthropic aspect 1.30[16] - allowed the doctrine to be consolidated. For instance, in the current times was understood that the achievement of the three dimensions of sustainability - economic,

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[11] E.g., Joseph McGuire, William Frederick, Clarence Walton

[12] See DAHLSRUD, A. (2006) "How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions.", John Wiley & Sons, Ltd. And ERP Environment

[13] BOWEN, Howard (1953): "Social Responsibilities of the Businessman"., p. 6

[14] DAVIS, Keith (1973), "The Case for and Against Business Assumption of Social Responsibilities", Academy of Management Journal, vol. 16, nº2, p. 312

[15] According to "Carroll's pyramid of CSR: taking another look", by Archie B. Carroll, p. 2 there are many theoretical references of the pyramid (Swanson, 1995; Wartick and Cochran, 1985; Wood 1991) and empirical research references (Aupperle, 1984; Aupperle et al., 1985; Burton and Hegarty, 1999; Clarkson, 1995; Smith et al., 2001).

[16] CARROLL, Archie B. (2016): "Carroll's pyramid of CSR: taking another look", International Journal of Corporate Social Responsibility.

social and environmental[17] - depends on the reorientation of capital flows while combatting *greenwashing* of financial products[18], which led to the creation of a single classification system for environmentally sustainable economic activities. This marked the first steps towards the creation of ESG metrification, with particular emphasis on Regulation (EU) 2019/2089, which amended Regulation (EU) 2016/1011 on EU benchmarks for climate transition to incorporate this new benchmark.

In *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, the EC defined CSR as "the responsibility of enterprises for their impacts on society", densified by the conviction that "(…) enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders (…)[19]". This is a more elaborated definition that the one given by the *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, even though the figure of the stakeholder was already present in 2001: "(…) not only fulfilling the applicable legal obligations, but also going beyond compliance and investing 'more' into human capital, the environment and relations with stakeholders[20]."

While a stakeholder can be defined as "an individual, group of persons or organisation that can affect or is affected by the decisions of another organisation[21]", their relationship with the organisation can be determined according to the power to influence, the existence of a legitimate relationship and an urgent claim on the organisation[22].

The European vision understood that "sustainable solutions require multi-stakeholder approaches, interventions at different levels and a long-term vision[23]", as

[17] Recital (2) of the Taxonomy Regulation
[18] Recital (11) of the Taxonomy Regulation
[19] "3. A modern understanding of corporate social responsibility. 3.1 A new definition", from *A renewed EU strategy 2011-14 for Corporate Social Responsibility*. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0681
[20] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52001DC0366
[21] Eurofound (2019), "Stakeholder", European Industrial Relations Dictionary, Dublin. https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/stakeholder
[22] Ibid and according to MITCHELL, Ronald; AGLE, Bradley, WOOD, Donna (1997): "Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts", *The Academy of Management Review*, No. 4, p. 854
[23] Paragraph 69 of the New European Consensus on Development, "Our World, Our Dignity, Our Future". https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42017Y0630(01)

corroborated in Regulation (EU) 2020/852 (Taxonomy Regulation), which foresees in its Article 20 that the calibration of criteria for different economic activities should be based on input from a multi-stakeholder Platform on Sustainable Finance[24]. These stakeholders are, in this specific case, financial and non-financial experts who are involved in relevant industries and business sectors, and people with expertise in reporting and accounting[25]. The constructive dialogue with stakeholders continued to be improved with Directive (EU) 2022/2464 (CSRD), in which this group is divided into two non-exhaustive categories: on the one hand, investors; on the other hand, civil society actors, such as non-governmental organisations and social partners[26]. Here, the figure of the stakeholder is inherent to sustainability reporting in demonstrating how their interests are being considered[27], but without any article expressly providing for their involvement.

The figure of the stakeholder, precisely because of its symmetrical growth with CSR, culminates in the CSDDD: it is expected "meaningful engagement" with them[28], as the identification, mitigation and prevention of adverse impacts can be leveraged through multi-stakeholder initiatives[29]. In this context, it means "(…) a combination of voluntary due diligence procedures, tools and mechanisms, developed and overseen by governments, industry associations, interested organisations, including civil society organisations, or groupings or combinations thereof, that companies may participate in in order to support the implementation of due diligence obligations[30]", with the specific list of parties that constitute the role of stakeholder envisaged in Article 3(1)(n) of the CSDDD.

To this end, it is understood that stakeholders should be consulted on a regular basis, provided with comprehensive and relevant information, allowing for a dialogue at an appropriate level[31]. And this is how Article 13 of the CSDDD came about: as a binding obligation for directors to engage with stakeholders at various stages of the due diligence

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24 Cf. Taxonomy Regulation, Recitals (2), (38) and (50) and Article 20
25 Article 20(1)(b) of the Taxonomy Regulation
26 Recital (9) of the CSRD
27 Article 19a and Article 29a of the CSRD
28 Recitals (31) and (38) of the CSDDD
29 Recital (52) of the CSDDD
30 Article 3(1)(j) of the CSDDD
31 Recital (65) of the CSDDD

process, with a duty to seek to resolve any barriers to stakeholder engagement and, when it is not possible to carry it out effectively, to consult experts.

c. The Evolution of CSR from a Voluntary Concept to a Hybrid One: Between Soft and Hard Law

The legislative role can be performed by establishing binding or non-binding obligations - known as hard law and soft law[32]. Although compliance with soft law is inevitably weakened by the absence of liability in the event of a breach, it plays an essential role in the EU in contexts where hard law is not effective: either when the EU does not have the competence to impose hard law measures or when Member States are unable to reach a consensus, soft law plays a persuasive role in introducing binding national policies and overcoming resistance to the adoption of policy proposals[33]. That is why Article 288 of the Treaty on the Functioning of the EU (TFEU) lists the various legislative instruments available to the EU, depending on their nature: regulations, directives and decisions are binding, as opposed to the effect of recommendations and opinions.[34]

But how can we define CSR in such a binary way, when the emergence of European hard law in the 21st century, regarding human rights and the environment, can only be consolidated and interpreted in light of all the soft law that has been developed since the 20th century? When bindingness appears in one form but complete materiality relies on another, is not it time to accept CSR as a hybrid concept?

The United Nations (UN), in pursuit of its objectives - which includes resolving international problems of an economic, social, cultural, or humanitarian nature[35] -, has

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[32] According to ECCHR, "Hard law refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court.", while "The term soft law is used to denote agreements, principles and declarations that are not legally binding. Soft law instruments are predominantly found in the international sphere.". https://www.ecchr.eu/en/glossary/hard-law-soft-law/

[33] Eurofound (2023). Soft law. European Industrial Relations Dictionary. https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/soft-law

[34] Article 288 of the Treaty of the Functioning of the EU (TFUE), JO C 202 from 7.6.2016, p. 89

[35] Article 1(3) of the Charter of the United Nations

sought, at the turn of the century, to establish guiding principles and objectives for the international community on behalf of the environment and human rights. In 2000, the *UN Global Compact* was launched by its Secretary-General Kofi Annan and sought to incorporate ten universal principles in the areas of human rights, labour, environment, and anti-corruption into business practice. Eleven years later, the *Guiding Principles on Business and Human Rights* (UNGPs) arrive as a materialization of the Universal Declaration of Human Rights in the business sector through three core principles, as Special Representative John Ruggie had anticipated in his 2008 *Protect, Respect and Remedy Framework* report.

In 2015, we have two key moments: the *Transforming our world: the 2030 Agenda for Sustainable Development* that sought to finish what the *Millennium Development Goals* had not achieved through the establishment of 17 *Sustainable Development Goals (SDGs)*, and the *Paris Agreement* that was adopted at the UN Climate Change Conference (COP21)[36]. The influence of the 2015 Paris Agreement on the European mission quickly expanded to the binding version of the same objectives through the European Climate Law and the creation of the concept of double materiality[37] for financial and non-financial reporting purposes, under Directive (EU) 2022/2464 (CSRD).

The European Green Deal was a communication published by the EC on 11 December 2019 to transform the EU into a fair and prosperous society with a resource-efficient and competitive economy[38], due to which the EC sought a process of macroeconomic coordination to pursue UN's 2030 Agenda and SDGs, setting the subsequent legislative path aimed at achieving that purpose.

EC's communication *Action Plan: Financing Sustainable Growth*, of 8 March 2018, had as one of its established objectives the reorientation of capital flows toward sustainable investment through an action plan dominated by the establishment of a unified classification system for sustainable activities[39]. In view of the emerging need for greater

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[36] The implementation of these two agendas through business contributions is now being pursued by the *2021-2023 UN Global Compact Strategy*
[37] Recital (29) of the CSRD
[38] The European Green Deal, "1. Introduction - Turning an urgent challenge into a unique opportunity". https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52019DC0640
[39] Recital (6) of the Taxonomy Regulation

transparency, the Taxonomy Regulation, of 18 June 2020, establishes the criteria for determining whether an economic activity qualifies or not as environmentally sustainable[40]. In that context, UN's PRI and OECD's standards take a structural role regarding the technical screening criteria[41].

We arrive at Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence (CSDDD), which amended Directive (EU) 2019/1937 - as CSDDD presupposes the mandatory establishment of an institutionalised whistle-blower system similar to the LkSG[42] -, and Regulation (EU) 2023/2859, as it establishes a European Single Access Point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability.

