Getting serious about the role of company law in sustainability: a rewrite of Articles 64 and 72(2) of the Portuguese Companies Code?

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Abstract:
The article examines the evolution of company law in response to the demands of environmental and social sustainability. It argues for a 'duty of sustainability' on the part of directors, which would operate as a residual duty alongside the duty of legality (which makes directors personally liable for ESG duties directed at the company). It is shown that the duty of sustainability can be built on the basis of the current legal framework, but that its effectiveness could be enhanced by amending Article 64 of the Portuguese Companies Code, which regulates directors' duties. A proposal is therefore made for a new wording for this provision, as well as for Article 72(2) of the same Code, which regulates the business judgement rule. The aim is to launch a public debate on the issue.

Keywords:
Sustainability; director's duties; business judgement rule

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1. Introduction to the Duty to Promote Environmental and Social Sustainability: A Review of Corporate Law Structures

The aim of this text is to show that, in the light of the changes dictated by the objectives of environmental and social sustainability, company law has undergone a structural transformation and that the current legislative and recommendatory framework has given rise to a 'sustainability duty' on the part of the director.[1] This duty is not limited to compliance with the specific rules to which the company is subject in environmental and social matters, but encompasses the entire sphere of action of the director and the company. This movement tends to be accompanied by the convergence of

[1] See Rui Pereira Dias/Mafalda de Sá, 'Deveres dos administradores e sustentabilidade', in Paulo Câmara (ed), Administração e Governação das Sociedades. Coimbra (Almedina 2020) 33-85.

investors, financiers and the market, but does not depend on the individual priorities of the subjects considered.[2-3]

The present moment is characterised by the international emergence of climate litigation with a focus on managers.[4] Making directors responsible and not the company represents an additional step, which should be approached with caution. Furthermore, the liability of directors, where it exists, is in principle internal, i.e. to the managed company, which will then be liable to third parties. However, the exceptional possibility of third parties suing directors is not excluded when the rule or duty violated has a direct protective effect on them. The possibility of direct actions against directors will continue to be tested in the near future.

The current legislative framework already binds directors to this duty of sustainability, which doesn't mean that there isn't an interest and convenience in making it clear that company law serves the value of sustainability.

Ultimately, what is at stake is a process of deepening the ethical vector of company law, which is not opposed to the ultimate goal of profitability. The transformation is radical and will involve the *pie-growing mentality* to which EDMANS emblematically introduced us:[5] we are aware that companies can benefit from creating value for investors and creating value for society by overcoming the *pie-splitting mentality,* in such a way that the company will achieve a *win-win* situation and financial success and social and environmental success become inseparable. But there is no denying that in the day-to-day decisions that managers make, there will always be a choice between the most beneficial solution for shareholders and the one that best balances profitability and sustainability.

2. The Regulatory Framework

In the age of sustainability, company directors are operating within a very dense regulatory framework, European and national, that leaves little or no room for business decisions that are not predetermined.[6] The regulatory web is vast, in order to achieve the objectives of the Paris Agreement

[2] See Ana Perestrelo de Oliveira, 'Sustainable corporate finance', in *Treatise on Environmental Law* (2024), forthcoming.

[3] It covers all sectors, including banking. See Ana Perestrelo de Oliveira, 'Fit for Paris: Banking and the sustainability governance', Catolica Law Reviw, 8 No. 1 (2024) forthcoming.

[4] So far without success. In July 2023, a landmark case was decided in England, in which Climate Earth claimed that the directors of Royal Dutch Shell had breached their duties by failing to take sufficient account of climate risk in their decisions. [2023] EWHC 1897 (Ch). In this case, the English court considered that there had been no *prima facie* evidence of a breach of duty on the part of the directors, but it was an interesting warning, nonetheless.

[5] ALEX EDMANS: Grow the Pie. How Great Companies Deliver Both Purpose and Profit (Cambridge University Press 2021) 4 ff.

