Global Campus Europe

UNIVERSITY OF SEVILLE

**European Master's Programme in Human Rights and Democratisation**
**A.Y. 2023/2024**

# CORPORATE DIRECTORS' DUTIES
# The Path to Preventing Human Rights Violations and Enhancing Accountability

Author: Alessandra D'Alessandro
Supervisor: Carmen Márquez-Carrasco

Word Count Declaration: 21 876

*To my mother, whose kindness inspires me daily.*

# Abstract

This thesis examines the role of corporate directors in preventing human rights violations and enhancing accountability through a stakeholder-oriented approach. The research addresses two main questions: the efficacy of stakeholder orientation for human rights protection and the optimal framing of directors' duties to enhance this protection.

It explores key debates in corporate governance, contrasting shareholder-centric and stakeholder-oriented models, and their impact on corporate decision-making regarding human rights. The study evaluates current legal frameworks governing directors' duties, with a focus on European legislation, to determine if they support stakeholder approaches or remain entrenched in shareholder primacy. It investigates the integration of mandatory human rights due diligence into directors' responsibilities, analyzing legislative initiatives like the European Union Corporate Sustainability Due Diligence Directive (CSDDD). Practical recommendations are provided for incorporating due diligence into corporate governance to prevent human rights violations. Additionally, enforcement mechanisms and relevant case law are reviewed to assess the effectiveness of holding directors accountable for corporate misconduct.

The thesis concludes that while stakeholder orientation shows promise, it is insufficient alone. Legislative reforms mandating explicit human rights duties for directors and establishing direct liability to affected groups are recommended to ensure robust corporate accountability and human rights protection.

## Table of Contents

*Introduction* ..... *1*

*Chapter 1. Shareholderism vs. Stakeholderism within Directors' Duties in Light of Human Rights Protection* ..... *6*

**1. The Shareholder Model and the Stakeholder Theory: an Overview ..... 6**

**2. Shareholderism vs. Stakeholderism: Implications for Directors' Duties ..... 7**

**3. Evaluating Theories in Light of Human Rights Protection ..... 8**

3.1 Shareholder Value Approach ..... 8

3.2 Enlightened Shareholder Value Approach ..... 10

3.3 Stakeholder Approach ..... 10

3.4 Conclusions ..... 11

**4. The Link between CSR, the Shareholder Model and the Stakeholder Theory ..... 12**

4.1 Corporate Social Responsibility (CSR) Theory: An Overview ..... 12

4.2 The Intersection of CSR and the Shareholder Model ..... 13

4.3 The Intersection of CSR and the Stakeholder Theory ..... 14

**5. The Link between Business and Human Rights (BHR) and Stakeholder Theory ..... 14**

5.1 Business and Human Rights (BHR): An Overview ..... 15

**6. The Convergence of BHR and Stakeholder Theory ..... 15**

**7. Conclusion ..... 18**

*Chapter 2. Current Legal Framework on Director´s Duties and Proposals for Reform* ..... *19*

**1. Fiduciary Duties ..... 19**

1.1 A Traditional Perspective on Fiduciary Duties ..... 19

1.2 Directors' Main Obligations: The Duty of Care and the Duty of Loyalty ..... 19

**2. The Best Interest of the Company: Shareholder Model or Stakeholder Orientation? . 22**

**3. Human Rights: Exceeding the Fiduciary Duties of Directors ..... 23**

**4. Conclusions ..... 25**

**5. The Concept of Personal Liability in Ethical/Responsible Business Conduct ..... 26**

5.1 Conclusions ..... 28

**6. The Challenges of Reforming Directors' Duties for Improving Human Rights Protection ..... 28**

6.1 Proposal for Reform ........ 28
6.2 The Boundaries of Directors' Duties: The Corporate Purpose ........ 30
6.3 The Main Challenges ........ 31

**7. Conclusion ........ 33**

***Chapter 3. Directors' duties and mandatory human rights due diligence: the European Union Corporate Sustainability Due Diligence Directive (CSDDD) ........ 35***

**1. Introduction: the Background of the CSDDD and the Proposed Duty of Care ........ 35**

**2. Scope, Content and Effect of the Proposed Duty of Care ........ 38**

**3. Directors' Duties and Human Rights Due Diligence ........ 41**

***Chapter 4: Enforcing Directors' Duties through Business and Human Rights Case Law ........ 43***

**1. Derivative Claims ........ 43**

1.1 ClientEarth v Board of Directors of Shell plc ........ 43
1.2 The Ostroleka C Case ........ 47
1.3 Beyond Climate Litigation ........ 48

**2. Actions of Third Parties against Directors ........ 48**

2.1 Antuzis & Ors v DJ Houghton LTD ........ 49
2.2 Criminal Charges ........ 50

**3. Conclusions: the Potential of Mandatory HREDD Litigation ........ 50**

***Conclusion ........ 52***

***Bibliography ........ 55***

***Annex ........ 63***

***Table 1 – Directors' Duty to Act in the Best Interest of the Company in European Jurisdictions. ........ 63***

# Introduction

The role of corporate directors has evolved significantly in recent years, particularly within the realm of corporate accountability and human rights. Traditionally seen as fiduciaries whose primary duty was to maximize shareholder value,[1] directors are now increasingly recognized as pivotal actors in ensuring that businesses operate responsibly and ethically in a globalized economy.[2] This evolution is driven by growing awareness and concern over corporate practices that impact human rights, prompting calls for more robust mechanisms to prevent violations and enhance accountability.[3]
Indeed, when directors and managers fail to assess human rights issues as part of their risk-management functions, there can be very serious adverse outcomes on human rights[4] as well as serious and unwanted commercial consequences for the company. Furthermore, as studies show,[5] failure to address human rights concerns may give rise to consequential violations which themselves continue to mount.[6] Witness, for example, the renowned collapse of the Rana Plaza building in Bangladesh in 2013, which housed garment factories producing goods for global brands, resulted in over 1,100 deaths and thousands of injuries. This disaster highlighted the dire working conditions and lack of oversight in supply chains. Subsequent legal actions and demands for compensation underscored the importance of incorporating human rights assessments in corporate risk

---

[1] For a reconstruction and critique of this paradigm, see Margaret M. Blair and Lynn A. Stout, 'Director Accountability and the Mediating Role of the Corporate Board', *SSRN Electronic Journal*, 2001, 405, https://doi.org/10.2139/ssrn.266622.
[2] Edelman, 'Edelman Trust Barometer 2021', 34–35, https://www.edelman.com/sites/g/files/aatuss191/files/2021-01/2021-edelman-trust-barometer.pdf.
[3] See, e.g., Robert G. Eccles, Ioannis Ioannou, and George Serafeim, 'The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance', *SSRN Electronic Journal*, 2011, https://doi.org/10.2139/ssrn.1964011; Ans Kolk and Jonatan Pinkse, 'The Integration of Corporate Governance in Corporate Social Responsibility Disclosures', *Corporate Social Responsibility and Environmental Management* 17, no. 1 (January 2010): 15–26, https://doi.org/10.1002/csr.196.
[4] Jena Martin, 'Business and Human Rights: What's the Board Got to Do with It?', *West Virginia University Legal Studies Research Paper*, no. 11 (2013): 108, https://ssrn.com/abstract=2297567.
[5] 'Addendum: Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 23 May 2008), para. 100, https://documents.un.org/doc/undoc/gen/g08/136/61/pdf/g0813661.pdf?token=cLPx4fBPM6dQ487OKA&fe=true.
[6] Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation', *Business Ethics Quarterly* 22, no. 1 (January 2012): 156, https://doi.org/10.5840/beq20122218.

management. Many brands faced lawsuits and were compelled to contribute to a compensation fund for the victims.[7]

Corporate accountability has been recognised as a complex concept,[8] which has resulted in it being defined in a variety of ways. Here, we will start from an understanding that the term "accountability" derives from holding corporations to account and making them answerable for their actions and how they meet (or do not meet) their responsibilities. The law is one and perhaps the most obvious accountability mechanism: it can mandate corporate human rights responsibilities and define legal sanctions in case of non-compliance.[9] Legal accountability will therefore be the main focus of this work.

In 2011, the United Nations Guiding Principles on Business and Human Rights (UNGPs) established the corporate responsibility to respect human rights.[10] The integration of corporate responsibility to respect human rights greatly impacts company governance. If a firm's governance framework fails to address these broader issues, the responsibility to respect human rights will be ineffective. Central to this is comprehending human rights risks and the corresponding corporate responses.[11] To this end, the UNGPs introduced the Human Rights Due Diligence (HRDD) as a process for identifying, preventing, mitigating, and accounting for how businesses address their impacts on human rights.[12] This process inherently requires meaningful stakeholder engagement, as it involves understanding the perspectives and experiences of those affected by corporate activities.[13]

Engaging with management theories is crucial in the context of corporate responsibility and Human Rights Due Diligence (HRDD). The introduction of a corporate responsibility to respect human rights suggests that the shareholder primacy model of corporate governance may be insufficient to address the complex changes in governance and regulation this responsibility entails. This model is deeply embedded in the corporate laws of many countries, particularly those following the Anglo-American approach, and is ethically grounded in preserving shareholders' legitimate property rights against managerial malpractice. However, it is challenging to see how the corporate responsibility to respect

[7] 'Justice Still Outstanding: An Update of Legal Cases Related to Rana Plaza Eight Years On', Clean Clothes Campaign, 28 April 2021, https://cleanclothes.org/news/2021/justice-still-outstanding-an-update-of-legal-cases-related-to-rana-plaza-eight-years-on.

[8] Jonathan Borden and Xiaochen Angela Zhang, 'Towards a Conceptualization of Corporate Accountability: A Consumer Perspective', *Management Communication Quarterly* 38, no. 2 (May 2024): 309, 310, https://doi.org/10.1177/08933189231180132.

[9] Florian Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 1st ed. (Cambridge University Press, 2022), 171, https://doi.org/10.1017/9781009158374.

[10] *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (New York, Geneva: United Nations : Office of the High Commissioner for Human Rights, 2011), 13–26.

[11] Muchlinski, 'Implementing the New UN Corporate Human Rights Framework', 155.

[12] *Guiding Principles on Business and Human Rights*, para. 17.

[13] *Guiding Principles on Business and Human Rights*, para. 18 (b).

human rights can significantly influence corporate actions without adopting a more stakeholder-oriented approach in corporate governance and regulatory developments.[14]

The latter is a critical debate in corporate governance. As contended by some scholars[15] and official studies,[16] the prevalent focus on short-term shareholder value maximization at the expense of long-term sustainability not only undermines the resilience and long-term viability of businesses but also jeopardizes their ability to contribute positively to economic, environmental, and social sustainability goals, including those outlined in the United Nations Sustainable Development Goals (SDGs) and the Paris Agreement on climate change. Other scholars[17] believe corporations directors should only be concerned with, and are legally mandated to, maximize shareholders' profit. The debate can thus be summarized by contrasting shareholder theory on the one hand, and stakeholder theory on the other.[18]

Stakeholder theory emphasizes the importance of recognizing and addressing the interests of all parties affected by corporate actions, rather than focusing solely on shareholder interests. This approach aligns closely with the principles laid out in the UNGPs and the process of HRDD, which build on a relational theory of corporate responsibility. The stakeholder approach has however had in turn been the subject of criticism itself.