The issues that the CSDDD aims to tackle from a human rights perspective cover all five fundamental principles and rights at work defined in ILO's Declaration *on Fundamental Principles and Rights at Work*[43], from 1998 and amended in 2022, while the environmental concerns have the context of international agreements under the UN Framework Convention on Climate Change, such as the Paris Agreement and the Glasgow Climate Pact[44].

The concept of human rights due diligence was developed by the OECD through its 1976 *Guidelines for Multinational Enterprises* (*MNE Guidelines*), revised in 2023, in coherence with the importance that the UNGPs have attributed to this practice in 2011[45]. Nevertheless, the concept is also embedded in ILO's *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*[46], from 1977. OECD's involvement regarding soft law also includes the *Guidance for Responsible Business Conduct*, which was approved in 2018 and is composed by frameworks setting out practical due diligence steps to help companies implementing their own processes[47].

[40] Article 1 of the European Taxonomy
[41] Recitals (43) and (44) of the European Taxonomy
[42] Cf. Article 14 of the CSDDD and KOOS, Stefan (2021): "The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies", Advances in Social Science, Education and Humanities Research, volume 659, p. 113
[43] Recital (32) of the CSDDD
[44] Recital (10) of the CSDDD
[45] Recital (5), Recital (14) and Recital (37) of the CSDDD
[46] Recital (6) of the CSDDD
[47] Recital (6) of the CSDDD

Although the conventional positivist approach understands law in binary terms - recognising only as law that which is binding -, there's an alternative definition whereas law is considered a continuum where soft law occupies the middle space between legal norms and non-legal norms[48]. Literature has already demonstrated that it is not currently possible to treat them as two ontologically distinct entities, obliging European Courts to embrace the regulations' hybridity through the re-thinking of basic notions of judicial review[49]. This marks the evolution of CSR's concept from voluntary to hybrid, in which the meaning and scope of binding norms depends on a systematic interpretation mainly composed by non-binding norms, giving rise to a new paradigm of obligations and a liability regime that is still being designed: "(…) the adopted paradigm for corporate sustainability will no longer rest solely on 'voluntary international standards' and will very soon be based on normative injunctions recognized as a priority by the EU, and which, in the event of non-compliance, will justify a compensation claim against the company[50]".

3. Corporate Sustainability Due Diligence Directive

a. The Political Turmoil of the CSDDD

In view of the transformation of CSR into this hybrid concept, a growing number of European companies have taken the initiative to start due diligence processes guided by the existing soft law in this area. From there, some Member States - of which stand

[48] STEFAN, Oana; AVBELJ, Matej; ELIANTONIO, Mariolina; HARTLAPP, Miriam; KORKEA-AHO, Emilia; RUBIO, Nathalie, "EU Soft Law in the EU Legal Order: A Literature Review", p. 30. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346629

[49] ELIANTONIO, M.; STEFAN, O. (2018): "Soft law before the European courts: discovering a 'common pattern'?", Yearbook of European Law, 37(7), p. 469. https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/61552912/Eliantonio_2018_Soft_Law_before_the_European_courts.pdf

[50] ANTUNES, Ana Filipa Morais (2022) "ESG, racionalidade empresarial, e novos contenciosos", Revista de Direito Comercial, p. 2000. https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/63b0260ffd28426edc76cda8/1672488464588/2022-40+-+1997-2024.pdf

out the two largest European economies - took legislative action to develop their own legal framework on the practice[51], which led the European Parliament to request the EC to introduce mandatory legislation to avoid fragmentation and ensure legal certainty[52].

The Proposal arrived in February 2022, defining obligations for companies regarding adverse impacts on "actual and potential" human rights and the environment, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with which the company has a business relationship. The Proposal's comprehensive scope of application[53] led to the lost the support of several Member States in March 2024[54], which obliged trilogues between the three co-legislators - the Parliament, Council and Commission - to reach a political agreement[55]. With a way minor scope of application[56], on 13 June 2024, Directive (EU) 2024/1760 of the European Parliament and of the Council on Corporate Sustainability Due Diligence was adopted.

However, stability did not last long: CSDDD became a European symbol of the tensions that CSR represented, until then, as a primarily theoretical element. The political turmoil had been accompanied by multiple economic concerns, not only from corporate lobbying[57], but many institutional bodies[58]. The clarity that the Inception Impact

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[51] E.g., France's *Duty of Vigilance Act* (2017), Netherlands' *Child Labour Due Diligence Law* (2019), Germany's *Supply Chain Due Diligence Act* (2021) or Norway's *Transparency Act* (2021)

[52] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2021_474_R_0003

[53] Article 2 of the Proposal (COM (2022) 71 final. https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF

[54] To see more about this political setback: https://www.euronews.com/my-europe/2024/03/06/exclusive-governments-mull-last-chance-bid-for-stripped-down-corporate-diligence-law

[55] European Coalition for Corporate Justice Press Release regarding CSDDD political deal: https://corporatejustice.org/news/press-release-csddd-political-deal-a-pivotal-step-but-a-missed-opportunity-to-embrace-transformative-change/ and Friends of the Earth Europe Press Release: https://friendsoftheearth.eu/press-release/the-final-political-trilogue-on-csddd-a-bittersweet-moment-for-corporate-justice/

[56] Article 2 of the CSDDD. https://eur-lex.europa.eu/eli/dir/2024/1760/oj/eng

[57] "Corporate Influence on the CSDDD. Who Lobbied the EU on Human Rights Due Diligence? A Social lobbyMap Analysis", p. 12. https://sociallobbymap.org/wp-content/uploads/2025/06/Corporate-Influence-on-the-CSDDD-Final-report.pdf

[58] Cf. Chapter 4, c)

Assessment had brought, through its open public consultation and supporting studies[59], was - not that slowly - dominated by harsh criticism surrounding the economic viability of the Directive.

It was within this context and the Draghi report[60] that the EC presented the 2025 *Competitiveness Compass*: so Europe could pursue its economic growth by meeting the three needs encountered: closing the innovation gap, decarbonising the European economy and reducing dependencies[61]. Its Omnibus Simplification Package unfolds, regarding CSDDD, in a "stop-the-clock" Directive, already approved, which postponed the transposition deadline for the Member States and, therefore, the application of the sustainability due diligence requirements for wave 1 companies by one year[62]. There is also a proposal still under political debate, which aims to change CSDDD's materiality so it would reduce even more the scope of application, only apply to direct business partners, limiting the information that can be requested to them, reduce the frequency of the mandatory periodic assessment, the suspension or termination of the commercial relationship would no longer be mandatory, civil liability provisions would be removed, transition plans would be no longer mandatory to implement, the provision regarding sanctions would be removed, an even more demanding transposition would no longer be permitted, and requirements for financial institutions would be removed[63][64].

We understand that the CSDDD, as the culmination of CSR tensions, was also the culmination of a horse-trading war that is not yet over. However, the political process cannot take precedence over the legislative reality - which is why the obligations that will

59 Study on due diligence requirements through the supply chain and a study on directors' duties and sustainable corporate governance. Study on due diligence requirements through the supply chain - Publications Office of the EU and Study on directors' duties and sustainable corporate governance - Publications Office of the EU

60 DRAGHI, Mario: "The Draghi report on EU competitiveness". https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en#paragraph_47059

61 EC (2025): "A Competitiveness Compass for the EU". https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025DC0030

62 COM (2025) 80 final: Proposal, Article 2. https://commission.europa.eu/document/download/0affa9a8-2ac5-46a9-98f8-19205bf61eb5_en?filename=COM_2025_80_EN.pdf

63 COM (2025) 81 final: "Explanatory Memorandum", Detailed explanation of the specific provisions of the proposal, p. 17-20. https://commission.europa.eu/document/download/892fa84e-d027-439b-8527-72669cc42844_en?filename=COM_2025_81_EN.pdf

64 COM (2025) 81 final: Proposal, Whereas 21. Proposal, Article 4, "Amendments to Directive (EU) 2024/1760", paragraph (3) and (4)(d). https://commission.europa.eu/document/download/892fa84e-d027-439b-8527-72669cc42844_en?filename=COM_2025_81_EN.pdf

be subject to further analysis are those included in the version approved in July 2024 and currently in force.

b. National Due Diligence Laws prior to the CSDDD: France and Germany as Models

The *Loi sur le devoir de vigilance* set France as the first country in the EU and worldwide to adopt a general due diligence law, in 2017[65]. The scope of application comprehends large companies with over 5,000 employees in France and over 10,000 in the world, during two consecutive years[66]. The business relations covered comprehend the activities of companies under direct and indirect control, and every "established commercial relation" regarding contractors and suppliers[67].

The French due diligence obligations summarize in "(…) reasonable vigilance measures to identify risks and prevent serious attacks on human rights and fundamental freedoms, the health and safety of people and the environment (…)[68]". The *devoir de vigilance* is expected to be developed with the involvement of stakeholders to determine measures such as - but not limited to - risk mapping, procedures for regular assessment of existing business relationships, appropriate actions to mitigate risks or prevent serious attacks, an alert and reporting mechanism established in consultation with the company's representative trade unions, and a system for monitoring the measures and evaluating their effectiveness.