[6] THILO KUNTZ, 'ESG and the weakening business judgement rule', in KUNTZ, THILO (ed.), Research Handbook on Environmental, Social, and Corporate Governance, Forthcoming (2023), <https://ssrn.com/abstract=4395003>, accessed 17 January 2024.

and the conclusions of the 2019 European Council, which aim for a climate neutral European Union by 2050.[7-8]

The attainment of climate and social EU's objectives is ensured through intense and far-reaching regulation, using both hard law requirements and market incentives. One can identify four pillars that make up the EU's sustainability framework in what Corporate Law is concerned:[9]

(i) The classification system, or 'taxonomy' of sustainable activities:[10] Taxonomies make it possible to assess whether and to what extent an asset is in line with sustainability objectives. Taxonomies provide a consistent system for identifying certain characteristics that are considered 'sustainable'. In the European context, the Taxonomy Regulation and its delegated acts harmonise the criteria for determining whether an economic activity is environmentally sustainable.

(ii) The disclosure framework for financial and non-financial companies. This includes the Non-Financial Reporting Directive (NFRD),[11] the Sustainable Finance Disclosure Regulation (SFRD),[12] the Corporate Sustainability Reporting Directive (CSRD),[13] supplemented by the future Corporate Sustainability Due Diligence Directive (CSDDD), as well as Article 8 of the Taxonomy Regulation.

(iii) Investment instruments, including benchmarks, standards, and labels: (a) Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 (Low Carbon Benchmark) amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related

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[7] Adopted under the United Nations Framework Convention on Climate Change, and approved by the European Union by Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 282, 19.10.2016) 1.

[8] This target comes alongside intermediate targets to reduce emissions by 55% by 2030, as a result of the Fit for 55 strategy, as well as the objectives of ending dependence on Russian fossil fuels by 2030, under the REPowerEU plan.

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Financing the transition to a sustainable economy [COM (2021) 390 final].

[10] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

[11] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[12] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

[13] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU as regards corporate sustainability reporting.

disclosures for benchmarks; (b) the aforementioned Taxonomy Regulation; (c) the Regulation on European Green Bonds;[14] and (d) the EU Ecolabel Regulation.[15]

(iv) Proposed Corporate Sustainability Due Diligence Directive (CSDDD). The directive makes companies responsible for the impact on human rights and the environment of the company's operations and its value chain. But the Directive states in Article 25 that Member States must ensure that, in fulfilling their duty to act in the interests of the company, directors take into account the sustainability consequences of their decisions, including, where appropriate, the consequences in terms of human rights, climate change and the environment, including in the short, medium and long term. The direct accountability of directors, provided for in Article 26, has disappeared in the latest version of the proposal.

These acts are applicable in Portugal, either directly or indirectly. The NFRD, in particular, was transposed by Decree-Law 89/2017 of 28 July, which amended the Companies Code (introducing Articles 66-B, 508-G and 546 and amending Articles 65, 451 and 528) and amended Article 246-A of the Securities Code, while the transposition of the CSRD is still underway.

In addition, Portugal's commitment to sustainable finance is enshrined in the Basic Climate Law,[16] with Article 3(m) stating that ‘public climate policies aim to achieve ecological balance by fighting climate change and pursuing the following objectives: m) boosting sustainable finance and promoting information on climate risks for economic and financial agents’. Sustainable finance - whether at the State or private level - is governed by a set of principles laid out in Article 34 of the Basic Climate Law.

For its part, Article 38 of this law requires that ‘the duties of care, loyalty, management reporting and presentation of accounts include prudent consideration and the sharing of transparent information on the risk that climate change poses to the business model, capital structure and assets of companies’.

What's more, we can't ignore the so-called ‘multiplier effect’, which means that a country's legislation or European legislation (for example) becomes applicable to companies to which *prima facie* it wouldn't apply, through contracts: companies subject to a jurisdiction where such duties are in force contractually impose them on companies in other jurisdictions.[17] This well-known ‘cascade effect’

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[14] Proposal for a Regulation of the European Parliament and of the Council on European Green Bonds, Brussels, 6.7.2021, COM (2021) 391 final. The text was adopted by the European Parliament and the Council on 5 October and 23 October 2023, respectively.