Given the interconnectedness of stakeholder theory, HRDD, and corporate responsibility, it is crucial to consider these elements together in addressing corporate accountability. This thesis aims in particular to investigate how directors, one of the most influential figures in corporate governance, should operate and be regulated to address the critical problem of enhancing corporate accountability and protecting human rights. For the purposes of this thesis, 'director' will refer to a broad range of

---

[14] Muchlinski, 'Implementing the New UN Corporate Human Rights Framework', 162, 163.

[15] See, e.g., Margaret M. Blair, 'What Must Corporate Directors Do? Maximizing Shareholder Value versus Creating Value through Team Production' (Centre for Effective Public Management at Brookings, June 2015), https://www.brookings.edu/wp-content/uploads/2016/06/Blairrevised-61115.pdf; Dominic Barton and Mark Wiseman, 'Focusing Capital on the Long Term', *Harvard Business Review*, Features, January-February 2014 (2014), https://hbr.org/2014/01/focusing-capital-on-the-long-term; Lynn A. Stout, 'New Thinking on "Shareholder Primacy"', *Accounting, Economics, and Law* 2, no. 2 (2012), https://doi.org/doi:10.1515/2152-2820.1037.

[16] European Commission. Directorate General for Justice and Consumers. and EY., *Study on Directors' Duties and Sustainable Corporate Governance: Final Report.* (LU: Publications Office, 2020), https://data.europa.eu/doi/10.2838/472901.

[17] See for example, Robert J. Rhee, 'A Legal Theory of Shareholder Primacy', *Minnesota Law Review* 102 (2018): 1951, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1121&context=mlr; Jonathan Macey, 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties', *Stetson Law Review* 21, no. 1 (1991), http://hdl.handle.net/20.500.13051/964; Stephen M. Bainbridge, 'In Defense Of The Shareholder Wealth Maximization Norm: A Reply To Professor Green', *Washington and Lee Law Review* 50, no. 4 (1993): 1423–47, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1781&context=wlulr; Stout, 'New Thinking on "Shareholder Primacy"', 17,18.

[18] Blair, 'What Must Corporate Directors Do? Maximizing Shareholder Value versus Creating Value through Team Production', 1.

individuals, including not only statutory directors but also top management members such as executive committee members.[19]

To conduct this investigation, the thesis will focus on three key areas:

1. Governance theories and the normative framework underlying directors' decisions.
2. The legal regulation of directors' duties.
3. The enforcement of these regulations.

The main research questions this thesis seeks to answer are:

1) Is stakeholder orientation the most effective approach for protecting human rights? The stakeholder theory suggests that managing a company with consideration for all stakeholders, rather than focusing solely on shareholder value, is an efficient way for executives to run their businesses. This concept, often referred to as "the business case for protecting human rights",[20] will be examined through the lens of International Human Rights Law. We will specifically explore whether integrating human rights considerations into directors' duties through a stakeholder-oriented approach is the most effective method for protecting human rights.
2) How should directors' duties be framed to enhance human rights protection? Building on the findings from the initial question, this thesis will investigate the optimal framing of directors' duties to enhance human rights protection. This inquiry raises several sub-questions:
    - Should directors' duties be legally reformed?
    - Should these duties be integrated with additional legislation?
    - Should the existing duties be interpreted differently?
    - Can a legally mandated stakeholder management approach within directors' duties lead to enhanced human rights protection?

The thesis is structured as follows. The first chapter delves into the ongoing debate in corporate governance between the traditional shareholder-centric model and stakeholder theory. This debate significantly impacts directors' duties, particularly concerning human rights protection. The chapter

[19] This is basically the definition adopted by European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', Document 52022PC0071 COM/2022/71 § (2022), art. 3, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0071; Mieke Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', *Ondernemingsrecht*, Special: The Proposal for a Corporate Sustainability Due Diligence Directive, 5, no. 38 (2023): 279, https://www.stibbe.com/sites/default/files/2023-03/Tijdschrift%20Ondernemingsrecht%20%E2%80%93%20the%20leading%20Dutch%20company%20law%20Journal.pdf.

[20] Raut Chandrakant and R. Rajesh, 'Social Sustainability, Corporate Governance, and Sustainability Performances: An Empirical Study of the Effects', *Journal of Ambient Intelligence and Humanized Computing* 14, no. 7 (July 2023): 9133, https://doi.org/10.1007/s12652-022-04417-4.

provides an overview of these two contrasting approaches within the frameworks of Corporate Social Responsibility (CSR) and Business and Human Rights (BHR). It examines the impact of these theories on corporate decision-making, particularly concerning human rights, and discusses the implications of adopting a stakeholder perspective for directors' duties.

In the second chapter, the focus shifts to the current legal frameworks governing directors' duties, with an emphasis on European legislation. This chapter evaluates whether existing regulations adequately support stakeholder theory or remain entrenched in shareholder primacy. It analyzes the scope of fiduciary duties and the concept of acting in the 'best interests of the company,' suggesting necessary reforms to better align directors' duties with the protection of human rights. This chapter provides a legal foundation for understanding how directors' responsibilities can be redefined to include stakeholder considerations.

The third chapter investigates the integration of mandatory human rights and environmental due diligence into directors' duties. It explores recent legislative initiatives focusing on the Corporate Sustainability Due Diligence Directive (CSDDD) and its implications for corporate governance practices. By examining these developments, the chapter offers recommendations for incorporating mandatory due diligence into directors' responsibilities, aiming to prevent human rights violations and improve corporate accountability. This chapter highlights practical steps for embedding human rights considerations into corporate decision-making processes.

The fourth chapter addresses the enforcement mechanisms for directors' duties, analyzing their effectiveness in holding directors accountable for human rights violations. It reviews relevant case law and jurisprudence to identify situations where directors can be personally liable for corporate misconduct. The chapter discusses the role of enforcement in ensuring directors' compliance with human rights obligations and proposes enhancements to the current enforcement framework. This analysis provides insights into strengthening accountability mechanisms to ensure directors adhere to their expanded duties.

Overall, the thesis builds a coherent analysis of how directors' duties can be regulated to protect human rights within the corporate governance framework. It demonstrates that adopting a stakeholder-oriented approach is not only feasible but essential for achieving greater corporate accountability and justice in the context of business and human rights. The primary contribution to knowledge lies in the detailed proposal for integrating stakeholder theory into directors' duties and the practical recommendations for legal and regulatory reforms, ultimately enhancing human rights protection in corporate governance.

# Chapter 1. Shareholderism vs. Stakeholderism within Directors' Duties in Light of Human Rights Protection

Corporate governance literature is marked by the debate between traditional shareholder-centric model and other theories that advocate to take into consideration different stakeholders.[21] This controversy has profound implications for directors' duties, particularly in the context of human rights protection. The debate happens within the two current major frameworks regulating the role of businesses in society: Corporate Social Responsibility (CSR) and Business and Human Rights (BHR). This chapter gives an overview of the two different approaches and examines how these competing theories influence corporate decision-making, their linkages with CSR and BHR, and the potential consequences for human rights. It is outside of the scope of this thesis to elaborate further on these theories; however, the latter are a useful framework on extra-market and management orientations. By exploring the origins and principles of different approaches, we aim to understand how directors can balance their responsibilities to shareholders and other stakeholders to enhance corporate accountability and respect for human rights.

## 1. The Shareholder Model and the Stakeholder Theory: an Overview

The tradition shareholder-centric model is often traced back to Milton Friedman's impactful piece in the New York Times[22] where he underscored the firm's primary duty for maximizing profits. His view was then seized upon by investors and CEOs[23] until becoming the dominant paradigm in the business world through the 1980s and 1990s and deeply ingrained in the culture of corporate boardrooms to these days.[24] The main argument of shareholder primacy is that companies can have a positive impact by simply running a profitable business: the self-interest pursuit of profit has *per se* beneficial effects on the society (for example, by creating employment opportunities and augmenting the social wealth in general).

[21] As evidence that the debate is still ongoing, see as an example: Lucian A. Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance', *SSRN Electronic Journal*, 2020, https://doi.org/10.2139/ssrn.3544978.
[22] Milton Friedman, 'A Friedman Doctrine – The Social Responsibility of Business Is to Increase Its Profits', 13 September 1970, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.
[23] Alan Gutterman, 'Sustainability and Corporate Governance', *SSRN Electronic Journal*, 2023, 7, https://doi.org/10.2139/ssrn.4493058.
[24] Blair, 'What Must Corporate Directors Do? Maximizing Shareholder Value versus Creating Value through Team Production'.

The stakeholder theory, introduced by R. Edward Freeman in 1984,[25] challenges the traditional shareholder-centric model of corporate governance. It posits that corporations should create value for all stakeholders, not just shareholders. The author defines a stakeholder as “any group or individual that can affect or be affected by the objectives of an organization”.[26] Stakeholders therefore include employees, customers, suppliers, communities, the environment and society at large. This theory advocates for a broader view of corporate responsibility, recognizing that long-term success depends on the well-being of all stakeholder groups. Freeman argues that the stronger the relations of the firm with the external factors, the easier it will be for it to meet its’ corporate business objectives,[27] i.e. the stakeholder approach is the most effective way to manage an organization and therefore leads to the achievement of conventional corporate performance objectives as well, or better, than rival approaches.[28] According to this theory, the stakeholder concept can be used to make strategic management decisions but also to understand the role of an organization in society and can influence the company and the managers’ values. Together with a values analysis (“what does the company stand for?”) and an analysis of the societal issues, analyzing a company’s stakeholders should be at the base of setting the enterprise level strategy. This way directors can make sure that the company is aligned with its own managers, the expectations of stakeholders and the societal issues around it, thus ensuring its own survival.[29]

The stakeholder theory contrasts sharply with the "input-output" model underpinning shareholder primacy. In the shareholder model, investors, employees, and suppliers are seen as providing inputs that the firm transforms into outputs for the benefit of customers and investors. In contrast, stakeholder theory envisions a company where all persons or groups with legitimate interests in the enterprise gain benefits, with no inherent priority of one set of interests over another.[30]

## 2. Shareholderism vs. Stakeholderism: Implications for Directors’ Duties

Different approaches to directors' duties significantly impact corporate decision-making and human rights protection. Broadly, three perspectives can be distinguished:[31]

---

[25] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge (GB): Cambridge university press, 2010).

[26] Freeman, 52.

[27] Raut Chandrakant and R. Rajesh, ‘Social Sustainability, Corporate Governance, and Sustainability Performances: An Empirical Study of the Effects’, *Journal of Ambient Intelligence and Humanized Computing* 14, no. 7 (July 2023): 9132, https://doi.org/10.1007/s12652-022-04417-4.