Although failure to comply with the obligations can raise civil liability[69], Article L. 225-102-4(II) and Article L. 225-102-5(III) - regarding the consequences of non-compliance in the form of a financial penalty and the obligation to repair the damage that

[65] European Parliament's Briefing "Corporate sustainability due diligence. How to integrate human rights and environmental concerns in value chains", p.3. https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729424
[66] Article 1 of the *Loi* and now Article L. 225-102-4 of the French Commercial Code
[67] Article 1 of the *Loi*
[68] Article 1 of the *Loi*
[69] Article 2 of the *Loi* and now Article 225-102-5 of the French Commercial Code

compliance would have prevented, respectively - were declared unconstitutional by the Constitutional Council No. 2017-750 DC of March 23, 2017. Since the obligations laid out by the *Loi* are of means and not of results, there are differing views on the role of the court: should it strike a balance between a presumption of guilt that can be rebutted by enhanced obligations of means or is this law merely a standard of behaviour to be assessed on a case-by-case basis, depending on the reality of the business[70]? The court's assessment will certainly pass through the financial and material resources allocated to the implementation of this law, despite this certainly not being sufficient for the crystallisation of concepts such as the comprehensiveness of the vigilance plan, the inherent content of the different vigilance measures and its effective implementation[71]. Bearing in mind that, since 2019, the enforcement mechanism of the *Loi* has been triggered seven times and three cases have reached the courts[72], it is important to remember that the complainants - so far, mainly trade unions and NGOs - bear the burden of proof. This leads to the fulfilment of the three conditions under the general law of torts - a damage, a breach of one of the obligations and a causal link between the damage and the breach of the obligation - becoming increasingly difficult to prove how far back in the value chain the damage occurred, not to mention when, even if the damage has been proven, liability applies when it occurred outside France[73].

The German Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettensorfgfaltspflichtengesetz* (LkSG)) was approved on July 16, 2021 but, according to Article 5, it entered into force on January 1, 2023. The scope of application concerns companies that have at least 3,000 employees in Germany in year 2023 and, from the first day of year 2024, at least 1,000 employees[74], while the business relations

[70] SAVOUREY, Elsa; BRABANT, Stéphane (2021): "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption", Business and Human Rights Journal, 6, p. 151. https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/french-law-on-the-duty-of-vigilance-theoretical-and-practical-challenges-since-its-adoption/0398716B2E8530D9A9440EEB20DB7E07

[71] Ibid, p. 150

[72] E.g., Danone lawsuit (re plastic use and pollution, filed in France), of 9 January 2023

[73] BRABANT, Stéphane ; SABOUREY, Elsa (2017) : "A Closer Look at the Penalties Faced by Companies", Revue Internationale de la Compliance et de L'Éthique Des Affaires, p. 3. https://media.business-humanrights.org/media/documents/d32b6e38d5c199f8912367a5a0a6137f49d21d91.pdf

[74] Division 1, Section 1, (1) of the LkSG

covered are the companies' own operations and supply chain operations from direct and indirect suppliers[75].

Nuclear obligations include risk analysis and management, the appointment of a person or persons responsible within the company, the issuance of a policy statement, preventive measures and remedial actions, a complaints procedure, due diligence obligations regarding risks from indirect suppliers, and documentation and reporting[76]. It's equally important to highlight the determination of the obligations, according to the nature and extent of business activities, the ability of the company to influence the party directly responsible for creating risks or violations of environmental or human rights obligations, the severity, reversibility, and likelihood of such violations occurring, and the nature of the causal contribution between the company and such risks[77].

In LkSG, civil liability was explicitly excluded[78], even though there are foreseen administrative fines up to 800,000€ or up to 2% of annual global turnover, when the latter is over 400€ million[79]. The LkSG is monitored and enforced by the Federal Office for Economic Affairs and Export Control (BAFA), which is subordinate to the Federal Ministry for Economy and Energy and reviews the reports of the enterprises, carries out risk-based controls, can require enterprises to take specific action and impose the financial penalties and administrative fines[80].

The *Loi sur le devoir de vigilance* and LkSG have their enforcement carried out in different ways: while discussions regarding compliance with the *Loi* should be brough before the judicial authority - the Paris Civil Court[81] -, Germany opted for an administrative authority - BAFA - whose role is shared with workers' representatives, as they can inquire about due diligence procedures in their companies, and with the

[75] Division 1, Section 2, (5) of the LkSG
[76] Division 2, Section 3, (1) of the LkSG.
[77] Division 2, Section 3, (2) of the LkSG
[78] Division 2, Section 3, (3) of the LkSG
[79] Division 6, Section 23, (3) of the LkSG
[80] Ver.di, "The Supply Chain Due Diigence Act (LkSG). Regulatory content and the role of legal representative bodies". https://www.verdi.de/++file++64929c42eae1608afefd50da/download/221205-verdi-Mitbestimmung_Factsheet-Supply-Chain-Due-Diligence-Act_EN.pdf
[81] Cour de cassation, decision of 15 December 2021, n° 21-11.957, n° 21-11.882. https://www.courdecassation.fr/en/decision/61b99380ef20f6a61afc3611

administrative court, as it can receive complaints for failure to act[82]. Nevertheless, similarities arise in both objectives and weaknesses. On the one hand, both laws develop CSR obligations in their own legal systems, guided by the UNGPs in the formulation of their due diligence processes and looking to reach the SDGs. On the other hand, the consequences for non-compliance need to be clarified in order to be more objective and plausible in practical application, since while the Loi excludes penalties, the LkSG excludes civil liability.

This misalignment between highly ambitious obligations and consequences for non-compliance immediately brings to mind the Paris Agreement, as a hybrid instrument of binding obligations with no effective enforcement mechanisms in the event of non-compliance. This leads us to ask: given that the approved version of the CSDDD provides for a civil liability regime and a system of penalties to be transposed by all Member States, and is therefore much more ambitious than the French and German laws, can we consider these two laws to be genuine precedents? Or merely policy initiators instrumentalised to justify compliance with the principle of subsidiarity?

c. The Axis of Economic Concerns

Inaction on climate change that would allow for a 3ºC warming scenario would represent human and natural losses such as 90,000 annual deaths due to extreme heat[83], the equivalent of 15% of the EU population living under water stress for at least one month per year[84], a 24% growth of people exposed to high-to-extreme fire danger levels

[82] JAULT-SESEKE, Fabienne (2023): "A Comparison of the French and German Transparency Laws", Scandinavian University Press, Vol. 10, No- 2-2023, p. 6-8. https://www.scup.com/doi/epdf/10.18261/olr.10.2.3

[83] EC's Joint Research Centre PESETA IV, "Climate change impacts of heat and cold extremes on humans". https://joint-research-centre.ec.europa.eu/document/download/4a47ce00-e052-437f-ae36-7ff4cce80f8f_en?filename=11_pesetaiv_heat_and_cold_sc_august2020_en.pdf

[84] EC's Joint Research Centre PESETA IV, "Climate change and water resources". https://joint-research-centre.ec.europa.eu/document/download/99628d29-2e1f-4240-8cf2-f44729bd0935_en?filename=10_pesetaiv_water_resources_sc_august2020_en.pdf

for at least 10 days per year[85] and an 84% shrinkage of alpine tundra[86]. But the damage also extends to the economy: a global warming of 3ºC would represent an additional annual welfare loss of at least 175€ billion, while achieving the Paris Agreement's goal of 1.5ºC would lower additional welfare losses by 75%[87]. Economic and social motivations converged in the creation of the European Green Deal - "Europe's man on the moon[88]" moment - in 2019, but can we say that the proportionality between the two values remained balanced with the CSDDD?

EC's Inception Impact Assessment presented the anticipated impacts of what would be the CSDDD in a structure analogous to the Triple Bottom Line agenda[89]. While the positive economic impacts are qualitative, - as it's expected an enhancement of the productivity, profitability and attractiveness of EU businesses due to a better management of sustainability-related risks, opportunities and stakeholders' interests -, the negative economic impacts are quantitative, as they include both one-off and on-going costs due to compliance[90]. The economic gains merge in nature with the expected environmental and social impacts, since among these are found the fight against climate change and loss of biodiversity, the preservation of natural resources, waste management, and the improvement in jobs, wages, working conditions and human rights[91].

The ECB took the initiative to issue an opinion on the Proposal, because it foresaw significant practical implications for credit institutions, such as the increase of litigation

[85] EC's Joint Research Centre PESETA IV, "Climate change and wildfires". https://joint-research-centre.ec.europa.eu/projects-and-activities/peseta-climate-change-projects/jrc-peseta-iv_en
[86] EC's Joint Research Centre PESETA IV, "Climate change and alpine tundra loss". https://joint-research-centre.ec.europa.eu/projects-and-activities/peseta-climate-change-projects/jrc-peseta-iv_en
[87] EC's Joint Research Centre PESETA IV, "Welfare loss from climate change impacts". https://joint-research-centre.ec.europa.eu/document/download/aaf8b30e-8d4e-45d4-b0ea-7660252b420b_en?filename=14_pesetaiv_economic_impacts_sc_august2020_en.pdf
[88] Press remarks by President von der Leyen on the occasion of the adoption of the European Green Deal Communication (2019). . https://ec.europa.eu/commission/presscorner/detail/fr/speech_19_6749
[89] A term coined in 1994 by John Elkington, to describe an agenda that seeks to shift the business focus from an entirely economic perspective to also embrace the concern regarding its ability to create or destroy value at an environmental and human level. To know more about the three metrics of People, Planet and Profits: https://johnelkington.com/archive/TBL-elkington-chapter.pdf
[90] The obligation to set up due diligence procedures is estimated to be less than 0.14% of the revenues for SMEs and 0.009% for large companies, with higher and further costs being expected in certain sectors because of environmental targets.
[91] EC' Inception Impact Assessment, "C. Preliminary assessment of expected impacts". https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en

risks for banks - leading to the need of a transition that reconciles a sustainable economy with a robust global risk management strategy. In this sense, the granting of loans becomes dependent on a credible transition plan presented by the borrower, based on scientific data and aligned with the Paris agreement. This transition plan, although imposed by the proposed directive, has the content and practical requirements for its dissemination prescribed in the CSRD, which requires the consistency and integration of transition plans under these two pieces of legislation[92].