[15] Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009

on the EU Ecolabel.

16 Law no. 98/2021, of 31 December.

17 For example, in Germany, there are requirements regarding companies' supply chains: this means that German companies that contract with Portuguese companies will incorporate certain standards into the contracts that ensure compliance with German law. Inherently, Portuguese companies are indirectly bound by the

(or 'Brussels effect', when applied to European legislation) is also accompanied by the adoption of international sustainability standards in contracts and the adoption by companies of codes of governance, to which they are bound even in the logic of comply or explain.

Sustainability concerns are addressed, for instance, in the Governance Code of the Portuguese Institute of Corporate Governance,[18] revised in 2023. Principle I.A states that 'in their organisation, operation and in the definition of their strategy, companies shall contribute to the pursuit of the Sustainable Development Goals defined within the framework of the United Nations Organisation, in terms that are appropriate to the nature of their activity and their size'. For its part, Principle I.B. states that 'the company periodically identifies, measures and seeks to prevent the negative effects related to the environmental and social impact resulting from the exercise of its activity, in terms adjusted to the respective nature and size of the company'. Principle I.C. indicates that 'in its decision-making processes, the management body weighs up the interests of shareholders and other investors, employees, suppliers and other stakeholders in the activity of the company'. The issue of sustainability also deserves attention in Chapter VIII of the Governance Code, regarding the adequacy and disclosure of non-financial information, as well as in Chapter VII, dedicated to internal control, which incorporates recommendations on environmental and social risk.

Sustainability in soft law still has a long way to go. The revision of the UK Corporate Governance Code[19] is a good example of the process that is needed.

There are conflicting views on the changes underway: some emphasise the risk of excessive liability for directors due to the dense web of duties related to sustainability that have been added to the traditional set of duties; others, on the other hand, believe that the existence of new benchmarks for directors' actions creates room for them to invoke the pursuit of the interests of certain stakeholders in the face of any potentially harmful action, and that 'responsibility to all is responsibility to none'. Admittedly, there can be little doubt that the demands placed on directors and the risks inherent in their activity have worsened, especially when the very requirements for the operation of the business judgement rule have also changed, as we shall see.

3. The Juridification of Stakeholders' Interests and the Structural Transformation of Corporate Law

Rather than being at the center of governance systems, shareholders act almost exclusively as referees to the company's management, although the latter is obliged to take other interests into account. In private limited companies, shareholders have formal control over management. Even in

requirements of German law, not as German law, but as contractual rules. Madalena Perestrelo de Oliveira, 'Sustainable corporate governance', in Treatise on Environmental Law (2024), forthcoming.

[18] https://cgov.pt/images/ficheiros/cgs-europeus/portugal-en.pdf

[19] https://media.frc.org.uk/documents/UK_Corporate_Governance_Code_2024_FF6VFzi.pdf.

public limited companies,[20] the general meeting - as the meeting or representation of the company's *owners* - is the sovereign body, is neither elected nor appointed by anyone else and decides on the most important corporate issues (e.g., corporate changes and structural modifications).[21] This means that, in practical and legal terms, directors - elected and controlled by the shareholders - are empowered to decide on management matters, but these powers are merely a consequence of the necessary professionalisation and streamlining of company management. Thus, the *operational or practical* centrality belongs to the management body, but the *structural* or *fundamental* centrality continues to belong to the general meeting, which naturally poses difficulties when it comes to introducing different corporate management references.

The truth is that in public limited companies, where the challenges of regulating interests are most acute, the board of directors concentrates almost all of the company's powers, but its centrality is merely functional and not structural. Structural centrality belongs to the shareholders. Corporate governance was therefore centered on ensuring that the directors' interests were aligned with those of the shareholders, without prejudice to the lateral consideration of the position of other stakeholders.