[28] Thomas Donaldson and Lee E. Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’, *The Academy of Management Review* 20, no. 1 (January 1995): 71, https://doi.org/10.2307/258887.

[29] Freeman, *Strategic Management*, 89–91.

[30] Donaldson and Preston, ‘The Stakeholder Theory of the Corporation’, 67,68.

[31] David Bilchitz and Laura Ausserladscheider Jonas, ‘Proportionality, Fundamental Rights and the Duties of Directors’, *Oxford Journal of Legal Studies* 36, no. 4 (December 2016): 830–37, https://doi.org/10.1093/ojls/gqw002.

1. Shareholder Value Approach: Directors' primary duty is to manage the corporation in the interests of shareholders, focusing on maximizing their profit. Using corporate funds for purposes other than this is seen as a violation of their duties.[32]
2. Enlightened Shareholder Value (ESV) Approach: Directors aim to maximize shareholder benefit in the long-term. This means considering other factors beyond immediate profit, as these can affect the long-term interests of shareholders.[33]
3. Stakeholder Approach: Directors' duty is to create as much value as possible for all stakeholders, meaning all parties with an interest in the company, whether financial or otherwise.[34]

## 3. Evaluating Theories in Light of Human Rights Protection

To understand which approach aligns best with human rights protection, we must explore these theories in depth. Without compelling empirical evidence, we evaluate these theories normatively, assessing how they interpret the function of the corporation and identify moral or philosophical guidelines for corporate operation and management.[35]

### 3.1 Shareholder Value Approach

In line with Milton Friedman's influential position, the shareholder approach maintains a narrow view of corporate governance. It assigns low priority to socio-environmental considerations, arguing that companies have a positive impact simply by running a profitable business. Directors focusing on social benefits may lose accountability and take on tasks that should pertain to the state.[36]
Advantages of this approach include simplicity and a clear definition of directors' duties, concentrating on maximizing shareholder value. However, it often neglects broader societal and environmental impacts, potentially undermining human rights protections.[37]
The main critics to this approach argue that this approach is descriptively inaccurate and normative unacceptable from a human right perspective. Furthermore, it fosters short-termism and neglects broader societal and environmental responsibilities. By focusing narrowly on profit, this approach can lead to ethical lapses and human rights violations.

[32] Bilchitz and Ausserladscheider Jonas, 831.
[33] Bilchitz and Ausserladscheider Jonas, 834.
[34] Bilchitz and Ausserladscheider Jonas, 834.
[35] Donaldson and Preston, 'The Stakeholder Theory of the Corporation', 66, 67.
[36] Alan Gutterman, 'On the Purpose of the Corporation', *SSRN Electronic Journal*, 2020, 11, https://doi.org/10.2139/ssrn.3833599.
[37] Bilchitz and Ausserladscheider Jonas, 'Proportionality, Fundamental Rights and the Duties of Directors', 831.

From a descriptive point of view, the "Friedman doctrine" argues that corporations exist to maximize shareholder profits, with directors and executives acting as agents for shareholders. This idea is supported by two theories: the agency theory and the nexus of contracts theory.[38] The agency theory sees managers as trustees for shareholders,[39] while the nexus of contracts theory views the corporation as a set of contracts with shareholders as the main beneficiaries. [40] Critics argue that corporations are distinct entities with legal personalities, and directors should act on behalf of the corporation itself, not just shareholders.[41] They also note that shareholders have limited influence over directors and cannot demand dividends. Instead, directors should balance the interests of all stakeholders, including creditors, employees, and the community. Additionally, corporate law does not mandate that corporations prioritize shareholder wealth maximization.[42]

Critics also argue that the shareholder model is normatively unacceptable in terms of human rights.[43] Shareholderism conflicts with human rights, as it fails to recognize the intrinsic value of all stakeholders. Traditionally, states have protected these rights, but now all entities, including businesses, should adhere to human rights obligations.[44] Directors should balance shareholders' interests with those of other stakeholders whose rights may be affected. Legal systems prioritizing human rights should reject approaches focused solely on shareholder value. The stakeholder approach, which considers all stakeholders' interests, is most compatible with human rights.[45] Additionally, even if shareholders are seen as owners, their rights can be limited if harmful to others.[46] Lastly, critics argue that prioritizing shareholders' interests leads to short-termism,[47] which means corporate decision-making based on short-term earnings expectations. The focus on maximizing share value, combined with quarterly earnings reports and executives' compensation tied to yearly stock price increases, drives corporate managers to prioritize short-term activities over long-term ones.[48] This persistent focus on short-term shareholder value maximization can be detrimental to human rights. Typical examples include cutting labor costs or failing to take necessary actions for

---

[38] Beate Sjåfjell and Benjamin J. Richardson, eds., *Company Law and Sustainability: Legal Barriers and Opportunities* (United, Kingdom ; New York: Cambridge University Press, 2015), 85.
[39] Adolf Augustus Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New Brunswick London: Transactions, 1991); quoted in Gutterman, 'On the Purpose of the Corporation', 5.
[40] Gutterman, 'On the Purpose of the Corporation', 9,10; Sjåfjell and Richardson, *Company Law and Sustainability*, 84.
[41] Gutterman, 'On the Purpose of the Corporation', 6; Margaret M. Blair and Lynn A. Stout, 'Specific Investment: Explaining Anomalies in Corporate Law', *Journal of Corporation Law* 31, no. 3 (2006): 729, 730.
[42] Blair and Stout, 'Specific Investment: Explaining Anomalies in Corporate Law', 726–38.
[43] Donaldson and Preston, 'The Stakeholder Theory of the Corporation', 82.
[44] *Guiding Principles on Business and Human Rights*, 13–26.
[45] Bilchitz and Ausserladscheider Jonas, 'Proportionality, Fundamental Rights and the Duties of Directors', 831–36.
[46] Donaldson and Preston, 'The Stakeholder Theory of the Corporation', 83.
[47] Sjåfjell and Richardson, *Company Law and Sustainability*, 79–147.
[48] Barnali Choudhury, 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough', *Business and Human Rights Journal* 8, no. 2 (June 2023): 183, https://doi.org/10.1017/bhj.2023.29.

environmental sustainability to maximize financial returns. [49] As will be analyzed in more detail in Chapter 3, this argument is widely adopted in the European context, influencing the early versions of the CSDDD.

### 3.2 Enlightened Shareholder Value Approach

The ESV approach provides a more balanced perspective, encouraging directors to consider long-term impacts on shareholder value. This includes acknowledging environmental, social, and governance (ESG) factors, which can affect long-term profitability. While still prioritizing shareholder interests, this approach integrates broader concerns that indirectly support human rights and sustainability.[50]

The main critique addressed to this approach is that directors' consideration of the impact on human rights harms in deciding whether to pursue a particular corporate decision is always subordinate to not impinging on shareholder value generation.[51] Consequently, the same observations made for the approach above apply.

### 3.3 Stakeholder Approach

The stakeholder approach advocates for equal consideration of all stakeholders' interests, promoting a holistic view of corporate responsibility. Directors are encouraged to make decisions that benefit employees, customers, suppliers, communities, and the environment, alongside shareholders. This approach inherently supports human rights protection by recognizing the interconnectedness of corporate actions and societal well-being.[52] Some studies have analyzed the relationship between human rights respect and corporate performance and have tended to generate "implications" suggesting that adherence to stakeholder principles and practices achieves conventional corporate performance objectives as well or better than rival approaches.[53] Indeed, the stakeholder theory was born as a strategic management approach for examining the connection between the practice of stakeholder management and the achievement of corporate performance goals (e.g., profit, growth).[54] If it was to be empirically verified that stakeholder management is the optimal strategy for

[49] European Commission. Directorate General for Justice and Consumers. and EY., *Study on Directors' Duties and Sustainable Corporate Governance*, 62.
[50] Bilchitz and Ausserladscheider Jonas, 'Proportionality, Fundamental Rights and the Duties of Directors', 831–36.
[51] Choudhury, 'Corporate Law's Threat to Human Rights', 187.
[52] Bilchitz and Ausserladscheider Jonas, 'Proportionality, Fundamental Rights and the Duties of Directors', 831–36.
[53] Donaldson and Preston, 'The Stakeholder Theory of the Corporation', 71.
[54] Donaldson and Preston, 66, 67.

maximizing a firm's conventional financial and market performance, we could infer that the stakeholder theory provides the "business case" to respect human rights.

Some argue that the focus on increasing share value leads to inefficiency.[55] The shareholders themselves are better off when they cede power to directors that are not required to maximize share value. Directors have to manage the shareholders' capital while also being able to take other stakeholders' needs into consideration: this will keep the corporation alive and healthy which will in turn grant the shareholders a return on their investment.

However, balancing competing interests of various stakeholders is inherently complex. Critics argue that this approach may dilute accountability and complicate decision-making processes.[56] Indeed, the language used to define stakeholders has been criticized for its lack of precision within a firm's context, making it difficult to distinguish individuals and groups with legitimate stakes from those without. Determining who qualifies as a stakeholder and understanding the nature of their claims against the firm necessitates a clear normative framework. The literature offers various approaches to establish this foundation, including Kantian capitalism,[57] Rawlsian fairness,[58] social contract theory, and utilitarianism.[59] Despite general acknowledgment that some stakeholders' claims have inherent value, there is little consensus on the normative basis for these claims.[60]

## 3.4 Conclusions

The debate between shareholderism and stakeholderism fundamentally shapes corporate governance and directors' duties. While the shareholder value approach offers clarity and focus, it often falls short in addressing broader societal and human rights/ethical responsibilities. The enlightened shareholder value approach bridges this gap to some extent but still prioritizes shareholders. The stakeholder approach, despite its complexities due to determining who qualifies as a stakeholder, provides a comprehensive framework for integrating human rights and sustainability into corporate decision-making.

---

[55] Blair and Stout, 'Specific Investment: Explaining Anomalies in Corporate Law', 737, 738.

[56] Bebchuk and Tallarita, 'The Illusory Promise of Stakeholder Governance', 2020; Andrés Juan Recarde Castells, '¿Puede el derecho contribuir a evitar o reducir los abusos de las empresas? No lo fíes a los ejecutivos; preocúpate de los bienintencionados; cuida la seguridad jurídica', in *Empresas transnacionales, derechos humanos y cadenas de valor: nuevos desafíos*, 2023.

[57] William M. Evan and R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation : Kantian Capitalism*, 1988.

[58] Robert A. Phillips, 'Stakeholder Theory and A Principle of Fairness', *Business Ethics Quarterly* 7, no. 1 (January 1997): 51–66, https://doi.org/10.2307/3857232.

[59] Elisabet Garriga and Domènec Melé, 'Corporate Social Responsibility Theories: Mapping the Territory', *Journal of Business Ethics* 53, no. 1 (1 August 2004): 51–71, https://doi.org/10.1023/B:BUSI.0000039399.90587.34.