During 2021, the RSB revealed, not once, but twice, its negative opinion on the Proposal. Of the four shortcomings cited to justify this position, the fourth is particularly noteworthy, as it concerns the report's need of improvement regarding the proportionality assessment, given the uncertainty as to whether the expected benefits will in fact materialise and outweigh the costs on a large scale[93]. Even so, the EC did not back down from presenting a final Impact Assessment Report[94], on February 23, 2022, and from there proceeded to vote on the proposal.

Subsequently, the EESC issued its mandatory opinion[95], in which it highlighted the importance of creating a coherent EU legislative framework on sustainable governance and corporate due diligence, but also stressed that systemic change is only possible by helping countries fulfil their duty to protect human rights, without companies replacing this fundamental role. The geopolitical context did not go unnoticed, as the EU was forced to reassess its economic relations and dependencies. In this regard, it was required a reflection on the relationship between the duty of diligence and the obligation to apply sanctions imposed by the political level that limit business activity, but it was also asked for rigour to prevail over speed and for a sense of proportionality to be maintained.

[92] ECB (2023): "Opinion of the European Central Bank". https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023AB0015

[93] Regulatory Scrutiny Board (2022): "Regulatory Scrutiny Board Opinion". https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:SEC(2022)95

[94] Final Impact Assessment Report (2022). https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=celex%3A52022SC0042 and Executive Summary of the Impact Assessment Report. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022SC0043

[95] Mandatory opinion available at: https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/mandatory-due-diligence

In light of these concerns, many of which precede the approval of the CSDDD, and the *Competitiveness Compass* that followed, it is important to consider what was the main economic argument that supported the EC's stoicism regarding the importance of this legislation. Opinions will vary, but we argue that the dominant one is how companies, in particular those listed on regulated markets, are being limited by a short-term vision that is reflected in the correlation between corporate financial performance and the directors' remuneration, encouraging high levels of pay-outs and low investment intensity. This decapitalization represents a self-inflicted inability to invest that hinders the necessary sustainable transition and contributes to income inequality, leading to a situation where companies are unable to integrate new investment opportunities or to build resilience[96].

d. CSR at CSDDD: Obligations and Liability of Directors

The due diligence duty set out in Article 5 of the CSDDD has its compliance foreseen through a series of actions listed in it and developed throughout the directive. This duty must, first and foremost, be integrated into the risk management policies and systems of the companies concerned, in accordance with Article 7. Its paragraph (1) also includes the obligation to establish a risk-based compliance policy and, in accordance with (2), drawn up in prior consultation with the company's employees and their representatives, including the elements mentioned in the provision.

Article 7 can be considered the most elementary norm, as it can only be implemented once the other obligations laid down have been fulfilled[97]. In fact, the CSDDD seeks to bind companies in relation to actual and potential adverse impacts on human rights and the environment, with regard to their own operations, the operations of their subsidiaries,

[96] Between 1992 and 2018, the ratio of total shareholder payouts increased from 20% to 60% in listed European companies, while the ratio of capital expenditure and research and development spending to net income have declined by 45% and 38%, respectively - according to the own Inception Impact Assessment.
[97] Article 7(3) CSDDD

and the operations carried out by their business partners in the chains of activities of those companies.

Negative effects are distinguished by their realization (potential or actual), their degree of severity, and their source (the company itself, its subsidiaries, or its direct and indirect business partners). That is why the company's obligations may involve simply identifying and assessing its negative effects (Article 8), followed by prioritization according to their severity and likelihood, when they cannot be fully resolved (Article 9), to sole prevention and mitigation (Article 10) or cessation (Article 11) and, in case of damages, the obligation to repair them (Article 12). Each of these obligations is reinforced by a set of "appropriate measures" which are densified in Article 8(1), Article 10(1) Article 11(1), and listed, in a non-exhaustive manner, in Article 10(2) and Article 11(3). It should be noted that, in both Articles 10 and 11, where we are on the verge of a real negative effect, when caused by a commercial partner, the company is obliged to refrain from establishing new business relationships or expanding existing ones with that partner, adding the obligation, as a last resort, to terminate the business relationship[98].

With regard to reparation for damage, particular attention should be paid to Article 12(2) which, without imposing any obligation, encourages the company covered by the scope of the directive to grant voluntary reparation and/or influence the commercial partner that actually caused the negative effect to grant remedial action.

Article 13 establishes the obligation for companies to cooperate "constructively" with stakeholders through appropriate measures which, although not listed, are based largely on the sharing of information by the company, the limits of which are mainly based on Directive (EU) 2016/943[99]. There are several stages in the due diligence process at which stakeholders should be consulted, as listed in Article 13(3), and the company's obligation to additionally consult experts to provide credible information on actual and potential adverse impacts when such engagement is not effective. Stakeholders also have a right to confidentiality and anonymity, given the obligation set out in (5) for the company to

[98] Article 10(6) and Article 11(7) CSDDD
[99] Article 13(1) and (2) CSDDD

identify and remove obstacles to cooperation, such as preventing them from being subject to retaliation.

Article 14(1) provides that the persons and entities referred to in (2) may lodge a complaint where they have legitimate concerns about the actual or potential adverse effects on their own business operations, on the business operations of their subsidiaries or on the business operations of their business partners in the supply chain. Article 15 requires companies to carry out assessments at least once a year, using qualitative and quantitative indicators to evaluate the adequacy and effectiveness of the obligations set out in the previous articles. There is also a disclosure obligation under Article 16, according to which the company must publish on its website an annual statement on matters relating to the CSDDD, in accordance with the characteristics set out in (1).

The Directive also addresses the obligation of these companies to adopt and implement a transition plan for climate change mitigation consistent with the Paris Agreement[100] in Article 22, in addition to introducing a model of civil liability in the event of non-compliance with the obligations set out.

The regime provided for in Article 29 includes in its (1) that a company may be held liable where its intentional or negligent failure to comply has resulted in damage to the legal interests of a natural or legal person which are protected by national law, as explained in points (a) and (b). More specifically, the obligations laid down in Articles 10 and 11, when the right, prohibition or obligation listed in the Annex to this Directive is intended to protect a natural or legal person. Consequently, (2) provides that the same natural or legal person is entitled to full compensation for damages. While (3) and (7) list guarantees that Member States must provide when transposing this civil liability, (4) to (6) provide for cases in which civil liability is not limited or excluded.

4. Fiduciary Duties and Civil Liability of Directors towards the Company

[100] Article 1(1) CSDDD

a. The Duties of Care and Loyalty provided for in Article 64

The original version of Article 64 of the PCCC provided that the duty of diligence consisted of "The managers, directors or officers of a company must act with the diligence of a prudent and orderly manager, in the interests of the company, taking into account the interests of shareholders and employees[101]". With the 2006 revision of the PCCC, Article 64 was changed to the heading "fundamental duties" and, in its (1), the duties of care and loyalty were established. These duties apply not only to managers and directors, but also to the members of corporate bodies with supervisory functions, as provided for in (2).

Between 1986 and 2006, Portugal underwent changes that led to the recognition of two specific duties within the same legal framework: European integration allowed for sophistication and internationalisation, with Anglo-Saxon standards dominating business as the stock market became internationalised with Euronext, although American influence was also present through the listing of Portuguese companies on the NYSE[102]. In this sense, the review came at a time when there was already a build-up of Corporate Governance reflections on the international scene that emerged in the twenty years following the approval of the PCCC, combined with motivations such as the promotion of Portuguese companies' competitiveness, the increase of corporate autonomy, namely by broadening the range of governance solutions available and the elimination of unjustified distortions between models[103].

The duty of care, foreseen in Article 64(1)(a) PCCC, is defined as "the availability, technical competence, and knowledge of the company's activities appropriate to their duties and exercising in this regard the diligence of a prudent and orderly manager". This open clause of behaviour is embodied in an express legislative option of a criterion that is more demanding than the *Bonus Pater Familias* foreseen in Article 487(2) of the

[101] Original version from Decree-Law nº 262/86, according to the Portuguese Diário da República. https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1986-34443975

[102] VASCONCELOS, Pedro Pais (2009): "Responsabilidade Civil dos Gestores das Sociedades Comerciais", Direito das Sociedades em Revista, Coimbra, v.1, p. 18

[103] CMVM (2006), "Governo das Sociedades Anónimas: Propostas de Alteração ao Código das Sociedades Comerciais", Processo de Consulta Pública nº 1/2006, pp. 7-9

Portuguese Civil Code[104] - the "prudent and orderly manager" -, since it encompasses the idea of professionalism, which inherently involves a certain degree of specialisation and professional competence[105].

This criterion is divided into two parts: a general clause of careful action and a criterion of diligent action that serves as a benchmark for compliance with the former[106]. There is, therefore, a consensually accepted duality, according to which, on the one hand, an objective and general criterion is maintained for the purposes of verifying unlawfulness - since, if it were subjective, the exemption from liability would depend on the mere assertion by the directors that they had done their best[107] - and, on the other hand, a general pattern of behaviour from which subjective censure can be derived, from which guilt can be derived[108].