Quite simply, the above set of duties means that today we are witnessing a 'juridification of stakeholder interests',[22] which is dictating a structural change in company law that is moving towards putting shareholders and stakeholders on an equal footing. In the new green and social company law, the very foundations of company law are at stake: with more or less enthusiasm, the new company law is at the service of sustainable transformation, regardless of the wishes of the company's owners. If until now, in the confrontation between shareholder value and stakeholder

[20] Private limited companies are characterised by their personal nature and managers are bound by the shareholders' resolutions on management matters (article 259). See, for example, RAÚL VENTURA, *Sociedades por quotas. Comentário ao Código das Sociedades Comerciais*, vol. II. Coimbra (Almedina, 1989) 165; MENEZES CORDEIRO, *Manual de direito das sociedades*, vol. II, Coimbra (Almedina, 2006) 403 and 404. In public limited companies, there is a 'principle of board independence'. Article 405, in conjunction with Article 373(3), means that, in management matters, the board of directors is sovereign and the shareholders are only called upon to give their opinion at the request of the directors. The competence of the general meeting, without prejudice to the tasks specifically assigned to it by law or the articles of association, is delimited by the negative. On the organisational structure of companies, see COUTINHO DE ABREU, *Curso* DE *Direito Comercial. Das sociedades,* vol. II. Coimbra, (7th ed., Almedina, 2021) 70 ff.

[21] In addition to the election and dismissal of members of the board of directors, the main issues at stake are: (i) matters involving direct control over the performance of the management body throughout the financial year: e.g. approval of the report and accounts; general appraisal of the management and supervision: Article 376/1, a) and c).(ii*)* validation of the proposal for the appropriation of profits (Article 376(1), *b))*, as well as all outflows of company assets by way of distribution (Article 31), taking into account their impact on the company and its shareholders; (iii) acquisition of own shares (Article 319), in order to guarantee the preservation of the company's financial position; (iv) changes to the articles of association, including increases and reductions in the share capital (Articles 85 ff.); (v) mergers (Articles 97 ff.), de-mergers (Articles 118 ff.) and transformations (Article 130 ff.); (vi) moving the registered office abroad (Article 3), with an inherent change in the company's personal law; (vii) conclusion of a subordination contract (Article 496/1) or equal group contract (Article 492/2), (viii) creation of a group relationship by total control (Article 489/2), with a potential shift of management power within the group; (ix) dissolution of the company (Article 141(b)) and (x) return of the dissolved company to business (Article 161). For further information, see MENEZES CORDEIRO/DAVID OLIVEIRA FESTAS, article 373, in *Código das Sociedades Comerciais anotado.* Coimbra (3rd ed., Almedina, 2020) 1249; COUTINHO DE ABREU, Article 373, in *Código das Sociedades Comerciais em Comentário,* vol. VI. Coimbra (Almedina, 2013) 17 ff.

[22] Kuntz, 'ESG and the weakening business', 6.

value, the latter had no weapons with which to prevail in concrete, the regulatory change that has taken place dictates an equalisation of interests and the end of the practical prevalence of shareholder interests.

It cannot be denied that this change represents an interference by public policies in the purely private structure of company law[23] and translates into a functionalisation of private law, albeit justified by the climate emergency. Corporate law is recovering some of the institutional interference that had disappeared.

While it is often argued today that financial and sustainability interests naturally converge, in the day-to-day practice of corporate decision-making it will always be a matter of managing conflicting values.[24]

4. The Duties of Directors Related to Sustainability

Directors have a relevant set of duties related to sustainability:

a) **Duty of legality (duty to ensure compliance with sustainability regulations):** although ESG duties are directed at the company,[25] they indirectly become duties of the directors, despite the legal personality of the company, due to the phenomenon of organic representation. The purpose of the duty of legality is to impose directly on the director, in a personal capacity, the duty to ensure compliance with the legal, contractual and other duties that affect the company. This duty, in principle, is only internal, but it cannot be excluded that, in exceptional cases, it may be interpreted as a duty to protect third parties, thus opening the door to external liability of the directors, with the inherent dangers.[26] This is an issue to be discussed further.

b) **Duty of organisation and *compliance*:** the duty of legality derives from the duty to monitor compliance with sustainability obligations, dogmatically situated in the area of the duty of care. Depending on the size of the company, its complexity and the specific risks involved, it may be necessary to formally implement internal risk management and compliance systems.