[60] Ken McPhail, 'From Stakeholder to Rightsholder Perspectives The UNGPs, SDGs and New Paradigms for Corporate Accountability', *Accounting and Management Review | Revista de Contabilidade e Gestão* 26, no. 1 (24 November 2022): 116, https://doi.org/10.55486/amrrcg.v26i.5a.

Ultimately, directors must navigate these competing theories to enhance corporate accountability and respect for human rights. As the global business environment evolves, integrating stakeholder theory into fiduciary duties will be crucial for achieving long-term sustainability and societal well-being.

# 4. The Link between CSR, the Shareholder Model and the Stakeholder Theory

Corporate Social Responsibility (CSR) theory represents a distinct perspective on corporate governance and the role of corporations in society. However, the relationship between this theory and the shareholder and stakeholder model are complex and intertwined. This section explores the link between CSR theory and the two opposite approaches, examining how CSR initiatives can be aligned with both and how these theories can coexist to promote both profitability and social responsibility.

## 4.1 Corporate Social Responsibility (CSR) Theory: An Overview

The European Commission describes CSR as "the responsibility of enterprises for their impacts on society"; [61] Scherer and Palazzo as an "umbrella term for the debate on the role of business in society".[62] Between the 1920s and the 1940s, business managers primarily focused on maximizing profits,[63] but the 1950s marked the initial stages of CSR movement. Bowen, regarded as the father of CSR, [64] advocated for large corporations to shift from profit driven decision making to principles that enhance social well-being. He emphasized the social responsibilities of businessmen to align their actions with societal objectives and values. [65] Bowen's theory laid the foundation for CSR, evolving into a moral responsibility, especially amidst the socio political and financial challenges of the 1960s. CSR is rooted in management and business scholarship and was conceived essentially as a private responsibility of the company, a sort of set of voluntary activities carried out by companies that have a positive impact on society, including human rights , but that cannot in any case replace the duty of

[61] European Commission, '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', Document 52011DC0681 COM/2011/0681 final § (2011), para. 3.1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681.

[62] Andreas Georg Scherer and Guido Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and Its Implications for the Firm, Governance, and Democracy', *Journal of Management Studies* 48, no. 4 (2011): n. 1, https://doi.org/10.1111/j.1467-6486.2010.00950.x.

[63] Salvatore Principale, *Fostering Sustainability in Corporate Governance: Analysis of the EU Sustainable Corporate Governance and Due Diligence Directives*, SIDREA Series in Accounting and Business Administration (Cham: Springer Nature Switzerland, 2023), 78, https://doi.org/10.1007/978-3-031-30354-8.

[64] Cristina Cedillo, 'Better Access to Remedy in Company-Community Conflicts in the Field of CSR: A Model for Company-Based Grievance Mechanisms', *Dovenschmidt Quarterly* 1, no. 4 (December 2013): 198, https://doi.org/10.5553/DQ/221199812014001004006.

[65] Howard R. Bowen, *Social Responsibilities of the Businessman* (University of Iowa Press, 2013), https://doi.org/10.2307/j.ctt20q1w8f.

the state to protect them. These responsibilities include ethical, social, and environmental considerations. CSR initiatives can range from charitable donations and community engagement to sustainable business practices and ethical labor standards. The underlying principle of CSR is that businesses should contribute positively to society while operating in an economically viable manner. Because of these features, CSR has traditionally been associated with philanthropy and voluntary endeavors.[66] Particularly because perceived as belonging to the voluntary domain, the main critique from a human rights perspective is that human rights risk becoming a casual narrative and corporate policies for social responsibility remaining general strategic commitments.[67]

### 4.2 The Intersection of CSR and the Shareholder Model

The shareholder model, rooted in Milton Friedman's philosophy, posits that the primary responsibility of a corporation is to maximize shareholder value. According to this model, the main duty of directors and executives is to ensure the profitability of the company, thereby providing the highest possible returns to shareholders. This approach emphasizes short-term financial performance and often views social and environmental responsibilities as secondary or even irrelevant to the corporation's primary objective. CSR theory, on the other hand, argues that corporations have broader responsibilities beyond profit maximization. Friedman contended that integrating CSR strategies would unjustifiably raise costs, particularly considering CSR was seen as voluntary and poorly defined.[68] According to this model, companies should only engage in CSR activities that can increase their financial performance and avoid any social or environmental costs that could reduce their competitiveness: the only social responsibility of businesses is to use their resources and engage in activities designed to increase their profits, as long as they stay within the rules of the game.

Although CSR theory and the shareholder model may appear to be at odds, there are significant intersections where they can complement each other. Some authors believe that the previous view of shareholder primacy norm as an impediment to CSR is misguided[69] and that the two theories are reconcilable because the objective of profit maximization should satisfy not only shareholders' interests, but also stakeholders'.[70]

---

[66] Mallika Tamvada, 'Synthesising Synergies between CSR and BHR for Corporate Accountability: An Integrated Approach', *International Journal of Corporate Social Responsibility* 8, no. 1 (December 2023): 2, https://doi.org/10.1186/s40991-023-00084-6.
[67] Tamvada, 2.
[68] Friedman, 'A Friedman Doctrine – The Social Responsibility of Business Is to Increase Its Profits'.
[69] David Ronnegard and N. Craig Smith, 'Shareholder Primacy vs. Stakeholder Theory: The Law as Constraint and Potential Enabler of Stakeholder Concerns', *SSRN Electronic Journal*, 2018, https://doi.org/10.2139/ssrn.3165992.
[70] Jesus Garcia-Madariaga and Fernando Rodríguez-de-Rivera-Cremades, 'Corporate Social Responsibility and the Classical Theory of the Firm: Are Both Theories Irreconcilable?', *Innovar* 20 (May 2010): 5–19.

### 4.3 The Intersection of CSR and the Stakeholder Theory

The simultaneous development of CSR and stakeholder theory resulted in misunderstandings, with some perceiving them as either identical or mutually exclusive.[71] In Freeman's view, CSR has the advantage of rethinking the role of businesses in society and applying the stakeholder concept to non-traditional stakeholder groups who are usually thought of as having adversarial relationships with the firm. However, it fails to indicate ways of integrating this concern into the strategic systems of the corporation without isolating the "social issues" as a separate from the economic impact which they have.[72] Occasionally, companies may embark on socially responsible initiatives primarily to enhance their public image, without truly tackling social and environmental concerns. Some authors argue that firms embracing stakeholder theory are more likely to devise effective strategies for addressing societal issues compared to those solely focused on CSR.[73]

Nonetheless, the discourse on CSR has evolved over time, with some doctrines overcoming the vision of CSR as merely voluntary and philanthropic, approaching CSR as a model of corporate governance focusing on the impact on multiple stakeholders. CSR is for example defined as a "social contract" with the principle of justice having the prevailing role; it would involve self-regulation based on explicit norms derived from social dialogue among companies and stakeholders, this way not solely relying on managerial discretion or external regulation through laws.[74] Other scholars expressly reconstruct CSR as made up of mandatory obligations.[75]

Even though there are some scholars who perceive them as closely related and others that discern conflicting perspectives among them, in general, it could be posited that CSR and Stakeholder Theory both center on promoting responsible corporate conduct, albeit from different viewpoints.

## 5. The Link between Business and Human Rights (BHR) and Stakeholder Theory

The intersection of Business and Human Rights (BHR) and stakeholder theory represents a significant paradigm shift in corporate governance and responsibility. Both frameworks advocate for broader accountability of corporations beyond mere profit maximization. This section explores the connection

[71] R. Edward Freeman and Sergiy Dmytriyev, 'Corporate Social Responsibility and Stakeholder Theory: Learning From Each Other', *Symphonya. Emerging Issues in Management*, no. 1 (21 December 2017): 9, https://doi.org/10.4468/2017.1.02freeman.dmytriyev.

[72] Freeman, *Strategic Management,* 38-40.

[73] Freeman and Dmytriyev, 'Corporate Social Responsibility and Stakeholder Theory'.

[74] Lorenzo Sacconi, 'Corporate Social Responsibility and Corporate Governance', *EconomEtica*, no. 38 (June 2012): 42, https://ssrn.com/abstract=2102116.

[75] Tamvada, 'Synthesising Synergies between CSR and BHR for Corporate Accountability', 6.

between BHR and stakeholder theory, examining how they collectively promote a more inclusive and ethical approach to business operations.

### 5.1 Business and Human Rights (BHR): An Overview

Business and Human Rights (BHR) emerged only in 1990s in the legal scholarship, as a separate and parallel discussion, involving different actors and following a different logic: it focuses more on accountability mechanisms and particularly on binding measures.[76] Consequently, BHR calls for prescribing and enforcing corporate responsibility by law, while CSR emphasizes the benefits of flexible private initiatives that cope with corporate reality on the ground. This is not a coincidence as BHR could be considered a critique to CSR:[77] indeed, it aims to tackle the major struggles of corporate human rights abuses that CSR could not solve, which are legal redress and access to justice.[78]

The BHR framework emerged from the recognition that businesses, through their global operations, can impact human rights both positively and negatively. The United Nations Guiding Principles on Business and Human Rights (UNGPs), endorsed in 2011, provide a comprehensive framework for businesses to respect human rights and are characteristic of the BHR approach. The UNGPs outline three pillars:

1. The State Duty to Protect Human Rights: states must protect against human rights abuses by third parties, including businesses.[79]
2. The Corporate Responsibility to Respect Human Rights: businesses should avoid infringing on human rights and address adverse impacts with which they are involved.[80]
3. Access to Remedy: victims of business-related human rights abuses should have access to effective remedy.[81]

These principles emphasize the role of corporations in ensuring that their operations do not harm individuals' rights and highlight the need for businesses to engage in due diligence, transparency, and accountability.

## 6. The Convergence of BHR and Stakeholder Theory

[76] Wettstein, *Business and Human Rights,*3.
[77] Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', *Journal of Human Rights* 14, no. 2 (3 April 2015): 237–59, https://doi.org/10.1080/14754835.2015.1037953.
[78] Wettstein, 23.
[79] *Guiding Principles on Business and Human Rights*, 1–12.
[80] *Guiding Principles on Business and Human Rights*, 13–26.
[81] *Guiding Principles on Business and Human Rights*, 27–35.

The convergence of BHR and stakeholder theory lies in their shared emphasis on the broader responsibilities of corporations. Both frameworks advocate for businesses to consider the impacts of their operations on a wide range of stakeholders and to adopt ethical and sustainable practices. The theme of stakeholder engagement runs across the UNGPs (and other key human rights-based frameworks, such as the OECD Due Diligence Guidance for Responsible Business Conduct)[82] and is critical to a company's efforts to meet the corporate responsibility to respect human rights.[83]
Stakeholder engagemtn is key to one of the core aspects of the BHR framework: human rights due diligence, which is increasingly becoming mandated by legislators across the globe.[84] This process involves assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Effective human rights due diligence requires meaningful engagement with stakeholders,[85] particularly those who are most affected by the business's operations. In particular, stakeholder engagement is needed for: conducting any credible Human Rights Impact Assessment; seeking Free Prior Informed Consent from communities and other affected stakeholders before establishing mining, infrastructure, and energy operations; and providing remedy for any harmful human rights impacts.[86] Stakeholder theory supports this approach by emphasizing the importance of considering the interests and impacts on all stakeholders.
While the integration of BHR and stakeholder theory offers numerous benefits, it also presents challenges. Stakeholder theory provides the most widely used perspective for retheorizing the social responsibility of firms[87] and this perspective has obvious links to the business and human rights field, however, there has been little systematic analysis of how the UNGPs relate to stakeholder theory[88] and the relationship between the two frameworks remains unclear to a certain extent.

