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COMPLIANCE AND SUSTAINABILITY

BRAZILIAN AND PORTUGUESE PERSPECTIVES

ORGANISERS
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SPECIAL PART

STRATEGIES AND PUBLIC AND PRIVATE COMPLIANCE INSTRUMENTS

5.

CORPORATE SOCIAL RESPONSIBILITY
CAN CONSUMERS AND INVESTORS BE PARTNERS FOR THIS PURPOSE?

INÊS PENA BARROS

Abstract: In a world in which there is more concern about the environmental and social issues and the necessity of a sustainable development, the consumers and the investors have also become more aware in this matter. Is this change of attitude in the consumers and the investor the key to motivate companies to implement practices of Corporate Social Responsibility?

This article wishes to be an abstract of the state of the art in the matter of Corporate Social Responsibility and of the compliance in the World, in Europe and in Portugal. Therefore, this study will begin by clarifying some essential considerations to the understanding of the article's focus; it follows the analysis of the methods used by the international community to encourage companies to implement practices of Corporate Social Responsibility, as well as some briefs parallels with the situation of the subject in Portugal. The article will conclude, at last, with a synthesis of the, eventual, consequences of the approaches taken until now, at an international and national level.

Keywords: corporate social responsibility; corporate companies; consumer; investor; Greenwashing; non-financial reports; sustainability

1. Initial Considerations

The present article analyses the approaches taken by the international community to encourage companies to voluntarily implement practices of corporate social responsibility through international organizations, national organizations or societal legislation, as well as the current paradigm in Portugal.

However, it is necessary to begin by clarifying certain considerations that are essential to the understanding of the subject of corporate social responsibility.

Based on the definition of Gro Harlem Broutland, to achieve truly sustainable development — that is, development that will not jeopardize the possibility of future generations themselves developing[1] — it is necessary to harmonize three dimensions: economic, social and environmental.

In the business context, this means that to contribute to the achievement of sustainable development, a company will have to consider not only the economic aspects but also the social and environmental aspects. If the notion of "corporate social responsibility" established by the European Union in the Communication (2011) 681 final as "actions by companies over and above their legal obligations towards society and the environment"[2] is taken into account, then the implementation of practices of corporate social responsibility is a way for companies to contribute to sustainable development.

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[1] Gro Harlem Brundtland *et al., Our Common Future: Report of the World Commission on Environmental and Development.* Disponível na internet: <http://www.un-documents.net/ocf-02.htm#I>.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — *A renewed EU strategy 2011-14 for Corporate Social Responsibility,* 4.

In a utopian world, a company would incorporate corporate social responsibility practices without any form of obligation and incentive, as only in this way would they contribute to sustainable development, which would always be the ultimate goal of the company.

It happens, however, that societal law, in most jurisdictions, has dispositions that encourage directors to try to obtain the greatest possible profits in a short period, thus protecting the shareholders of the company[3]. In the Portuguese legal system, leaning on the notion of "partnership" established in article 980º of the Portuguese civil code (CC)[4], the purpose of the company is to obtain profit, which means that many companies' directors main focus is the economic dimension alone, and they ignore the other dimensions (social and environmental).

In addition to the argument of the notion of "partnership" — and, consequently, the notion of corporation — is the issue of the legal duties of the directors. In most international jurisdictions[5], as well as in Portugal, the director has a legal duty of care that translates to a duty of applying the time, effort and knowledge that are required by the nature of the director position, the competences and the circumstances[6]; it is important to note that this duty has a strong economicconnotation[7]. From the perspective of some authors,

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[3] Stephen J. Turner, *Corporate Practice: Addressing the Balance between Commercial Success and Environmental and Social Responsibility,* 3; and Hanne Birkmose / Mette Neville / Karsten Engsis Sørense, ed., *Boards of Directors in European Companies: Reshaping and Harmonising Their Organisation and Duties.* The Netherlands: Kluwer Law International, 2013, 158.

[4] This notion is the basis for the notion of the corporate company, established in article 1º, nº 2 of the CSC.

[5] Stephen J. Turner, *Corporate Practice,* 3.

[6] Jorge Manuel Coutinho de Abreu, *Responsabilidade Civil dos Administradores de Sociedades.* Coimbra: Almedina, 2010, 18.

[7] Hanne Birkmose / Mette Neville / Karsten Engsis Sørense, ed.,

this duty means that during decision-making, the director must prioritize the economic dimension over the social and environmental dimensions[8].