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[23] Madalena Perestrelo de Oliveira, 'Sustainable corporate governance cit.

[24] The analysis is based on the assumption of a profit-making company, which does not mean that there cannot be a different statutory configuration, taking advantage of contractual freedom regarding the (non-)minimum distribution of profits. Non-profit companies can, however, exist.

[25] Not even Article 25 of the CSDDD is currently being considered in the proposal.

[26] On this duty, see, for example, Fleischer, ‚Aktuelle Entwicklungen der Managerhaftung' (2009) NJW 32, 2337-2400; Manuel Carneiro da Frada, 'O dever de legalidade: um novo (e não escrito?) dever fundamental dos administradores' (2012) DSR 4, vol. 8, 65-74. Linking the requirement to comply with legal rules to duties of loyalty, see KUNTZ, 'ESG and the weakening business' cit.

c) **Duty to monitor ESG risks in general:** the scope of the duty of compliance is unclear, particularly in terms of whether it extends to a duty to monitor sustainability risks. Monitoring compliance with specific legal rules and duties is not to be confused with the duty to implement internal reporting and control systems for ESG risks (*e.g.* climate aspects, scarcity of environmental resources, labour issues, human rights). The Portuguese Institute of Corporate Governance (IPCG) Governance Code establishes, in Chapter VII on internal control, a duty for the company to set up processes to collect and process data related to environmental and social sustainability, to alert the management body to the risks the company is incurring and to propose strategies for mitigating them. It also must report on how climate change is taken into account in the organisation and how it takes climate risk analysis into account in decision-making processes.

d) **Duty to adopt the most sustainable solution, provided that it does not involve an unreasonable sacrifice of shareholder interests.** Placing the interests of stakeholders at the forefront of corporate action, alongside profit, implies that, in addition to the specific duties imposed by law or contract, directors have a duty to adopt the most sustainable decision that does not involve a disproportionate sacrifice of shareholders' profit interests. This is a residual duty that comes into play only in the absence of a specific rule.

   The affirmation of this general duty to act sustainably is directly related to the interpretation of the meaning of the business judgement rule. According to Article 72(2), 'liability shall be excluded if any of the persons referred to in the preceding paragraph proves that he acted in full knowledge of the facts, free from any personal interest and in accordance with the criteria of commercial reasonableness'. In order to define the limits of the manager's discretion, the rule needs to be reinterpreted in order to define the intended link between sustainability and profitability.

e) **Commitment to implementing a culture of sustainability:** organisational culture[27] plays a fundamental role in putting sustainability principles and rules into practice. The culture should be 'ethical', i.e. conducive to an allocation of capital that contributes to economic stability, employment and general well-being. There are two ways of promoting an ethical culture: *top-down* and *bottom-up.* In the first case, standards are set by international and national regulators to deter unethical behaviour and promote ethical behaviour; in the

27 It can be defined as the combination of tangible and intangible elements and values that govern the company, developed over the course of the organisation's history or established by the top bodies, uniformly understood by employees, often unconsciously accepted and put into practice in the company's daily activities, shaping the way in which different experiences are dealt with (buildings, dress codes, logos, formal objectives, mission statements, ideology and philosophies). See, with further references, Ludovico Picciotto, 'Fostering an ethical culture in the banking industry', Seven Pillars Institute Moral Cents Vol. 8 Issue 2, s/p, <https://sevenpillarsinstitute.org/wp-content/uploads/2019/10/Ethical-culture-in-banks-Edited.pdf>, accessed 17 January 2024.

second, companies themselves promote an ethical culture. This is 'instrumental ethics',[28] which does not contradict the development of business, but rather serves it. The ethical elements - trust and reputation - are generated by the market and aim to maximise shareholder value. In addition to approving the Code of Conduct, it is the responsibility of the Board of Directors to develop a 'speak-up' culture, i.e. an environment that encourages questioning of information and behaviour in the area of sustainability.