[82] Sam Eastwood et al., 'Business and Human Rights: Meaningful Stakeholder Engagement in Due Diligence', Mayer Brown, 14 September 2022, https://www.eyeonesg.com/2022/09/business-and-human-rights-meaningful-stakeholder-engagement-in-due-diligence/.
[83] Shift, 'Bringing a Human Rights Lens to Stakeholder Engagement', Workshop Report (New York, August 2013), 3, https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Shift-Workshop-Report-3-Bringing-a-Human-Rights-Lens-to-Stakeholder-Engagement.pdf.
[84] Eastwood et al., 'Business and Human Rights: Meaningful Stakeholder Engagement in Due Diligence'.
[85] Global Compact Network Germany, 'What Makes Stakeholder Engagement Meaningful? 5 Insights from Practice', Insight Series – Keys to Effective Human Rights Due Diligence, n.d., 4, https://www.globalcompact.de/fileadmin/user_upload/Dokumente_PDFs/UN_GCD_Insights_Series_HR_Due_Diligence_Stakeholderengagement_english.pdf.
[86] Rosa Kusbiantoro, 'Human Rights, Access to Remedy, and Stakeholder Engagement', BSR, 18 June 2019, https://www.bsr.org/en/blog/human-rights-access-to-remedy-and-stakeholder-engagement.
[87] Crawford Spence, Javier Husillos, and Carmen Correa-Ruiz, 'Cargo Cult Science and the Death of Politics: A Critical Review of Social and Environmental Accounting Research', *Critical Perspectives on Accounting* 21, no. 1 (January 2010): 81, https://doi.org/10.1016/j.cpa.2008.09.008.
[88] McPhail, 'From Stakeholder to Rightsholder Perspectives The UNGPs, SDGs and New Paradigms for Corporate Accountability', 117.

One perspective is that the rights holder model embedded in the UNGPs might address some limitations of the stakeholder theory.[89] On a normative basis, stakeholders and their stakes have been broadly construed in terms of "anything influencing or influenced by the firm." By contrast, BHR grounds the answer to this question in those rights recognized in international law. While stakes may not have any legal recognition, rights do.[90] Human rights are universally applicable, clearly defined rights that are grounded in international law rather than the perspectives of either the company (which may for example be inclined to limit the scope of stakeholders), or the community (who may not know what rights they are entitled to).[91] Nonetheless, the relationship between the two categories should be clarified to understand whether human rights can always be the basis of stakeholder status since, according to stakeholder theory (and further depending on the version of stakeholder theory adopted), some stakeholders may justifiably be excluded from stakeholder analysis, stakeholder dialogue and stakeholder engagement.[92]

The instrumental stream of stakeholder research has always focused on the extent to which positively engaging with stakeholders enables the firm to achieve its objectives. These ends have predominately been framed in terms of profitability. Its integration in the BHR lead to the question of whether we should reframe company's objectives beyond the maximization of corporate value (the sum of the values of all financial claims on the firm).[93] The concept of corporate purpose will be dealt with in more detail in Chapter 2.

Finally, the stakeholder theory implies negotiating multiple interests, but it is not clear how do we conceptualize this function in terms of realization of rights.[94] While the theory acknowledges the need to address diverse stakeholder concerns, it falls short of explicitly connecting these negotiations to concrete actions that protect and promote human rights. This lack of clarity can make it difficult to implement stakeholder theory in a way that effectively safeguards human rights, as there isn't a straightforward method for translating stakeholder interests into rights-based outcomes.

These issues highlighted underscore that further work is required on the potential for the UNGPs to expand our thinking about the firm. More research and practical frameworks are needed to bridge this gap and ensure that stakeholder theory can be applied in a manner that genuinely supports the realization of human rights.

---

[89] McPhail, 117.
[90] McPhail, 118.
[91] McPhail, 118.
[92] Bert Van De Ven, 'Human Rights as a Normative Basis for Stakeholder Legitimacy', *Corporate Governance: The International Journal of Business in Society* 5, no. 2 (April 2005): 53, https://doi.org/10.1108/14720700510562659.
[93] McPhail, 'From Stakeholder to Rightsholder Perspectives The UNGPs, SDGs and New Paradigms for Corporate Accountability', 119.
[94] McPhail, 120.

## 7. Conclusion

The emergence of stakeholder theory has been an important development in terms of human rights protection if compared to the traditional shareholder model. It recognizes that the firm is a vehicle through which different interests are met and also that the financial success of the firm depends on the extent to which a broad range of stakeholder interests are managed. However, we have observed that it does not provide any conclusive basis for the recognition of these claims. Neither does it provide an actionable way to negotiate between competing claims.[95]

The link between BHR and stakeholder theory underscores the importance of a holistic approach to corporate governance and responsibility. Both frameworks advocate for businesses to consider the broader impacts of their operations on all stakeholders and to adopt transparent and accountable practices. By integrating BHR principles with stakeholder theory, directors can enhance corporate accountability, respect for human rights, and long-term sustainability. This convergence not only aligns with human rights but also supports the long-term success and resilience of businesses in a globalized world. Through effective stakeholder engagement, human rights due diligence, and transparent communication, companies can navigate the complexities of modern corporate governance and contribute positively to society.

The analysis also highlighted that the relationship between stakeholder theory and BHR remains uncertain in certain respects, but a more cohesive integration between them could enhance the level of protection.

Stakeholderism represents a crucial advancement in human rights protection, yet its limitations indicate it might not be adequate by itself to improve corporate accountability for human rights violations. This is particularly evident when considering the practical challenges of seamlessly integrating stakeholderism within the BHR context.

Given the current limitations of the stakeholder theory, Chapters 2 and 3 will explore if and to what extent the latter is reflected in directors' duties legal regime and how its regulation could be improved to ensure corporate accountability. Besides, the author of the UNGPs himself, Professor John Ruggie, had already recognized that "Another development that would reinforce and build on the GPs would be to strengthen corporate law provisions that explicitly permit company directors, in fulfilling their fiduciary responsibility to the company, to consider its impact on other stakeholders and on society as a whole".[96]

---

[95] McPhail, 117.

[96] John Ruggie, 'Just Business: Multinational Corporations and Human Rights. 2013 Raymond and Beverly Sackler Distinguished Lecture.', in *The United Nations Guiding Principles on Business and Human Rights* (2013 Raymond and Beverly Sackler Distinguished Lecture, Storrs: Thomas J. Dodd Research Center, 2013), 11, https://humanrights.media.uconn.edu/wp-content/uploads/sites/3236/2022/05/2013-UN-Guiding-Principles-for-Business-and-Human-Rights_John-Ruggie.pdf.

# Chapter 2. Current Legal Framework on Director´s Duties and Proposals for Reform

This chapter aims to examine the current regulation of directors' responsibilities regarding human rights and the potential extension of their personal liability for corporate human rights violations. Initially, we will provide an overview of the content and implications of fiduciary duties within existing European (and some non-European) legislations. Following this, we will evaluate the extent to which fiduciary duties currently encompass human rights obligations. The second part of the chapter will concentrate on the personal liability of directors for breaching their duties resulting in human rights violations. This will include an overview of the existing enforcement regime for directors' duties and a discussion on the actual liability directors face for corporate human rights infringements.

## 1. Fiduciary Duties

### 1.1 A Traditional Perspective on Fiduciary Duties

Fiduciary duties are foundational principles that guide directors in the governance and management of a corporation. Directors’ fiduciary duties exist across all European Union Member States, either provided in legislation or in jurisprudence, and are largely consistent across them.[97] Traditionally, fiduciary duties have been articulated around two core obligations: the duty of care and the duty of loyalty. [98] This section delves into them, examining their content, legal foundations and implications for corporate governance.

### 1.2 Directors’ Main Obligations: The Duty of Care and the Duty of Loyalty

The duty of care requires directors to act with the diligence, care, and skill that a reasonably prudent person would exercise in similar circumstances.[99] It requires directors to make managerial decisions based on sufficient information and after careful assessment of the alternatives and likely outcomes, to establish information and monitoring systems and generally to supervise business operations.[100] This duty encompasses several key elements:[101]

[97] Robert McCorquodale and Stuart Neely, ‘Directors Duties and Human Rights Impacts: A Comparative Approach’, *Journal of Corporate Law Studies* 22, no. 2 (3 July 2022): 608, https://doi.org/10.1080/14735970.2021.2016147.
[98] Carsten Gerner-Beuerle and Edmund-Philipp Schuster, ‘The Evolving Structure of Directors’ Duties in Europe’, *European Business Organization Law Review* 15, no. 2 (June 2014): 199, https://doi.org/10.1017/S1566752914001104.
[99] Gerner-Beuerle and Schuster, 199.
[100] Gerner-Beuerle and Schuster, 199.
[101] Gerner-Beuerle and Schuster, 199.

1. Standard of Conduct: the laws of the EU Member States are characterized by a considerable degree of homogeneity in terms of the required standard of care. Directors are expected to make informed and well-considered decisions.[102] This involves gathering relevant information, active participation and continuous education.
2. Business Judgment Rule: developed originally by the Delaware courts and adopted by several European jurisdictions, this rule provides directors with protection from liability for decisions that result in adverse outcomes, provided that the decisions were made in good faith, with due care, and within the directors' authority. This rule recognizes that directors must often make difficult decisions with uncertain outcomes and aims to encourage risk-taking that is essential for corporate growth and innovation.[103] For example, a director deciding to invest in a new technology after thorough research and consultation with experts would be protected by the business judgment rule, even if the investment ultimately fails.

The duty of loyalty applies comprehensively to any situation giving rise to a conflict, or potential conflict, of interest between the director and the company.[104] It obliges directors to act in the best interests of the corporation, prioritizing the corporation's interests over their personal interests. Most aspects associated with the expectation that the directors avoid conflicts of interest can be related to two main applications of the duty of loyalty (even though they may be regulated separately in some jurisdictions):[105]

1. Self-dealing: refers to transactions between the company and the director, either direct or indirect, because the director is involved as a major shareholder or partner in another business that transacts with the company. Jurisdictions usually regulate this situations through the insertion of an additional layer of decision-making in order to neutralize the presence of the interested director on the board.[106]
2. Corporate opportunities: the exploitation of information that 'belongs' the company. Although there are some differences among jurisdictions, the duty of loyalty requires directors to refrain from exploiting corporate opportunities for personal gain. If a business opportunity arises that could benefit the corporation, directors must offer it to the corporation before pursuing it personally.[107]

[102] Gerner-Beuerle and Schuster, 200–203.
[103] Gerner-Beuerle and Schuster, 203–6.
[104] Gerner-Beuerle and Schuster, 206.
[105] Gerner-Beuerle and Schuster, 207.
[106] Gerner-Beuerle and Schuster, 207–9.
[107] Gerner-Beuerle and Schuster, 210–14.