Nevertheless, Coutinho de Abreu defends that the formulation of the duty of care deserves to be extended to the duty of organizational-functional control or surveillance, in the duty to act in a procedurally correct manner, and in the duty to make substantially reasonable decisions[109]. In terms of decision-making, the third duty is particularly incisive in demanding reasonableness of substance. Cases involving complex decisions are left to the "business discretion" of directors, whose assessment of their use is based on quality criteria such as not dissipating or squandering the company's assets, nor engaging in excessive risks, i.e., those whose worst possible outcome would be to compromise the functioning of the company[110]. We will understand these limits of autonomy better when we talk about BJR.

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[104] Due to remission from Article 799(2) of the Portuguese Civil Code, regarding failure to comply with obligations.
[105] GOMES RAMOS, Elisabete (2002): "Responsabilidade civil dos administradores e diretores de sociedades anónimas perante os credores sociais", Coimbra Editora, pp. 82-83
[106] CMVM, Respostas à consulta pública nº1/2006 sobre alterações ao Código das Sociedades Comerciais, 2º, A. www.cmvm.pt
[107] GOMES RAMOS, Elisabete (2002): "Responsabilidade civil dos administradores e diretores de sociedades anónimas perante os credores sociais", Coimbra Editora, p. 84
[108] COSTA, Ricardo; FIGUEIREDO DIAS, Gabriela (2010): "Deveres Fundamentais. Art. 64º", Código das Sociedades Comerciais em Comentário, vol. 1, pp. 732-736
[109] In a very similar understanding to that of the *Smith v. Van Gorkom*
[110] COUTINHO DE ABREU, J.M (2010): "Responsabilidade Civil dos Administradores de Sociedades", 2ª ed. Almedina, Instituto de Direito das Empresas e do Trabalho, Cadernos, nº5, p. 18, pp. 18-24

According to Article 64(1)(b) PCCC, the duty of loyalty presupposes that directors act "(…) in the interests of the company, taking into account the long-term interests of shareholders and considering the interests of other parties relevant to the sustainability of the company, such as its employees, customers and creditors." From this provision, it can be inferred that a disloyal conduct is, therefore, "(...) the one that directly or indirectly promotes or enhances situations of benefit or advantage for the directors (...), to the detriment or without consideration for the diverse interests of the company (understood as a separate entity from the shareholders), the shareholders (analysed from a perspective that is not limited to the short-term), the employees, suppliers, customers, creditors and other parties potentially affected by corporate decisions.[111]

The novelty of the 2006 revision lies in the call for consideration of the interests of designated stakeholders, including a wide range of potential parties interested in the development of the company's activities beyond its partners and employees - namely creditors, suppliers, and customers[112]. Nevertheless, prevailing doctrine has defended the use of the criterion of the "prudent and orderly manager" in prioritising these interests, in light of what is in the best interests of the company: primarily, the interests of the shareholders and, secondarily, the interests of other parties[113]. As the duty of loyalty points to the primacy of pursuing the social interest, it is necessary to dwell on the definition of this concept in order to determine specific conduct, as we will analyse next.

b. Defining Social Interest: Relevance and Doctrinal Divergences

[111] GOMES, Fátima (2007): "Reflexões em torno dos deveres fundamentais dos membros dos órgãos de gestão (e fiscalização) das sociedades comerciais à luz da nova redação do artigo 64º do CSC", p. 566
[112] GOMES, Fátima (2007): "Reflexões em torno dos deveres fundamentais dos membros dos órgãos de gestão (e fiscalização) das sociedades comerciais à luz da nova redação do artigo 64º do CSC", p. 566
[113] COSTA, Ricardo; FIGUEIREDO DIAS, Gabriela (2010): "Deveres Fundamentais. Art. 64º", Código das Sociedades Comerciais em Comentário, vol. 1, p. 745

Although almost a third of the PCCC[114] refers to management duties - even though the actual number of effective commands is substantially lower - there was no concern to establish clear connections between the duties and the general framework of responsibility, leading not only to a dogmatic reduction of the duties of directors, but also to the need of their reconstruction in the light of civil liability[115]. The liability of the heads of commercial companies' management bodies presupposes an understanding of the relationship between ownership and management: while the former consists of "(...) the position of the partners, the holders of capital, those who invested in the company by subscribing to the initial capital or subsequent issues, as partners, holders of shares[116]", the latter consists of "(...) the position of the heads of the company's management bodies and also of the management bodies themselves[117]".

As Anglo-Saxon law influenced the placement of shareholders in the position of *principals* and managers in the position of *agents*, this fiduciary relationship must adhere to one of two distinct conceptions of what the social interest is: the shareholder primacy theory[118] limits it to "(...) the interest of each and every partner in achieving maximum profit through the collective activity of the company. The social interest is, therefore, a common interest of all shareholders[119]", while the institutionalist school defines it as "(...) an interest that is not resolved in the interests of the shareholders, but which in some way represents the point of convergence of the interests of current partners, future shareholders, the company's dependents and, for some, consumers and the national community itself[120]."

Alexandre Soveral Martins defends shareholder primacy, since other formulations of social interest are not suited to the capitalist market economy, resulting in a

[114] In Portuguese, *Código das Sociedades Comerciais,* Decree-Law nº 262/86, of 2 September amended by Decree-Law nº 114-D/2023, of 5 of December
[115] MENEZES CORDEIRO, António (1996): "Da Responsabilidade Civil dos Administradores das Sociedades Comerciais", Lex-Edições Jurídicas, pp. 63-70
[116] PAIS VASCONCELOS, Pedro (2009): "Responsabilidade Civil dos Gestores das Sociedades Comerciais", Direito das Sociedades em Revista, Coimbra, v.1, p. 11
[117] PAIS VASCONCELOS, Pedro (2009): "Responsabilidade Civil dos Gestores das Sociedades Comerciais", Direito das Sociedades em Revista, Coimbra, v.1, p. 11
[118] In Portuguese, "Teoria Contratualista"
[119]LOBO XAVIER, Vasco (1999), "Anulação de deliberação social", Almedina, p. 242.
[120] *Ibid*., p. 244.

concealment of society[121]. Rui Pinto Duarte, on the contrary, understands that there are multiple legislative signs that social interest in the West transcends the collective interest of shareholders, since the interests of workers, potential shareholders and the community in general must also be considered[122]. Paulo Olavo Cunha shares this view, arguing that determining the long-term interests of shareholders depends on the indispensable contribution of employees, customers, and creditors, but also of financing entities. In fact, in his words, "Managing a company today, in the 21st century, requires consideration of other interests beyond those of shareholders and employees themselves.[123]"

This clarification is of the utmost importance in order to fulfil the duty of diligence broadly provided for in Article 64 of the PCCC, since, if we decide on the primacy of shareholders, management is all the more diligent the more profitable it is[124]. Nevertheless, the reflection on what is the social interest must take into account the crisis in the scope of profit, the fungible and neutral nature of society and the emergence of new interests that are recognised by law through the imposition of corresponding obligations on directors[125].

Nevertheless, Section 172(1) of the Companies Act 2006 changed the shareholder primacy paradigm, as it opened the possibility of treating stakeholders as a way to achieve long-term shareholder value: the Enlightened Shareholder Value approach[126]. In coherence, the 2006 revision of the PCCC can be understood, as we will see further, in line with this approach, as directors' duties include diligence circles, which unfold in the duties of protection and inherent negative finality of defence of the personal and

[121] SOVERAL MARTINS, Alexandre (2020): "Administração de Sociedades Anónimas e Responsabilidade dos Administradores", Almedina, pp. 352-353
[122] PINTO DUARTE, Rui (2008):" Escritos sobre Direito das Sociedades", Coimbra Editora, p. 55
[123] OLAVO CUNHA, Paulo (2022): "Direito das Sociedades Comerciais", Almedina, pp. 125-126
[124] GOMES RAMOS, Elisabete (2002): "Responsabilidade civil dos administradores e diretores de sociedades anónimas perante os credores sociais", Coimbra Editora, p. 85
[125] GOMES RAMOS, Elisabete (2002): "Responsabilidade civil dos administradores e diretores de sociedades anónimas perante os credores sociais", Coimbra Editora, citing Bonelli, p. 100
[126] FERRAN, Eilis; SCHILLING DE CARVALHO, Pedro (2025): "Reconciling Shareholder Primacy and the Interests of People and the Planet", Law Quarterly Review, p. 8. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5084134

patrimonial integrity of the company[127]. Only the extent of this compatibility with the imminent transposition of the CSDDD remains to be seen.

c. Directors' Civil Liability according to Article 72(1)

In accordance with the enforceability of Article 64 PCCC, it is important to distinguish between the three forms in which directors' liability may arise: liability to the company, liability to creditors, and liability to shareholders and third parties. However, liability to creditors arises in the event of culpable management that has led to the company's assets being insufficient to meet its liabilities[128], and liability to shareholders and third parties means that directors are liable for any damage they cause to them in the performance of their duties[129]. Knowing that failure to comply with the CSDDD, once transposed, will cause damage to the company, it is a priority to focus the analysis on the liability of directors in this regard, in light of Article 72(1) PCCC. Conversely, it is important to understand when this responsibility can be excluded, which requires the subsequent analysis of 72(2) PCCC.