5. Business Judgment Rule and sustainability

In the age of sustainability, the meaning of the *business judgement rule* needs to be reviewed in the light of the balance of interests that it is supposed to seek. In line with the conclusions we have drawn so far, we can say that

(i) On the one hand, sustainability goals can and should be pursued by managers: a rational business decision can take into account environmental impact as well as economic impact. This means that it is legitimate for the director to justify the adoption of measures that generate less profit than could be achieved in the name of pursuing environmental or social objectives.[29] This is particularly clear when the company has a statement of purpose, but it is also true in the absence of such a statement, given that the legislation in force legalises the interests of stakeholders, making them legitimate (and perhaps necessary) references for the company's actions.

(ii) A **reasonableness** or **proportionality test** applies: the commercial enterprise remains fundamentally profit-driven. Therefore, a director who deviates from shareholder value in order to pursue stakeholder value is acting within the scope of his recognised management freedom, only as long as he remains within the bounds of reasonableness. This is the solution that emerges from the combined interpretation of the Portuguese Companies Code and the Basic Climate Law, and (even if it doesn't formally change the national legal landscape) the future CSDDD.

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28 P. M. Vasudev, 'Ethics in finance - Social contracts and beyond', Ottawa Faculty of Law Working Paper No. 2015-6, 3 <https://ssrn.com/abstract=2512893>, accessed 17 January 2024

29 If the famous Ford case were decided today, it should be decided differently in the light of what we have written. In the emblematic Dodge v. Ford Motor Co. [204 Mich. 459, 170 N.W. 668 (1919)], when Henry Ford announced that no dividends would be paid to shareholders and that the company would dedicate itself to reducing prices in the interest of consumers, while planning to expand the business to obtain more jobs, the Michigan Supreme Court declared that 'the corporation is organised and conducted primarily with a view to the profit of the stockholders. The powers of the directors must be employed to that end. (...) It is not within the powers of the directors to conduct corporate affairs for the mere incidental benefit of the shareholders and for the primary purpose of benefiting others'. Ultimately, the issue in Dodge v. Ford Motor Co. was to what extent the pursuit of other interests was compatible with the directors' duties to the company.

(iii) On the other hand, as long as the imperative standards of sustainability are being met, a less favourable decision from an environmental or social point of view may still be justified by the creation of shareholder value, always within the logic of balance and proportionality*.* Thus, the application of the business judgement rule practically becomes an exercise in balancing interests and incorporates **a criterion of *reasonable sacrifice*.**

(iv) We should go one step further and impose a mandatory test of compliance with environmental and social standards in the application of the business judgement rule. In other words, managers must justify their behaviour in the light of sustainability standards, which become part of business rationality, even if this is not explicitly stated in the law.

6. The Proposed New Wording of Articles 64 and 72(2) of the Portuguese Companies Code

In view of the above, the current wordings of Articles 64 and 72(2) are capable of meeting sustainability objectives and the new role of company law: their wording is not committed to a single benchmark for corporate action but is flexible enough to take into account the interests of the various stakeholders.

Nevertheless, we believe it is important to launch a debate on amending the rules in question in order to clarify that the value of environmental and social sustainability is not subordinate to the interests of shareholders. In order to promote this debate, we have formulated the following proposal for a new wording for Article 64:[30]

‘1. The company's managers or directors must observe:

[30] In portuguese:

‘1. Os gerentes ou administradores da sociedade devem observar:

a) Deveres de cuidado, revelando a disponibilidade, a competência técnica e o conhecimento da actividade da sociedade adequados às suas funções e empregando nesse âmbito a diligência de um gestor criterioso e ordenado; e

b) Deveres de lealdade, no interesse de longo prazo da sociedade, com vista a promover o seu desempenho e desenvolvimento sustentado.