With regards to their legal foundation, fiduciary duties are generally grounded in either common law principles or statutory regulations, depending on the jurisdiction. In the latter case, they are codified in corporate laws and regulations, providing a legal framework for their enforcement. Many countries have incorporated fiduciary duties into their corporate governance codes and legislation. For example:

- United States: fiduciary duties are embedded in state corporate laws, such as Delaware General Corporation Law, which is influential due to Delaware's prominence as a corporate hub.[108]
- United Kingdom: the Companies Act 2006 outlines directors' duties, including the duty to act within their powers, promote the success of the company, and avoid conflicts of interest.[109]
- European Union: EU directives and regulations emphasize corporate governance principles that include fiduciary duties.[110]

Courts also play a crucial role in interpreting and enforcing fiduciary duties. Judicial decisions provide precedents and clarify the application of these duties in various contexts. Key judicial interpretations include, for example:

- Smith v. Van Gorkom (1985): The Delaware Supreme Court emphasized the importance of the duty of care, holding directors liable for failing to adequately inform themselves before approving a merger.[111]
- Regal (Hastings) Ltd v Gulliver (1942): The UK House of Lords highlighted the duty of loyalty, ruling that directors who profited from their position must account for their gains to the company.[112]

The traditional fiduciary duties of care and loyalty form the bedrock of corporate governance and have significant implications for corporate governance. They ensure that directors act responsibly, ethically, and in the best interests of the corporation. They remain essential for maintaining trust, accountability, and integrity within the corporate structure as they hold directors accountable for their actions whenever these duties are breached.

---

[108] William M. Lafferty, Lisa A. Schmidt, and Donald J. Jr. Wolfe, 'A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law', *Dickinson Law Review* 116, no. 3 (2012): 841–48, https://ideas.dickinsonlaw.psu.edu/dlra/vol116/iss3/6.

[109] 'United Kingdom Companies Act 2006', Pub. L. No. c. 46, § Part 10, Chapter 2 (2006), https://www.legislation.gov.uk/ukpga/2006/46/part/10/chapter/2.

[110] George Dallas and David Pitt-Watson, 'Corporate Governance Policy in the European Union' (CFA Institute, 2016), 7–13, https://rpc.cfainstitute.org/-/media/documents/article/position-paper/corp-gov-policy-in-european-union-through-investor-lens.pdf.

[111] Smith v. Van Gorkom, No. 488 A.2d 858 (Delaware Supreme Court 1985).

[112] Regal (Hastings) v Gulliver, No. 2 AC 134 (United Kingdom House of Lords 1967).

## 2. The Best Interest of the Company: Shareholder Model or Stakeholder Orientation?

Directors' fiduciary duties ensure they act in the corporation's best interests, a requirement in many jurisdictions, sometimes codified as a separate duty.[113] This concept is crucial for interpreting directors' duties in light of human rights, as it allows for different interpretations of what "company" means and what decisions serve its best interests. A shareholder approach equates the company with its shareholders, an enlightened shareholder approach prioritizes shareholders but considers other stakeholders, while a stakeholderist approach views the company as encompassing all stakeholders.[114]

Some authors[115] argue that agency and nexus of contracts theories, embedded in corporate law, mandate directors to maximize shareholder value, fostering a shareholder-centric corporate culture. Others[116] believe these are law-and-economics theories based on dominant social norms and business practices, not reflected in company law. The "shareholder value" norm is rarely codified, with the UK being a notable exception. However, this norm is so prevalent that the distinction is often overlooked, becoming a mainstream postulate.[117]

A comparative study on directors' duties and liabilities in European jurisdictions[118] reveals that directors' duties are primarily owed to the company as a legal entity, not to its shareholders, except in specific cases.[119] Common law jurisdictions like the UK, Cyprus, and Ireland, as well as those close to common law like Scandinavian countries, grant shareholders significant contractual freedom, often including instruction rights.[120] Duties to other stakeholders, such as employees or creditors, are generally not recognized, similar to the United States.[121] However, as a company approaches

---

[113] See, e.g., United Kingdom Companies Act 2006, art. 172.

[114] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 609.

[115] See for example, Rhee, 'A Legal Theory of Shareholder Primacy'; Bainbridge, 'In Defense Of The Shareholder Wealth Maximization Norm: A Reply To Professor Green'; Macey, 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties'; Stout, 'New Thinking on "Shareholder Primacy"', 17,18.

[116] See, e.g., Beate Sjåfjell, 'Realising the Potential of the Board for Corporate Sustainability', in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjåfjell and Christopher M. Bruner, 1st ed. (Cambridge University Press, 2019), 2–3, https://doi.org/10.1017/9781108658386.056; Bilchitz and Ausserladscheider Jonas, 'Proportionality, Fundamental Rights and the Duties of Directors', 835.

[117] Sjåfjell, 'Realising the Potential of the Board for Corporate Sustainability', 697; Blair and Stout, 'Specific Investment: Explaining Anomalies in Corporate Law', 731, 732; John Quinn, 'The Sustainable Corporate Objective: Rethinking Directors' Duties', *Sustainability* 11, no. 23 (27 November 2019): 2, https://doi.org/10.3390/su11236734.

[118] Carsten Gerner-Beuerle, Philipp Paech, and Edmund-Philipp Schuster, 'Study on Directors' Duties and Liability in Europe', *SSRN Electronic Journal*, 2013, 55–74, https://doi.org/10.2139/ssrn.3886382.

[119] Gerner-Beuerle, Paech, and Schuster, 63.

[120] Gutterman, 'Sustainability and Corporate Governance', 31.

[121] Lafferty, Schmidt, and Wolfe, 'A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law', 841. We consider Delaware corporate law because Delaware corporate law, where approximately two thirds of Fortune 500 US companies are incorporated (DLA Piper, 'Global Guide to Directors' Duties', 2022, 315, https://www.dlapiperintelligence.com/directorsduties).

insolvency, its interests may shift from shareholders to creditors. In contrast, jurisdictions in the French and German legal traditions view boards as independent corporate organs, largely isolated from shareholders.[122]

To sum up, directors' duties are always owed to the company, interpreted differently across a spectrum of approaches.[123] The UK's enlightened shareholder value prioritizes collective shareholder interests over others, while the Germanic-inspired stakeholder approach balances multiple interests around the enterprise's central point.[124] The pluralist end of the spectrum is diverse; some jurisdictions explicitly mandate considering all stakeholders' interests, including the enterprise itself. Others do not explicitly address “company interest”, but a broader pluralist approach is evident upon closer examination. Lastly, certain pluralist jurisdictions prioritize specific stakeholder groups through legal provisions or social norms.[125]

All legal systems allow for exceptions to the general rule that directors' duties are owed to the company and not to a particular stakeholder. In some jurisdictions, corporate law provisions may establish a direct legal relationship between directors and shareholders or third parties. In others, this relationship relies on tort law. This is the case in many French legal tradition jurisdictions, where a tort law clause provides for the liability of directors for any damage caused by intentional or negligent conduct. In France, third parties may only bring a claim directly against the director if the latter has committed a “faute séparabele des fonctions” - an intentional commission of a particularly serious fault incompatible with the normal exercise of the director’s functions.[126]

## 3. Human Rights: Exceeding the Fiduciary Duties of Directors

A comprehensive analysis of directors' duties concerning human rights must consider obligations that extend beyond explicit mentions in corporate law or fiduciary duty provisions. This involves examining:

### (i) Human Rights Obligations Imposed on Companies

Directors have a duty to ensure that companies comply with human rights obligations imposed at national or regional levels. At national level, we can mention as examples:

- United Kingdom (UK) Companies Act 2006: amended in 2013, this Act includes sections 414A-C, which require companies to submit a non-financial and sustainability information statement. This statement must detail the impact of the company’s business on the

[122] Gerner-Beuerle, Paech, and Schuster, ‘Study on Directors’ Duties and Liability in Europe’, 64.
[123] McCorquodale and Neely, ‘Directors Duties and Human Rights Impacts’, 610.
[124] Sjåfjell and Richardson, *Company Law and Sustainability*, 93.
[125] Sjåfjell and Richardson, 102.
[126] Gerner-Beuerle, Paech, and Schuster, ‘Study on Directors’ Duties and Liability in Europe’, 65.

environment, social issues, community, and human rights. Additionally, large UK companies must include a "section 172 statement" in their strategic reports. This mandates directors to promote the company's success for the benefit of its members as a whole, considering factors such as the community, the environment, and the company's reputation. However, directors are not held liable for failing to include human rights information in the strategic report if they can demonstrate that such disclosure was not necessary for understanding the company's business.[127]

- UK Modern Slavery Act 2015: Section 54 requires companies to disclose information about modern slavery in their business operations. Despite this requirement, the Act does not include effective sanctions for non-disclosure, resulting in many companies providing insufficient detail.[128]
- National Mandatory Due Diligence Acts:
    - French Duty of Vigilance Act 2017: requires companies to implement a vigilance plan to identify risks and prevent serious human rights violations.[129]
    - Dutch Child Labor Due Diligence Act: includes personal liability for the company's compliance officer, although it is unclear if this includes directors.[130]
    - German Corporate Due Diligence in Supply Chains Act of 2021[131] and the Norwegian Transparency Act 2021:[132] include mandatory human rights due diligence requirements.

    These duties all fall on the company, not directly on directors, except in cases of repeated breaches under Dutch law, which can result in imprisonment for responsible directors. [133]
- Statutory duties in other legal areas (health and safety, labor, security regulations, criminal law): in Spain, for example, the Environmental Liability Act mandates environmental impact assessments, making directors personally accountable for actions contributing to a company's liability.[134]

At regional level, we could refer for example to:

[127] United Kingdom Companies Act 2006, sec. 414 A-C.
[128] 'United Kingdom Modern Slavery Act 2015', Pub. L. No. c. 30 (2015), sec. 54.
[129] 'Loi N° 2017-399 Du 27 Mars 2017 Relative Au Devoir de Vigilance Des Sociétés Mères et Des Entreprises Donneuses d'ordre', Pub. L. No. 2017–399, ECFX1509096L NOR (2017).
[130] 'Wet Zorgplicht Kinderarbeid', Pub. L. No. Staatsblad 2019, 401 (2019).
[131] 'Lieferkettensorgfaltspflichtengesetz (LkSG)', Pub. L. No. BGBl. I S. 2959 (2021).
[132] 'Åpenhetsloven', Pub. L. No. Lov om rett til innsyn i dokument i offentleg verksemd (offentleglova) (2021).
[133] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 620.
[134] McCorquodale and Neely, 632.