The wording of Article 72(1) lists the four requirements that must be met for directors to be held liable under civil law vis-à-vis the company: the Unlawfulness of the conduct of the directors ("acts or omissions committed in breach of legal or contractual duties"), Fault (where there is a presumption of culpable conduct, which can only be rebutted if "they prove that they acted without fault"), Damage to the company ("damage caused to it by acts and omissions") and a Causal Link between the Fact (unlawful and culpable) and the Damage.

First and foremost, it is necessary to focus on the figure of the administrator, identifying that the law, although it often does not expressly mention it - as is the case in

[127] LUZ DOS SANTOS, Hugo (2016): "A perda da qualidade de sociedade aberta (*delisting* de participações sociais): a tutela dos sócios minoritários, o direito de propriedade, e o dever de lealdade dos administradores das sociedades comerciais (com uma breve paragem em Macau e em Hong Kong), pp. 906-907
[128] C.f. Article 78(1) CSC
[129] C.f Article 79(1) CSC

Article 72(1) - refers to directors of law and "directors *of fact*" as opposed to "shadow directors", where directors *of fact* consist of "(...) (in a broad sense) those who, without sufficient title, directly or indirectly and autonomously (not subordinately) perform the functions of a legal administrator of the company[130]".

Regarding the breach of legal or contractual duties, legal duties are divided into specific duties - which result immediately and specifically from the law - and general duties - which are relatively indeterminate in nature and correspond to the nature of the duties of care and loyalty[131]. Contractual obligations, on the other hand, correspond, in most cases, to statutory obligations, but although their disregard gives rise to civil liability, it would not be necessary to refer to them under 72(1) because of the principle of the binding force of contracts enshrined in Article 406(1) of the Portuguese Civil Code[132].

Fault exists when the director's conduct deserves censure, that is, when, in light of the circumstances, he or she could have acted differently. This distancing from the doctrine of strict liability is consistent with the idea that commercial activity involves a certain degree of risk, ensuring that the assessment of compliance regarding the obligations of means to which directors are bound is not based solely on poor results in corporate management[133]. In order to determine Fault, the degree of fault is not relevant to establishing liability, nor is any special technical or academic qualification or professional experience that the director may have, as there is no requirement for this under the PCCC. The general standard for assessing fault is abstract and is set out in Article 64(1)(a): "the diligence of a prudent and orderly manager[134]", adding other

[130] COUTINHO DE ABREU, J.M; GOMES RAMOS, Elisabete (2004): "Responsabilidade Civil de administradores e de Sócios Controladores", Almedina, pp. 40-46

[131] COUTINHO DE ABREU, J.M, (2010): "Governação das Sociedades Comerciais", 2ª ed. Almedina, pp. 12-14

[132] COUTINHO DE ABREU, J.M; RAMOS, Maria Elisabete (2010): "Pressupostos da responsabilidade civil dos administradores para com a sociedade (nº1)", Código das Sociedades Comerciais em Comentário, Almedina, pp. 840-842

[133] GOMES RAMOS, Elisabete (2002): "Responsabilidade civil dos administradores e diretores de sociedades anónimas perante os credores sociais", Coimbra Editora, pp. 85-86

[134] COUTINHO DE ABREU, J.M; GOMES RAMOS, Elisabete (2004): "Responsabilidade Civil de administradores e de Sócios Controladores", Almedina, pp. 25-26

relevant factors such as whether the director is executive or non-executive and their access to information.

The specificity of this presumed fault benefits the plaintiff company, since it reverses the burden of proof that it would initially have under the circumstances of Article 344(1) of the Portuguese Civil Code. However, this presumption does not cover unlawfulness, as this would coincide with an interpretative intensification of 72(1) that would increase the risk of civil liability for directors. If this were the case, it would suffice for the plaintiff company to allege and prove that the conduct of the director(s) was sufficient to cause damage, and both presumptions would be inferred from this[135].

As regards Damage, Actual Damage is defined as an "(...) injury to legally protected corporate interests, most often in the form of dissipation, subtraction, or deterioration of certain tangible or intangible assets (...)[136]" and Property Damage consists of "(...) the reflection of actual damage on the company's financial situation, which includes both actual damage and lost profits and is measured, in principle, by the difference between the company's current actual situation and the (hypothetical) situation in which it would have been if the harmful conduct had not occurred[137]." As for the Causal Link, the theory of adequate causality prevails, which requires that "(...) not only that the fact was, in concrete terms, a *sine qua non* condition for the damage, but also that it constitutes, in abstract terms, according to the normal course of events, an adequate cause for its occurrence[138]." Regarding these two elements, there are no distinctive features that stand out from those found in the general civil liability regime[139].

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[135] GOMES RAMOS, Maria Elisabete (2010): "O seguro de Responsabilidade Civil dos Administradores: Entre a exposição ao risco e a delimitação da cobertura", pp. 119-121

[136] COUTINHO DE ABREU, J.M (2010): "Responsabilidade Civil dos Administradores de Sociedades", 2ª ed. Almedina, Instituto de Direito das Empresas e do Trabalho, Cadernos, nº5, p. 8

[137] Ibid. Ibidem, p. 8

[138] ALMEIDA COSTA, Mário Júlio de (2020): "Direito das Obrigações", 12ª ed. Revista e atualizada Almedina, p. 763

[139] RAMOS, Maria Elisabete (1997): "Aspectos substantivos da responsabilidade civil dos membros do órgão de administração perante a sociedade", Boletim da Faculdade de Direito, Vol. LXXIII

d. The Business Judgement Rule's Influence on the Exclusion of Liability in the Portuguese Legal System

The American jurisprudential norm BJR was recognized in §4.01 (c) of Principles of Corporate Governance and it consists of four requirements: the existence of a business decision, subjective good faith on the part of the administrator, the absence of a conflict of interest, and compliance with the duty to make an informed decision[140]. The BJR applies, even quite exclusively, to breaches of the duty of care[141] and, when the requirements are verified, the applicability of this rule results in the court not assessing the merits of the decision, with the administrator only being held civilly liable when their decision is considered irrational[142]".

Regarding its interpretation, there are two main doctrines: BJR as the abstention doctrine, in which the court is prevented from appreciating the substance of commercial decisions, and as a standard of liability, in which it applies when the plaintiff shareholder does not meet the burden of proving that the directors breached one of their fiduciary duties[143]. As a jurisprudential pillar of the former, we have *Smith v. Van Gorkom*, in which the board of directors made the hasty decision of selling Trans Union - "After meeting for only two hours (…); the directors relied solely on Van Gorkom's representation of the details (…) the directors made no attempt to verify the adequacy of the merger price.[144]" - concluding that, regardless of the merits of the decision, there was a breach of the duty of care that gives rise to civil liability. From the same point of view, in *Shlenksy v. Wrigley*, the BJR was applied because none of the three duties were violated - good faith, duty of

[140] VALBOM BAPTISTA, João, "A Business Judgment Rule e o dever de neutralidade dos administradores da sociedade visada por uma OPA. Sobre a difícil articulação entre o art. 72º, Nº2, do CSC, e normas de conduta proibitivas específicas", p. 201

[141] COUTINHO DE ABREU, J.M (2010): "Responsabilidade Civil dos Administradores de Sociedades", 2ª ed. Almedina, Instituto de Direito das Empresas e do Trabalho, Cadernos, nº5, p. 47

[142] COUTINHO DE ABREU, J.M (2010): "Responsabilidade Civil dos Administradores de Sociedades", 2ª ed. Almedina, Instituto de Direito das Empresas e do Trabalho, Cadernos, nº5, p. 37 (citing EISENBERG, 1992)

[143] *Cede & Co. v. Technicolor, Inc*. https://www.law.upenn.edu/live/files/6825-1993-cede-and-co-v-technicolor-incsupreme-court

[144] *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). https://journals.library.wustl.edu/lawreview/article/3748/galley/20581/view/

care and loyalty - ruling out judicial review of the merits of the decision, even though it was based on personal opinions[145].

This institute of exemption from liability has many possible explanations, including the fact that judges' training is believed to be insufficient to decide on the quality of the decision itself, the lack of a comprehensive context for the company inhibits the consideration of all factors and the effect of time - which rapidly changes the circumstances and needs of the company and, therefore, the notion of what would be considered a good decision[146]. There are, of course, counter-arguments, namely how judges often rule on specific matters and how the merits of the decision go beyond any eventual changes in circumstances. Nevertheless, the most structural argument in favour of this rule is that it is economically desirable to take risky decisions, so there should be no constraints on the freedom of directors to act as they see fit for the company- in a limitation of the director's liability, but also as a protection of the integrity of the decision (since it limits the possibility of an injunction) [147].

In Portugal, Article 72(2) of the PCCC foresees that "Liability is excluded if any of the persons referred to in the previous paragraph proves that they acted in an informed manner, free from any personal interest and in accordance with criteria of business rationality." It is extracted from here that, if a director can prove the three requirements, it has the dual effect of refuting the presumption of guilt and demonstrating the lawfulness of the conduct, which will relieve the director of liability when the company seeks to fulfil the burden of proving the facts constituting the right to compensation[148].