2. No cumprimento dos deveres referidos no número anterior, os gerentes ou administradores ponderam os interesses dos sócios, trabalhadores, clientes, credores, fornecedores, e demais partes interessadas, bem como o desenvolvimento sustentável da comunidade em que a sociedade se insere, tendo em conta a sua dimensão e individualidade.

3. Os titulares de órgãos sociais com funções de fiscalização devem observar deveres de cuidado, empregando para o efeito elevados padrões de diligência profissional e deveres de lealdade, no interesse de longo prazo da sociedade’.

a) Duties of care, demonstrating the availability, technical competence and knowledge of the company's business appropriate to their duties and, in this context, employing the diligence of a judicious and orderly manager; and

b) Duties of loyalty, in the long-term interests of the company, with the aim of promoting its performance and sustained development.

2. In fulfilling the duties referred to in the previous paragraph, managers or directors shall consider the interests of shareholders, employees, customers, creditors, suppliers and other interested parties, as well as the sustainable development of the community in which the company operates, taking into account the dimension and the individuality of the company.
3. Company officers with supervisory duties must observe duties of care, employing high standards of professional diligence and duties of loyalty in the long-term interests of the company'.

In nuclear terms, the proposal is generally characterised by making clear the commitment of company law to the objectives of sustainability, without disturbing the legal system in force:

(i) conservation of the structure of article 64.

(ii) the introduction of a new paragraph 2, relating to the entire scope of directors' fundamental duties, which calls for the interests of shareholders and other relevant stakeholders to be weighed up, without subordinating the interests of the latter to those of the former.

(iii) clarification in the new paragraph 2 of the need to take into account the specificities of the company, including its size. This proportionality requirement is further clarified in the new wording proposed for Article 72(2).

(iv) simplification of point b) of paragraph 1, relating to the duties of loyalty, which are reported to the long-term interests of the company, as was already implicit in the current wording; clarification, in the same point, of the purpose of promoting the sustained performance and development of the company.

For the sake of the system's clarity, the change to Article 64 should, in our view, be accompanied by an amendment to Article 72(2), aimed at clarifying that the reasonableness of the decision adopted must also take into account sustainability factors.[31]

[31] In Portuguese:

'2. A responsabilidade é excluída se alguma das pessoas referidas no número anterior provar que actuou em termos informados, livre de qualquer interesse pessoal, segundo critérios de racionalidade empresarial e padrões adequados e proporcionais de sustentabilidade ambiental e social.'

'2. Liability shall be 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, according to criteria of business rationality and adequate and proportionate standards of environmental and social sustainability'.

7. Conclusion

The proposals for interpretation of the current legal system and for legislative change are intended to take seriously the role of company law in the area of environmental and social sustainability and imply a recognition that company law is an essential part of the necessary change in the legal system. However, little can be expected from the specification of directors' duties in the area of sustainability. More promising are structural interventions in corporate governance, in terms of appointments and remuneration. The selection of profiles appropriate to the company's purpose and the alignment of directors' remuneration with an organisational culture of sustainability (with concrete well-designed environmental and social metrics) create real conditions for company law to be an instrument of change towards sustainability rather than a reflection of it. Bringing public policy objectives into company law in a way that does not depend on the strategic decisions of investors and financiers is the aim of the Climate Change Act in Portugal. Interpreting the legal system as a whole, it can be concluded that company law is being transformed both from within, due to the changing priorities of investors and financiers, and from without, due to regulatory pressure. Strictly speaking, a new corporate law is emerging, with new standards and objectives for corporate behaviour. The final stage of its development will come when it is taken for granted within the institutions that the long-term financial success of the company includes the realisation of an environmental and social purpose, and, moreover, when the conditions are in place for the two interests to be weighed equally in each and every decision. For the time being, it is not realistic to expect this to happen spontaneously. Our proposal for a new wording of Articles 64 and 72(2) is intended to stimulate debate rather than to be a final proposal.