- Corporate Sustainability Due Diligence Directive (CSDDD):[135] published on the Official Journal of the European Union on the 5th of July 2024, this directive obliges large companies with significant activities in the European Union (EU) to conduct human rights and environmental due diligence across their operations and supply chains. While the duty falls on companies, it indirectly influences directors' responsibilities.
- EU Non-Financial Reporting Directive (NFR Directive):[136] requires certain large public companies and financial corporations operating in the EU to disclose information on environmental, social, human rights, and anti-corruption matters necessary for understanding the company's development, performance, position, and impact. The focus is on directors' reporting. However, categorizing these issues as non-financial or pertaining to "non-shareholder" interests implies they are secondary concerns for directors.

**(ii) Interpretation of Fiduciary Duties in Case Law**

Especially in common law systems, judicial interpretations of fiduciary duties provide additional guidance. We can mention as an example the Canadian Courts: they have indicated that management can consider non-shareholder interests, such as those of the general community or the environment, if doing so contributes to the company's success, even at the expense of shareholders.[137]

**(iii) Soft Law Initiatives**

Soft law initiatives also influence directors' duties. For example, the G20/OECD Principles of Corporate Governance recognize that an important responsibility of the board is to oversee risk management systems to ensure compliance with laws, including those related to tax, competition, labor, environmental protection, equal opportunity, anti-corruption, and health and safety.[138]

## 4. Conclusions

Different jurisdictions interpret and regulate fiduciary duties variably—some adhere to the classic shareholder model, while others require directors to consider additional stakeholders. However, even though fiduciary duties might be codified according to a stakeholder model, the legal framework presents the same limit identified in Chapter 1: equivalence between stakeholders and human rights

---

[135] 'Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859Text with EEA Relevance.', Pub. L. No. 2024/1760, PE/9/2024/REV/1 (2024).

[136] '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 Text with EEA Relevance', Pub. L. No. 2014/95 (2014).

[137] Sjåfjell and Richardson, *Company Law and Sustainability*, 98. See the example of Peoples Department Stores Inc (Trustee of) v Wise, No. 29682 (Supreme Court of Canada 29 October 2004).

[138] 'OECD Due Diligence Guidance for Responsible Business Conduct' (OECD, 2018), 59, https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

holders according to the BHR framework is not clear yet. For this reason, focusing solely on these provisions does not provide a comprehensive understanding of directors' obligations in terms of human rights. Furthermore, directors must navigate a complex landscape of statutory obligations, judicial interpretations, and soft law initiatives. For example, the UK's Companies Act, the EU's Non-Financial Reporting Directive, and various national due diligence laws mandate directors to consider and report on human rights and environmental risks, integrating these concerns into their duties of care and loyalty.

These sources bear considerable weight and are evidence of the fact that directors' duties of care and loyalty are expanding to include corporate accountability and human rights protection, going beyond mere compliance with corporate law. This would align with stakeholder theory, advocating value creation for all stakeholders and recognizing the long-term success linked to the well-being of employees, customers, suppliers, communities, and the environment. A shift from a shareholder-centric model to a stakeholder-oriented approach is also supported by the UN Guiding Principles on Business and Human Rights, emphasizing due diligence and proactive engagement with affected parties.[139]

Directors must balance these interests while complying with evolving legal and ethical standards. Integrating human rights considerations into corporate governance enhances corporate accountability, mitigates risks, and promotes sustainable development. This paradigm shift reflects the recognition of the interdependence between business success and human rights protection, paving the way for responsible corporate practices.

Although not positively codified in fiduciary provisions, this framework supports the inclusion of human rights within directors' fiduciary responsibilities. Failure to address human rights and environmental risks could lead to legal and reputational consequences, highlighting the importance of diligent navigation of these responsibilities to foster long-term value creation and uphold corporate commitment to human rights.

## 5. The Concept of Personal Liability in Ethical/Responsible Business Conduct

If human rights are included within directors' fiduciary responsibilities, then directors' failure to address human rights risks might result in a claim for breach of duty[140] and an obligation to compensate the company for damages caused by this negligence.[141] To further investigate the role of

[139] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 619.
[140] McCorquodale and Neely, 625.
[141] Quinn, 'The Sustainable Corporate Objective', 1.

directors in advancing corporate accountability, this section will outline the potential liabilities directors may face for actions of the company that violate human rights.

The duty of care is often seen as inadequately enforced, with its behavioral expectations not well-defined.[142] Directors' duties are generally owed to the company, allowing the latter to enforce these duties through authorized bodies. Minority shareholders might also bring derivative claims against directors for breaching their duties. Enforcement by authorized bodies typically requires a change in management and the initiation of proceedings against former directors, making derivative actions more common.[143] Such actions, grounded in the assertion that the company suffered harm due to directors' inadequate risk assessment, often seek remedies like the return of profits, compensation for losses, or legal actions against the directors.[144]

It appears, therefore, that minority shareholders could bring a derivative claim against the company's directors for breaching their duties due to a lack of consideration of human rights risks. A derivative action for human rights related obligations would be based on the assertion that the company suffered harm – typically financial or reputational - because the directors failed to adequately assess the risks associated with a particular activity, which resulted in environmental damage or human rights harm.[145]

However, bringing derivative actions presents significant challenges. Proving that directors knew or should have known about legal violations and failed to act is difficult due to the discretion they are afforded.[146] Common law courts interpret derivative actions narrowly, typically permitting them only in clear cases of abuse against minority shareholders. The financial benefits from successful cases go to the company, not the initiating shareholders, and the high costs of litigation act as further barriers. Consequently, directors' duties are rarely enforced while a company remains solvent.[147]

In some Member States, victims can sue directors personally under tort law. For example, in Italy, directors are jointly and severally liable to the company, shareholders, and third parties for damages from negligence in adhering to fiduciary duties.[148] Similarly, in common law jurisdictions, directors may share liability for company torts if they authorized, directed, or procured such actions. However, proving a causal link between a director's breach of duty and resulting damage is often challenging.[149]

---

[142] Gerner-Beuerle and Schuster, 'The Evolving Structure of Directors' Duties in Europe', 199.
[143] Quinn, 'The Sustainable Corporate Objective', 8; Gerner-Beuerle and Schuster, 'The Evolving Structure of Directors' Duties in Europe', 215.
[144] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 631.
[145] McCorquodale and Neely, 626.
[146] McCorquodale and Neely, 614.
[147] Quinn, 'The Sustainable Corporate Objective', 8.
[148] 'Articolo 2476 Del Codice Civile', Pub. L. No. R.D. 16 marzo 1942, n. 262 (1942).
[149] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 633.

Tort claims generally occur only in specific situations, such as crimes or statutory breaches with high director involvement. [150]

Directors' personal liability for human rights abuses can also arise from criminal sanctions, though these charges usually do not pertain directly to fiduciary duties but rather to specific statutory violations or criminal law breaches. Moreover, criminal charges do not automatically provide remedies for victims.[151]

Public investigation procedures leading to administrative sanctions also exist in some legal systems.[152]

### 5.1 Conclusions

Currently, both in the EU and the UK, there is no specific legislation establishing liability for directors who fail to address human rights and environmental risks. However, advancements in expanding directors' responsibilities and the widespread consensus that directors should consider stakeholders beyond just shareholders are significant.[153] Nonetheless, the development of extending directors' duties and statutory obligations, and expanding the types of risks they should address, faces a strong limitation. Directors owe a duty to the company, meaning it is the company that can bring a claim, leaving the position of human rights impact victims largely unchanged. Generally, victims cannot bring actions against directors for decisions leading to human rights violations by the company.[154] This reflects the need for further legal reforms to enhance directors' accountability in protecting human rights within corporate governance frameworks.

## 6. The Challenges of Reforming Directors' Duties for Improving Human Rights Protection

With the current state of directors' duties outlined, the challenge now is to determine how these duties should be regulated to ensure better protection of human rights and enhanced corporate accountability. As observed, the current configuration of directors' duties presents a significant limitation regarding the accessibility of remedies for potential victims of corporate human rights abuses.

### 6.1 Proposal for Reform

[150] McCorquodale and Neely, 636.
[151] McCorquodale and Neely, 626, 627.
[152] Gerner-Beuerle and Schuster, 'The Evolving Structure of Directors' Duties in Europe', 214–20.
[153] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 634.
[154] McCorquodale and Neely, 636.

Different legal sources contribute to defining directors' human rights obligations, which can be conceptualized into two categories: [155]

1. **External Obligations**: these must be followed in general corporate governance to comply with duties imposed on the company. Directors assess and manage these risks, aligning organizational structures and practices to measure the environmental and social impact of activities. Human rights protection here is external to corporate law and incentivizes directors to manage the company's potential liability under the law. These obligations affect the duty of care, potentially triggering directors' liability for non-compliance, only if it is proven that they failed to supervise adequately their compliance. These obligations are still compatible with a shareholder oriented corporate governance.
2. **Internalized Human Rights Obligations**: These obligations are integrated into corporate law, guiding corporate management and decision-making by incorporating human rights and environmental considerations into corporate strategy.[156] These directly affect the duty of care, their violation leading undoubtedly to directors' liability for breaches.

Directors' fiduciary duties vary broadly across jurisdictions, from a monist approach protecting only shareholders' interests to a pluralist approach requiring directors to consider multiple stakeholders' interests. In most cases, directors are liable to the company for breaches, typically resulting in recourse by shareholders.

Without explicit regulation, directors often adhere to the shareholder primacy model, demonstrating the need for clear, stakeholder-oriented regulations to shift this paradigm.[157]

To enhance human rights protection and corporate accountability, fiduciary duties should be configured as internalized norms, meeting the following requirements:

1. **Internalize Human Rights Protection**: corporate law should mandate directors to protect human rights explicitly, aligning with growing stakeholder pressure for sustainability. Directors should establish mechanisms to identify, prevent, and mitigate human rights and environmental harms, holding them accountable under corporate law for non-compliance.

[155] This type of conceptualization is taken up from Recarde Castells, '¿Puede el derecho contribuir a evitar o reducir los abusos de las empresas? No lo fíes a los ejecutivos; preocúpate de los bienintencionados; cuida la seguridad jurídica', 113–20.
[156] Recarde Castells, 120.
[157] Beate Sjåfjell, 'Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of the Corporate Board', *Sustainability* 12, no. 15 (3 August 2020): 4, https://doi.org/10.3390/su12156245.