However, is it possible to pursuit profits and maintain the company's economic viability, even while implementing corporate social responsibility practices?

Many studies have confirmed that a cultural shift has been occurring in the market[9]. Today, most consumers claim that they prefer to acquire a product designed by a sustainable company (that is, by a company that incorporates corporate social responsibility policies in the conception of the product and management of the company) than one made by a company that does not respect its workers, human rights and/or the environment, even if the sustainable product costs more. This means that in principle, being sustainable may be a competitive value for the company.

2. The role of the consumer and of investment in corporate social responsibility

The subject to be analysed in the present article is the one that was introduced in the previous section — the consumer, the investor and theory of the greater long-term profits associated with corporate social responsibility.

As mentioned before, studies have claimed that the consumer prefers a product designed in a sustainable way and

Boards of Directors in European Companies, 158.

[8] Stephen J. Turner, *Corporate Practice,* 3

[9] *Livro Verde — Promover um quadro europeu para a responsabilidade social das empresas,* Bruxelas, 18/7/2001 [com (2001) 366 final], 8; Nick Feinstein, "Learning from Past Mistakes: Future Regulation to Prevent Greenwashing". *Boston College Environmental Affairs Law Review* 40/1 (2013) 231-232; and Timothy C. Bradley, "Likelihood of Eco-Friendly Confusion: Greenwashing and the ftc Green Guides". *Landslide* 4/1 (2011) 39.

that sustainability has become a competitive value. Therefore, on the basis of the aforementioned economic and financial logic that a company's directors follow and that they must obey to as their legal duty, a director could integrate practices related to social and environmental concerns in the management of the company since in this way, they can increase the profits obtained, which is the purpose of the company.

Based on this premise, international organizations such as the UN Global Compact[10], the World Business Council for Sustainable Development[11], the Organisation for Economic Co-operation and Development[12] and, in a strictly national scope, the Associação Portuguesa de Ética Empresarial[13] have attempted to ensure that companies and groups of companies adhere voluntarily to their organizational goals. Although the company chooses to become part of the organization, from the moment that it does, it must comply with the requirements of the association in order to enjoy the perks that the organization offers. For example, if a company is part of the UN Global Compact, it must produce an annual report, which the Global Compact calls a Communication on Progress (COP), in which it discloses basic non-financial information; if the company fails to report, it may not be able to enjoy the benefits of membership, such as the use of the Global Compact logo[14].

This is how international organizations encourage companies to implement voluntary practices of corporate social responsibility when the jurisdictions themselves do

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[10] Available at: <https://www.unglobalcompact.org/>.

[11] Available at: <https://www.wbcsd.org/>.

[12] Available at: <http://www.oecd.org/>.

[13] Available at: <http://www.apee.pt/>.

[14] Available at: <https://www.unglobalcompact.org/participation/report/cop>.

not do so. Even though most of the main jurisdictions do not mention social responsibility, there are some exceptions, such as the English legal system[15] and, according to Coutinho de Abreu[16], the Portuguese legal system. According to this Portuguese author, under the legal duty of loyalty[17] established by item b) of number 1 of article 64º of the corporate code (CSC), the directors must consider, in their decision-making, actors such as clients, providers, and workers who together may constitute the ratio of corporate social responsibility. Says the author that, by exemplifying, the Portuguese legislation covers all dimensions that corporate social responsibility is intended to protect — which means that it is unnecessary to speak of corporate social responsibility in Portugal[18].

Beyond these exceptions, it is worth mentioning that in the remaining jurisdictions, in which corporate social responsibility is not mentioned, some authors — such as Beate Sjåfjell[19] —

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[15] Companies Act 2006, section 172 (1), particularly (b), (c) e (d). Available at: <https://www.legislation.gov.uk/ukpga/2006/46/section/172>.

[16] Jorge Manuel Coutinho de Abreu, *Responsabilidade Civil dos Administradores de Sociedades*, 7-8 (in press).

[17] The duty of loyalty is the second general legal duty that a director is obliged to observe. This is the duty of directors to have the interest of the company exclusively in mind and to find ways to satisfying that obligation, abstaining from promoting their own interests or the interests of a third party. Jorge Manuel Coutinho de Abreu, *Responsabilidade Civil dos Administradores de Sociedades*, Coimbra: Edições Almedina, 2010, 25.

[18] The author criticizes the lack of legal instruments at the disposal of these actors to hold responsible the directors who do not comply with the duty of loyalty. Jorge Manuel Coutinho de Abreu, *CSR: "responsabilità" senza responsabilità (giuridica)? Giurisprudenza Comerciale* (in press), 7-8.