Unlike the German option based on the criterion of good faith[149], the criterion of "business rationality" was chosen. According to Coutinho de Abreu, it can be densified as "(...) the achievement of a given end with the minimum expenditure of means (principle

[145] "(…) president refused installation of lights believing baseball to be daytime sport", from *Shlenksy v. Wrigley*. https://law.depaul.edu/admission/Documents/Shlensky%20v.%20Wrigley.pdf
[146] CAETANO NUNES, Pedro (2001): "Responsabilidade Civil dos Administradores perante os Acionistas", Almedina, pp. 24-25
[147] Ibid.
[148] According to Articles 75, 77, and 78(2) of the CSC, it is incumbent upon the plaintiff company or its substitute to prove the unlawful acts or omissions of the director that caused damage to the company's assets in order to enforce the right to compensation.
[149] C.f. § 93, (1) AktG

of economy of means), or the achievement, with given means, of the maximum degree of realization of the end (principle of maximum result).[150]" The multiplicity of possible outcomes of a business decision exposes the fragility of this or any other closed definition, which is why the same author advocates for a restrictive-teleological interpretation of Article 72(2) - which thus obliges the director to (counter)prove that he did not act in an incomprehensible manner, i.e., without a coherent explanation[151].

Although CMVM limits the influence of BJR to Article 72(2) regarding the probatory elements to be used by the defendant director to rebut the presumption of guilt[152], there are several doctrinal currents regarding the nature of BJR, which can be divided into three groups: BJR is taken as a rule for the exclusion of illegality[153], as an exclusion of guilt, or as a *tertius genius* in which it is a combination of both[154]. BJR plays, unquestionably, a major influence in the in the consolidation of the relevant elements to the exemption of directors' liability, which also contributes to the densification of their duties. This facilitates judicial scrutiny in the event of damage caused by unlawful acts, without overburdening courts with substantive evaluations that would require technical expertise that had not been previously developed by them[155]. However, BJR did not achieve its total length in Portuguese law, as "(…) a presumption of legality of the director's actions would imply a systematic fracture in our system of liability for damages, with undesirable practical consequences[156]". More so, when the American need to curb excessive litigation regarding companies and their directors' decisions is quite

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[150] COUTINHO DE ABREU, J.M (2010): "Responsabilidade Civil dos Administradores de Sociedades", 2ª ed. Almedina, Instituto de Direito das Empresas e do Trabalho, Cadernos, nº5, p. 45 (citing COUTINHO DE ABREU, 1990)
[151] Ibid., pp. 44-46
[152] CMVM (2006): "Governo das sociedades anónimas: Proposta de articulado modificativo do Código das Sociedades Comerciais. Complemento ao processo de consulta pública nº1/2006", p. 7. www.cmvm.pt
[153] C.f. FIGUEIREDO DIAS, Gabriela (2006), "Fiscalização de sociedades e responsabilidade civil", Coimbra Editora, p. 74
[154] RODRIGUES, Ricardo; LUZ SOARES, João: "Business Judgment Rule: context, presentation, analysis and thoughts", P. 708
[155] CMVM (2006): "Governo das Sociedades Anónimas: Propostas de Alteração ao Código das Sociedades Comerciais", Processo de Consulta Pública nº 1/2006, pp. 17-18. https://web.archive.org/web/20060208041011/http://www.cmvm.pt/consultas_publicas/cmvm/proposta_alter_csc.pdf
[156] CMVM (2006): "Governo das Sociedades Anónimas: Propostas de Alteração ao Código das Sociedades Comerciais", Processo de Consulta Pública nº 1/2006, pp. 18

different from the Portuguese reality, which would risk a lack of case law and, therefore, an underuse of national provisions on compensation for damages caused by directors.

e. Intersection between the CSDDD and the Portuguese Duty of Loyalty: Critical Analysis

Catholic social teaching can be considered the cornerstone of CSR, not only because of the context in which its first theorization happened[157], but because there is a moral and ethical obligation on all participants in economic activity to shape a culture that helps other to choose the good[158]. From the Aristotelian-Thomistic understanding of business and the common good, Domingo de Soto determines the key element for the ethical evaluation of commerce as its practice according to virtuous personal conduct[159].

However, the mandatory trade-offs to pursue both profit maximization and social good led to a disengagement about the merits of regulation and its effectiveness in protecting the relevant stakeholders, as directors are bound to comply[160]. The Portuguese legal framework is its own paradigmatic case, because the 2006 revision allowed the Civil Law foundation to be influenced by Common Law and by the controversial 5th Company Law Directive, even though the latter was never adopted[161].

As the duty of loyalty has both a procedural and a substantive dimension[162], and directors' remuneration falls within the reserved competence of the Shareholders'

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[157] "The Responsibilities of the Businessman" is a part of a larger study by the Department of the Church and Economic Life of the Federal Council of the Churches of Christ, in 1949.

[158] AZEVEDO ALVES, André; BOOTH, Philip; FRYZEL, Barbara (2019): "Business Culture and Corporate Social Responsibility: An Analysis in the Light of Catholic Social Teaching with an Application to Whistle-Blowing", the Heythrop Journal, pp. 604-605

[159] AZEVEDO ALVES, André; MOREIRA, José Manuel (2013): "Virtue and Commerce in Domingo de Soto's Thought: Commercial Practices, Character, and the Common Good", J Bus Ethics, p. 637

[160] FERRARINI, Guido (2022): "Sustainable Governance and Corporate Due Diligence: The Shifting Balance Between Soft Law and Hard Law", The Palgrave Handbook of ESG and Corporate Governance, p. 44

[161] FERREIRA, Bruno; SEQUEIRA, Manuel (2022): "Business Judgment Rule as a Safeguard for ESG Minded Directors and a Warning for Others", The Palgrave Handbook of ESG and Corporate Governance, pp. 270-271

[162] Ac. TRC of 15/06/2021, proc. 37/08.1TBSCD.C2, http://www.dgsi.pt.

Meeting or of a committee appointed by it[163], the right incentives have to be integrated at all levels of the firm and the investment chain, so executive decision-making can implement ESG factors into their strategy due to more than public pressure[164], ethics and law.

The intersection between the CSDDD and the Portuguese duty of loyalty brings two structural fragilities related with the expectation regarding the role of companies in addressing systemic problems and the relationship with stakeholders. As the due diligence is mandatory to be incorporated into companies' risk management policies and systems, which will scrutinise the company's operations and its value chain, we have to look at the damages that are being addressed. Environmental damage is systemic, yet endowed with a metric system that allows for its quantification; hence, social and international cooperation in its resolution is desirable. The same cannot be said with regard to human rights: their violation is systemic within certain borders, since it is up to each sovereign state to protect its citizens through the creation of laws that are enforced by institutions. This calls for the question: where are the international mechanisms for censuring and penalising states that allow their companies to resort to production in such countries, so they can benefit from the lack of capacity to claim better treatment conditions for their citizens? Even without these questions answered, the CSDDD does not shy away from interfering in the relationship between the company and the value chain when it continues to cause damage[165] and creates a voluntary precept for the company to grant compensation for the damage caused by the supplier or to influence the supplier to repair it[166]. Even with the strongest conviction that CSR is a hybrid concept, isn't the direction from soft law to hard law and not the other way around?

The requirement for "meaningful engagement" with stakeholders in Article 13, even though imbued with the spirit of CSR, interferes with management practices with a lightness that conveys a certain irresponsibility regarding the extent of what it requires. It is not because the stakeholder occupies a position of lesser bargaining power that they

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[163] Ac. STJ of 27/03/2014, proc. 9846/09.6TBMAI.P1.S1, http://www.dgsi.pt.
[164] CÂMARA, Paulo MORAIS, Filipe (2022): "Conclusion: ESG and the Challenges Ahead", The Palgrave Handbook of ESG and Corporate Governance, pp. 443-444
[165] Cf. Article 10(6) and Article 11(7) of the CSDDD
[166] Cf. Article 12(2) of the CSDDD

should be deprived of duties. The content of the information owed to stakeholders is not reasonably defined, given what is a company with a reasonable degree of confidentiality regarding its operations, and their consultation occurs at numerous stages of the due diligence process[167], which is far beyond reasonable, since this form of consultancy, when provided by someone not acting from a commercial perspective, ultimately constrains the inherent speed of the activity. Furthermore, when effective engagement is not possible, companies must consult experts on the damages[168]. Who takes responsibility for not being able to carry out the effective engagement? It is clear that it will be indirectly the company, even if for reasons not attributable to it, since this adds another cost.

This analysis, alongside institutional opinions in which economic concerns have multiplied, recognises that the CSDDD has a principled ambition that pays little attention to the practical reality of business, which further frustrates expectations that CSR will consolidate itself as an increasingly binding legal concept. There is great potential in reconciling the fiduciary duties of directors with CSR legislation, but it cannot be said that the CSDDD does not deserve the political turmoil it has experienced.

f. Proposal for Innovation

"(...) if the corporate system is to survive, - that the 'control' of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community (...)[169]"

The criterion of the "prudent and orderly manager" set by the Duty of Care in Article 64(1)(a) involves demanding, in a general and objective manner, compliance with the obligations set out in the CSDDD - which must, in the meantime, have been transposed into Portuguese law - and a subjective assessment of the director's conduct in

[167] Article 13(3) of the CSDDD
[168] Article 13(4) of the CSDDD
[169] BERLE A. Adolf; MEANS C. Gardiner (1933), "The Modern Corporation and Private Property", The MacMillan Company, p. 356 and pp. 352-356

relation to those obligations. However, the difficulty is immediately apparent: if compliance is too literal in a Directive dominated by stakeholder involvement, the interpretation of a lack of cooperation may be considered a form of illegality; if compliance is too expansive and generates even more costs than would be expected, it violates the social interest from the shareholder primacy point of view - knowing that this will, from the outset, be the dominant view among shareholders. However, in Article 72(2), influenced by the BJR, Coutinho de Abreu's understanding of what densifies the criterion of "economic rationality" allows for some clarity: if the Principle of Economy of Means does not allow compliance with the CSDDD to be rational because it entails significant costs for advantages that are not immediately quantitative or even economic in nature, this is consistent with the Principle of Maximum Result, since cooperation with stakeholders, eligibility for sustainable financial investments and greater knowledge of the company's operations through the CSDDD result in greater long-term competitiveness benefits than those offered by the traditional management method.