[19] Beate Sjåfjell / Anja Wiesbrock, ed., *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously.* London / New York: Routledge, 2015, 97-117; and Hanne Birkmose / Mette Neville / Karsten Engsis Sørense, ed., *Boards of Directors in European Companies*,153-178.

question this purely economic mentality and find legal ways through which the directors not only may implement corporate social responsibility practices but also must do so.

In the international panorama, it is necessary to speak of corporate social responsibility as well as the ways through which it is possible to implement such practices in the business environment with greater frequency. In this context, claims Miriam A. Cherry[20], consumers and investors may be determining factors.

In a way, consumers may strongly influence companies to implement corporate social responsibility practices for the reasons mentioned before — if, between two products, the consumer chooses the one designed by a sustainable company, then for a profit reason, any company will have a competitive advantage in being perceived[21] as sustainable. Therefore, a company will gain economic and financial benefits from observing social and environmental concerns, and the directors will be in compliance with their legal duty of care in considering those concerns.

If this motivation for creating sustainable products did not exist through a purely economic and financial logic implemented by company's directors, there would be no benefit in investing in corporate social responsibility. Moreover, the directors could even risk being accountable for the losses of the company owing to not complying with their legal duties[22].

Because consumers want and demand sustainable products (designed in a sustainable way and by sustainable companies), this demand ultimately encourages companies to invest

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[20] Miriam A. Cherry, "The Law and Economics of Corporate Social Responsibility and Greenwashing". *UC Davis Business Law Journal* 14/2 (2014) 283.

[21] The expression "being perceived" is used rather than "being" because of an issue that has being raised and will be explored in the next section: greenwashing.

[22] Except for some cases, such as the Companies Act of 2006.

in a shift of practices to take into consideration social and environmental issues since, in principle, the company will obtain more future profits for being socially responsible.

Another actor mentioned by Stephen Turner who can make a difference in encouraging companies is the investor[23].

Today, many investors have a policy of investing only in companies that are considered sustainable, which means that being perceived as sustainable or not sustainable could be the difference between obtaining an investment or not. For this reason, there are many ways of distinguishing between sustainable and unsustainable companies, either by the creation of different ranking lists[24] or by the creation of indices such as the Dow Jones Sustainability Indices (DJSI)[25].

Regardless of the form used, the result is the same, and the companies are divided into two large groups: sustainable and unsustainable. Through this division, the investor decides whether to invest; therefore, companies must be aware of this classification.

Basically, through the perception of either consumers or of investors, what the company truly needs to manage is its image because through this, it can be perceived as sustainable and thus obtain more future profits.

3. ***Greenwashing***

The preceding sections have developed a logic by which it can be concluded that even if a director has a legal duty to prioritize the economic sustainability of the company, a

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[23] Stephen J. Turner, *Corporate Practice,* 9.

[24] Available at: <https://www.ft.com/content/74c1e548-9ccd-11e9-b8ce-8b459ed04726>.

[25] Available at: <*https://www.robecosam.com/csa/indices/?r*>.

company can obtain competitive benefits in implementing corporate social responsibility because consumers and investors are demanding it at this moment. Briefly, being perceived as sustainable results in profits for the company.

The question that arises from this logic is exactly that of "being perceived". Basically, the problem that arises with the theory of greater long-term profits is that companies, instead of implementing practices of corporate social responsibility, implement practices of greenwashing. That is, they develop practices that allow them to create an (untrue) image that they respond to social and environmental concerns so that they can obtain an image that is more appealing to consumers and investors to obtain more profits[26].

As mentioned before, the shift in a company's behaviour implies an early investment in order to consider social and environmental concerns; the company hopes to gain a return on that investment in the future by obtaining more profits for being sustainable, as consumers prefer their sustainable product, or when investors favour their company for investment. What if the company can have "the best of both worlds"?

The truth is that this issue is simply a matter of image management. A company only has to be perceived as sustainable for consumers and investors to prefer it, even if in reality, the company is not truly sustainable. BP and Volkswagen are two known examples that prove that a company needs only good image management. For years, environmentalists recommended that consumers fuel their cars at BP stations because BP was considered a sustainable company; in turn, consumers would go out of their way to fuel at a BP station for

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[26] Michelle E. Diffenderfer / Keri-Ann C. Baker, "Greenwashing: What Your Clients Should Avoid". *GPSolo* 28/6 (2011) 2; Nick Feinstein, "Learning from Past Mistakes", 233; e Miriam A. Cherry, "The Law and Economics of Corporate Social Responsibility and Greenwashing", 284.

this reason[27]. However, with the Deepwater Horizon disaster, it became known to the public that BP's practices before and during the disaster not only were not sustainable but also put the lives of workers at risk[28]. In the same way, Volkswagen won sustainability awards for years until 2016, when the public learned that the company had adulterated the results of its car emissions testing in order to comply with the legal requirements, creating what is called the Dieselgate scandal[29].

In this context, it is perceived that this approach to win over consumers and investors, that is, the image of the company, can be beneficial but also harmful. Owing to scandals such as those mentioned above, consumers and investors will become sceptical in believing a company's allegations that is sustainable[30]; in becoming sceptical, they will stop acquiring sustainable products and invest specifically in this type of company, which will eventually lead to the loss of the competitive benefit that the international organizations claim exists[31].

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[27] Miriam A. Cherry / Judd F. Sneirson, "Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster". *Tulane Law Review* 85/4 (2011) 1003.

[28] For more information on the BP scandal, see Miriam A. Cherry / Judd F. Sneirson, "Beyond Profit"; e Brittan J. Bush, "Addressing the Regulatory Collapse behind the Deepwater Horizon Oil Spill: Implementing a Best Available Technology Regulatory Regime for Deepwater Oil Exploration Safety and Cleanup Technology". *Journal of Environmental Law and Litigation* 26/2 (2011).

[29] For more development on the sustainability awards won by Volkswagen, see its sustainability report (specially pages 74 ss.), available at: <https://www.volkswagenag.com/presence/nachhaltigkeit/documents/vw_Sustainability-Report_2016_EN.pdf>.

[30] Michelle E. Diffenderfer / Keri-Ann C. Baker, "Greenwashing: What Your Clients Should Avoid". 32.

[31] Miriam A. Cherry / Judd F. Sneirson, "Beyond Profit", 986; Nick Feinstein, "Learning from Past Mistakes", 235 e 250; e Miriam A. Cherry, "The Law and Economics of Corporate Social Responsibility and Greenwashing", 283.

For this reason, watchdogs such as Terrachoice and reports of sustainability (or the availability of non-financial information) have become important. These are ways to oblige companies to disclose information that can confirm that they actually implement practices of corporate social responsibility, that is, that they are truly sustainable.

Terrachoice is an example of a frequently cited watchdog[32]; in 2007, it created a report in which it not only analysed the percentage of "sustainable" companies that use Greenwashing but also managed to educate consumers regarding how to realize whether a company is using greenwashing. In this report, the organization created a list of "sins" — with a brief explanation and practical examples — through which a consumer can understand whether a company is truly sustainable or just trying to be perceived as such; in this way, Terrachoice managed to simplify the complex concept of greenwashing and educate consumers to become watchdogs themselves. In addition to this educational aspect, the report provides statistical dada regarding the amount of products that are actually sustainable. In 2007, when the report was first produced, the organization concluded that only one in 1,018 "sustainable" products analysed was not associated with at least one of the sins, that is, did not resort to greenwashing[33]; in 2010, the last year that the report was produced, 4.5% of the products were sin-free[34].

Despite the good work that these watchdogs are doing to

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[32] Michelle E. Diffenderfer / Keri-Ann C. Baker, "Greenwashing: What Your Clients Should Avoid". 46; Nick Feinstein, "Learning from Past Mistakes", 233-234; e Miriam A. Cherry, "The Law and Economics of Corporate Social Responsibility and Greenwashing", 285.

[33] Available at: <http://sinsofgreenwashing.com/findings/greenwashing-report-2007/index.html>.

[34] Available at: <http://sinsofgreenwashing.com/findings/greenwashing-report-2010/index.html>.

combat greenwashing[35], the truth is that it is not always easy to do so, especially when the information that they need is in the hands of the companies that are being "inspected". It is necessary, therefore, to make companies disclose non-financial information[36] and, in this context, to produce reports containing non-financial information or information about integration or sustainability. Whatever name is given to the report, they all have the same ratio of public information about social and environmental issues as well as the normal financial information[37].

The subject of non-financial reports is particularly relevant, and such reports have been well studied since, despite being initially voluntary, they later emerged in contexts in which they are mandatory for the companies.