Other critical point relates to the duty of loyalty: when loyalty is owed to the "interests of the company", guided primarily by the "long-term interests of the shareholders", it is necessary to understand what can reasonably be anticipated as these interests. In an external context that is undergoing increasingly significant changes, it seems an obvious conclusion that the most tangible long-term interest of these shareholders will be to avoid a situation of insolvency or the need for restructuring due to a negative imbalance in the accounts. Now, Article 64(1)(b) continues with the requirement that this duty of loyalty includes consideration of the "interests of other stakeholders relevant to the sustainability of the company", followed by a list of these stakeholders which, although it is understood that it is not exhaustive, reinforces the idea that this long-term is economic in nature: employees, customers and creditors. However, while the meaning of this duty of loyalty seems to include the idea that poor short-term financial results do not translate into unlawfulness as long as the long-term is safeguarded - even to avoid hasty litigation over the potential risk of the commercial activity -, the EC's understanding when was preparing to present the CSDDD was the opposite: that shareholders were benefiting in the short-term from dividend distributions that would undermine their long-term interests, as directors do not have the incentives to adopt more holistic strategies[170].

The proposal for innovation therefore consists of amending the wording of Article 64 of the PCCC, specifically the duty of loyalty provided for in (1)(b), so that the present formulation "Duties of loyalty, in the interests of the company, taking into account the long-term interests of the shareholders and weighing up the interests of other parties relevant to the sustainability of the company, such as its employees, customers and creditors", can be supplemented by adding a number 3 to Article 64, with the following wording: "For companies to which Article 262(2) of the present Code applies, the duty of loyalty includes the duty to consult their priority stakeholders." The proposal thus focuses solely on large companies, recognising that CSR risks disproportionality when it covers - even indirectly - SMEs. For companies of this size, shareholder primacy must remain under the terms to which they are already accustomed, so that they do not incur in administrative, legal and operational costs related to CSR compliance.

The procedure is based on the idea that directors are "obliged to listen", but stakeholders are also "obliged to speak". Its practical implementation is, in this sense, a parallel system to the known and practiced Social Dialogue[171] between the Government, Trade Unions and Employers' Confederations, before the vote in the National Parliament regarding the State Budget. If the Government listens without committing itself *a priori*, how can it be proportionate to demand a greater effort from companies?

The practical implementation can happen once per year, prior to the beginning of each economy year of the company. At the end of the meeting, a report must have been drawn up with the content stated by the stakeholders. The understanding of who composes the group of stakeholders will be a difficult step due to the lack of criteria, but the European requirements are a concrete starting point. Moreso, the group's definition depends on the last word of directors in a formal communication to shareholders, accompanied by the advisory opinion of the workers' committee. This involvement is not random: workers are the one of the first stakeholders as they are directly linked to the company's operations

[170] Final Impact Assessment Report (2022). https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=celex%3A52022SC0042
[171] Cf. https://ces.pt/concertacao-social/

and the mandatory consideration of their interest is set in Article 64(1)(b), which will always have a greater weight in management than any eventual mandatory auscultation of broader stakeholders. Later, the report from the meeting can be published with the public report already required by the CSRD and, if that is the case, what the company did to incorporate the auscultation into management. The practice of this "private" Social Dialogue can even be supported by industry metrics, but the auscultation process must be kept within the company, for two main reasons: for once, because CSR happens in the internal processes of the company, and then because the figure of the stakeholder is not the same as the worker, whose bond to the company is transactional. The stakeholder's value in the company is not intrinsic: it is merely instrumental so that the company can respect environmental and human rights - those gifted of intrinsic value, indeed.

As the scope of application seeks to cover only large companies that will, most probably, have global value chains and CSR legislation emerges from European Law, it is coherent that control also occurs at European level. Furthermore, the added value that a possible delegation in Member States would have is not understood, since each one will have a different understanding of CSR and this would contribute, again, to the fracture of the internal market. With regard to the consequences of non-compliance, the French and German cases of national law regarding due diligence are the proof that it is the last form of tension. In this sense, it is here defended that the institute of civil liability remains operational for violations of this intensified duty of loyalty, but that other specific sanctions or penalties should not exist.

This proposal is coherent with relevant international regulatory framework on the subject, remembering the solutions currently in place at the international level, which already include the Enlightened Shareholder Value[172]. This proposal aims for greater legal certainty to companies that had or are going to begin to balance themselves in these tensions, often incurring numerous preventive costs due to a lack of clarity about their relationship with CSR - that is, with their stakeholders - and that the European spirit can be incorporated in a more stable manner, without destabilising consumption and production every time legislation is issued. As the incompatibility between the

[172] CÂMARA, Paulo (2025): "Governação Societária e Propósito", Almedina, Pp. 339-340

management strategy traditionally provided for in the legal system and the emerging management method post-European Green Deal keeps rising, if the necessity of a reform is underestimated, the mandatory transposition of the CSDDD in 2027 will push Article 64 PCCC to an extensive interpretation empty in social understanding and prior debate - which will contribute to the legal uncertainty that was sought to be avoided, in the first place, with the CSDDD. Regarding the contribution to the Academy, it allows for a more up-to-date densification of Article 72(2) PCCC, particularly regarding the requirements of "informed manner" and "business rationality", which provides more protection for directors in the case of litigation for breach of fiduciary duties. As to its influence in future legislation, the auscultation works as a balance that reduces the need to create legislation as invasive as the CSDDD, in which the operationality of companies continues to be the dominant theme. In fact, once the business community embraces the concept of stakeholders, attention returns to the essential: what public authorities, at national and international level, have (not) done to address systemic problems that go far beyond market weaknesses. Thus, it mitigates the appointed structural short-termism by the EC to justify the CSDDD[173], since the pressure to deliver positive financial results in the short-term can be overcome when directors are required to be aware of more variables that can contextualise and improve their long-term management strategy.

The proposal has, of course, numerous theoretical weaknesses inherent to any innovation in an already innovative area: little empirical corroboration, scepticism about changing the tradition of the article, scepticism about changing a commercial article for non-commercial purposes, accusations of excessive optimism for claiming that shareholder primacy will be maintained. There are also practical difficulties: receiving stakeholders in a timely manner so that they still can produce reflections that influence management, the reception of stakeholders who emerge later and claim that the company is obliged to receive them, the defence that consultation must be accompanied by action in a broad interpretation of the letter of the law, the demand by workers to have their interests given even greater consideration, the political influence of lobbies and

[173] Final Impact Assessment Report (2022). https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=celex%3A52022SC0042

disinvestment in industries that have the largest number of stakeholders. Specifically, in Portugal, a country with a strong traditional culture, which has sought to revitalize its economy and with a business sector dominated by SMEs, CSR concerns often take on a residual tone.

Nevertheless, it is important when we conjecture realistic solutions for complex problems - as it is the CSDDD as the culmination of CSR tensions -, that the awareness that the profit motive of companies is what shapes their nature and, consequently, their role in society, does not empty the consequences of inertia in the form of an overload of responsibilities for the director, the feeling of betrayal for the shareholder, and the marginalisation of the stakeholder.

5. Conclusion

The present Dissertation had, as juridical question, the reassessment of Article 64 PCCC in light of the CSDDD, as the culmination of CSR tensions. The defended position is that CSR is an increasing hybrid paradigm, from which emerge several tensions that the CSDDD so comprehensively expresses - economic, legal and political tensions. As a consequence, Article 64 PCCC has to be reformed, so that the largest companies can have better legal certainty: shareholders can have more realistic expectations in light of the emerging legislation, stakeholder can have a more stable influence on management strategy and directors are better protected by the current interpretation of their fiduciary duties.

Even the most skeptical opinion, which considers CSR as a symptom of social awareness dependable on an implementation that disrespects free initiative, must involve its analysis in the context of the rampant capitalism we are witnessing: increasingly global and complex value chains that seek to remain competitive by offering the cheapest financial output, even if it comes at the highest human and environmental cost. With a legislative framework that had to adapt to market behaviour in order to guarantee principles that we have considered irreconcilable since the post-war period, the traditional logic of shareholder primacy carries risks that are increasingly less prone to be ignored in the current Global village era.

This was the scenario that led to the aforementioned innovation proposal, which aims to recognise the value of tradition and the need for modernisation. Furthermore, it aims to promote, in a tense scenario, a more conciliatory solution in the spirit of hybrid CSR. From here, there are several future lines of research, among which stand out the assertive relationship and negotiating power between the worker and the stakeholder, the material differences between weighing interests and consultation in the duty of loyalty, and the private mechanisms that will be created to enforce the private "social dialogue" within each company and, more broadly, within each industry.

At the end of the day, each person's ethical judgement will determine the merit of CSR, as it is through this judgement that each person defines their economic ideology, their social ideology and, ultimately, their political ideology. This dissertation does not aim to transform any nature: neither that of companies nor that of the reader. The aim is to confront the differences between the principles of law and the management practices raised by CSR, in order to arrive at the truth that underpins Academia and nourishes the solutions for the society of the future: that it is the time for the reform of the moderates.

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