Initially, the integrated report emerged in South Africa with the- King III Code, which demanded that the companies listed in the Johannesburg stock exchange produce this report[38]. More recently, in the scope of the European Union, Directive 2014/95/EU[39] — required[40] approximately 6,000

[35] For this opinion, see Nick FEINSTEIN, "Learning from Past Mistakes", 235.

[36] Miriam A. CHERRY, "The Law and Economics of Corporate Social Responsibility and Greenwashing", 292.

[37] Beate SJÅFJELL / Anja WIESBROCK, ed., *The Greening of European Business,* 118.

[38] Beate SJÅFJELL / Anja WIESBROCK, ed., *The Greening of European Business,* 126-127.

[39] DIRECTIVE 2014/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2014, amending Directive 2013/34/EU regarding the disclosure of non-financial and diversity information by certain large undertakings and groups. Official Journal of the European Union (15.11.2014).

[40] It is relevant to note that this is a slightly different obligation because it applies the comply-or-explain principle, which means that the

large European companies[41] to produce a report that contains non-financial information.

Even in scenarios (such as those ones mentioned before) in which it is mandatory to report, integrated reports do not always emerge in these contexts. Sometimes, companies wishing to improve their image and show how sustainable they are voluntarily produce this kind of report[42]. When such reporting happens, however, from the initiative of the company, it is also the company that decides what criteria to use and what information is relevant. Therefore, the innumerable reports that result are ultimately useless because it is impossible to compare them[43]; in addition, they show only what the company wants to share with the public and do not disclose information that is relevant to consumers and investors[44]. In this context, a set of international organizations — of which Global Reporting Initiative[45] and International

company can not produce this report but then must justify why it did not do so. See article 19º-A of the DIRECTIVE 2014/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2014, amending Directive 2013/34/EU regarding the disclosure of non-financial and diversity information by certain large undertakings and groups. Official Journal of the European Union (15.11.2014).

[41] Beate SJÅFJELL / Anja WIESBROCK, ed., *The Greening of European Business,* 141; Stephen J. TURNER, *Corporate Practice*, 8; and Martha C. WILSON, "A Critical Review of Environmental Sustainability", 5.

[42] Martha C. WILSON, "A Critical Review of Environmental Sustainability Reporting in the Consumer Goods Industry: Greenwashing or Good Business". *Journal of Management and Sustainability* 3/4 (2013) 1.

[43] Beate SJÅFJELL / Anja WIESBROCK, ed., *The Greening of European Business,* 141; Stephen J. TURNER, *Corporate Practice*, 8; e Martha C. WILSON, "A Critical Review of Environmental Sustainability", 5.

[44] About the potential manipulation, see Martha C. WILSON, "A Critical Review of Environmental Sustainability", 8.

[45] Available at: <https://www.globalreporting.org/Pages/default.aspx>.

Integrated Reporting Council[46] are examples — has emerged of which the only goal is to create criteria for this kind of report in order to make it universal and thus comparable.

Despite these attempts to create universal criteria for non-financial reports, the truth is that these attempts have not been truly productive. On the one hand, these criteria must be abstract enough to be applied to any company and to different industry sectors; on the other hand, they cannot be ambiguous to the point of not giving the necessary information to enable consumers and investors to form an opinion about the company in terms of social and environmental issues. According to some critics, this balance has not yet been found, but the existence (and, in some cases, the obligation) of these reports is nonetheless an important step towards the goal of sustainable development.

4. **Conclusion**

It can be concluded from this analysis that in the current paradigm, the course of corporate social responsibility has been mainly voluntary.

Basically, a company is encouraged to concern itself with social and environmental issues since, in principle, such efforts will be recognized by consumers and investors, who will prefer this sustainable company to others that have not made the same investment.

Although this approach has many benefits, the truth is that it may also be harmful to the goal. Through this approach, the encouragement to implement practices of corporate social responsibility ultimately improves the companies' image for consumers and investors, but what if the company implements practices that only give the appearance that it is sustainable?

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[46] Available at: <https://integratedreporting.org/the-iirc-2/>.

This is a great risk, and to overcome it, even in part, it is mandatory that the companies be more transparent and disclose information that can confirm this appearance. Currently, this "inspection" of companies — in hopes of overcoming the problem of greenwashing — is being performed mostly by watchdogs and through reports of non-financial information.

Even as these matters develop and potentially contribute more assertively to the achievement of sustainable development, the truth is that it can be more productive to explore other approaches in order to achieve this global goal as soon as possible.