This would integrate human rights and environmental considerations into corporate decision-making.[158]

2. **Enforcement Mechanisms**: declaratory effects alone are insufficient to disrupt the entrenched shareholder primacy norm.[159] Effective reform requires direct liability of directors to the protected group, enabling claims against directors for human rights violations.[160] Public enforcement mechanisms could provide more rigorous oversight, incentivizing compliance and prioritizing sustainability.[161]

### 6.2 The Boundaries of Directors' Duties: The Corporate Purpose

Reforming directors' duties also involves defining the corporate purpose: director's duties arise in relation to the latter and the director must act within it.[162] The purpose of a company as a societal institution refers to the reason for which society acknowledges the existence of companies as distinct legal entities.[163] It should guide the company's interests and ensure alignment with societal goals beyond profit maximization. Deriving the interest and purpose of a company from legal sources is challenging due to the lack of explicit statements in the law, which has allowed the development of shareholder primacy. This influence has led to the corporate purpose being interpreted as maximizing shareholder profit.[164] However, when considering the broader societal role of companies, profit generation for shareholders is just one aspect of their purpose. It is evident that no jurisdiction intends for maximizing shareholder returns to be the sole or ultimate objective assigned to companies by the societies that recognize their existence through law. Defining the corporate purpose should have the effect of drawing up the boundaries within which the board shall promote the interests of the company, outlining the scope within which profit will continue to be made. Reforming directors' duties by specifically including human rights obligations without also regulating corporate purpose

---

[158] For examples of proposals aligned with this vision, see Choudhury, 'Corporate Law's Threat to Human Rights', 194; McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 634; Quinn, 'The Sustainable Corporate Objective', 3; Sjåfjell, 'Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of the Corporate Board', 4.

[159] On the need to consider the role of enforcement within proposals for reforms of company law, see Quinn, 'The Sustainable Corporate Objective', 8.

[160] The proposal to strengthen the enforcement of directors' duties in favor of other stakeholders other than the sharehoders is not new and appeared in European Commission. Directorate General for Justice and Consumers. and EY., *Study on Directors' Duties and Sustainable Corporate Governance*, para. 59.

[161] Quinn, 'The Sustainable Corporate Objective', 8.

[162] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 617.

[163] Some scholars equate the company's interest with its purpose, often focusing exclusively on the company's interest and inferring its purpose from that perspective. See for example: Michael C. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function', *Journal of Applied Corporate Finance* 22, no. 1 (January 2010): 32–42, https://doi.org/10.1111/j.1745-6622.2010.00259.x. Guido Ferrarini, 'Corporate Purpose and Sustainability', *SSRN Electronic Journal*, 2020, https://doi.org/10.2139/ssrn.3753594. However, as noted by Sjåfjell and Richardson, *Company Law and Sustainability*, 90., the interest of the company is a means to achieve the company's societal purpose.

[164] Sjåfjell and Richardson, *Company Law and Sustainability*, 145.

would lead to inconsistencies between the latter – which keeps being interpreted as profit maximization – and the former. Or, at the very least, this would not bring about the desired results.[165] The EU-funded research project Sustainable Market Actors for Responsible Trade (SMART 2016-2020)[166] project proposed redefining corporate scope to "sustainable value creation within planetary boundaries," integrating human rights and sustainability into corporate governance.[167]

## 6.3 The Main Challenges

Proposals to reform the fiduciary duties of directors have met with considerable criticism. They are mostly based on the following arguments:

1. Limited effectiveness: critics argue that corporate law already provides directors with wide discretion, allowing them to make virtually any decision as long as it is justified as benefiting shareholders in the long term.[168] Most EU Member States already define directors' duties beyond shareholder primacy and yet this has not apparently solved the problem.[169] Some studies conducted in the UK, found that the reformed fiduciary provisions have had little impact on corporate behavior.[170] Empirical evidence further suggests that corporate leaders have strong incentives to enhance shareholder value but little incentive to treat stakeholder interests as an independent end.[171]
2. Risk of management entrenchment: changing directors' duties could entrench management, reducing accountability to shareholders.[172] The more interests that directors can serve, the more discretion they enjoy, which reduces the risk of liability. Proposals that allow for consideration of other interests directly increase the power of directors and further reduce the mechanisms for oversight of their management.[173]

---

[165] Choudhury, 'Corporate Law's Threat to Human Rights', 192.
[166] Beate Sjåfjell et al., 'Supporting the Transition to Sustainability: SMART Reform Proposals', *University of Oslo Faculty of Law Legal Studies*, 2019, 10, 11, https://ssrn.com/abstract=3503310.
[167] Sjåfjell, 'Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of the Corporate Board', 6.
[168] Recarde Castells, '¿Puede el derecho contribuir a evitar o reducir los abusos de las empresas? No lo fíes a los ejecutivos; preocúpate de los bienintencionados; cuida la seguridad jurídica', 102–4; Lucian A. Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance', *Harvard Law School Forum on Corporate Governance* (blog), 2 March 2020, https://corpgov.law.harvard.edu/2020/03/02/the-illusory-promise-of-stakeholder-governance/.
[169] Mark J. Roe et al., 'The European Commission's Sustainable Corporate Governance Report: A Critique', *SSRN Electronic Journal*, 2020, 145, https://doi.org/10.2139/ssrn.3711652.
[170] Choudhury, 'Corporate Law's Threat to Human Rights', 192.
[171] Bebchuk and Tallarita, 'The Illusory Promise of Stakeholder Governance', 2 March 2020.
[172] Erik Lidman, 'The Role of Corporate Governance in Sustainability and Why the Commission's CSDDD Proposal Might Do More Harm than Good', *ECGI* (blog), n.d., https://www.ecgi.global/publications/blog/the-role-of-corporate-governance-in-sustainability-and-why-the-commissions-csddd.
[173] Recarde Castells, '¿Puede el derecho contribuir a evitar o reducir los abusos de las empresas? No lo fíes a los ejecutivos; preocúpate de los bienintencionados; cuida la seguridad jurídica', 108.

3. Deterrence from risk-taking: introducing too many rules may deter companies from taking risks to achieve sustainable solutions due to directors' fear of legal claims. Additionally, judges may struggle to determine in hindsight whether a decision or action was genuinely socially responsible.[174]
4. Directors limited financial resources: for a damaged third party would be far more convenient to sue the company rather than the director.[175]

It is crucial to consider the extensive discretion granted to directors under corporate law, which is often protected by the business judgment rule in various jurisdictions.[176] Furthermore, directors and companies face significant economic disincentives to invest in social and environmental measures.[177] However, in the absence of clear legal norms, this discretion has translated into a focus on shareholder primacy.[178] Despite the latitude given to directors, boards have generally not used their discretion to balance a variety of stakeholder interests.[179] Therefore, the debate on "shareholderism vs. stakeholderism" cannot be dismissed, and exploring legal intervention into fiduciary duties is necessary.

The reformed provisions in the UK still prioritize shareholders and provide little guidance on what "having regard" to other stakeholders actually means.[180] Adopting such duties at the European level could serve an important signaling function, clarifying what is expected of EU-incorporated companies and their main decision-makers.[181]

Reform proponents suggest joint and several liability for the company and its decision-makers for breaches of duty, [182] addressing concerns about directors' limited financial resources.

While the fear of personal liability for directors is understandable, a duty of care does not automatically lead to liability. Several steps are required for a successful claim against a director, with the key question being whether decisions were made with sufficient care and diligence. Thus, the risk of directors' liability from including sustainability in decision-making should not be overstated.[183]

Critics of the stakeholder model argue that it reduces the responsibility of the board of directors towards shareholders, a common contention among shareholder model supporters. This fundamental

---

[174] Roe et al., 'The European Commission's Sustainable Corporate Governance Report', 152.
[175] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 637.
[176] Gerner-Beuerle and Schuster, 'The Evolving Structure of Directors' Duties in Europe', 204..
[177] Gutterman, 'Sustainability and Corporate Governance', 38.
[178] Quinn, 'The Sustainable Corporate Objective', 2.
[179] Sjåfjell and Richardson, *Company Law and Sustainability*, 96.7/13/2024 12:01:00 PM
[180] Choudhury, 'Corporate Law's Threat to Human Rights', 192.
[181] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 281.
[182] Sjåfjell, 'Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of the Corporate Board', 8.
[183] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 284.

difference underlines the descriptive and normative dimension of the debate between the two positions,[184] already addressed in Chapter 1.

Despite these objections, requiring directors to consider the company's impact on sustainability issues like human rights and the environment is a compelling proposal. Making this requirement explicit can increase awareness within company boards and encourage the incorporation of sustainability into everyday decision-making, as many directors aim to comply with their legal duties.[185] Corporate leadership is crucial for embedding sustainability, making the role of directors essential. Governance is central to integrating sustainability within companies and transitioning the economy ecologically.[186] Top management's actions significantly influence sustainable decision-making and behavior throughout the company.[187] Directors are positioned to make decisions with human rights implications and can plan strategies to integrate sustainability into business models, develop green technologies, and improve risk management.[188]

However, addressing corporate law and directors' fiduciary duties alone will not solve corporate impunity; it should be seen as part of a broader solution. Other tools for enhancing long-term sustainable decision-making include intrinsic motivation, employee roles, setting the right culture, remuneration, and board composition.[189]

Governance responsibility is a lever for improving corporate sustainability performance, but there are additional areas within corporate law to explore for better corporate accountability. Other areas within corporate law, such as separate legal personality and limited liability, also facilitate the prioritization of shareholders' interests. Corporations often use these protections to externalize human rights costs, directing risky ventures through subsidiaries to shield themselves from liability.[190]

Reforming directors' duties is one piece of the puzzle in addressing these broader structural issues in corporate law.

## 7. Conclusion

The shareholder vs. stakeholder debate is crucial but insufficient on its own. To ensure greater human rights protection and corporate accountability, it is necessary to internalize these protections in

[184] Olaerts, 280.
[185] Quinn, 'The Sustainable Corporate Objective', 7.
[186] Principale, *Fostering Sustainability in Corporate Governance*, 78.
[187] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 280.
[188] Principale, *Fostering Sustainability in Corporate Governance*, 56.
[189] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 280.
[190] Choudhury, 'Corporate Law's Threat to Human Rights', 186.

corporate law norms.[191] This requires reorienting the corporate law paradigm towards a stakeholder approach, explicitly including human rights stakeholders, enforce these duties rigorously and regulating corporate purpose towards sustainability. This comprehensive approach will ensure that directors are accountable for their decisions and actions, aligning corporate governance with broader societal and environmental goals. However, there are other areas of corporate law that contribute to corporate impunity, so reforming directors' duties should be seen a as one of the levers to improve corporate performance in terms of sustainability while parallel solutions should also be explored, rather than a panacea.

[191] Sjåfjell, 'Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of the Corporate Board', 7.

# Chapter 3. Directors' duties and mandatory human rights due diligence: the European Union Corporate Sustainability Due Diligence Directive (CSDDD)

## 1. Introduction: the Background of the CSDDD and the Proposed Duty of Care

In 2018, the High-Level Expert Group on Sustainable Finance in its Final Report recommended the Commission to "strengthen directors' duties related to sustainability".[192] Following this, EU Action Plan of 2018[193] identified corporate governance as one of the fundamental levers to promote sustainable growth of the economy.[194] The European Green Deal further emphasized the need to adapt corporate governance to include sustainability.[195] A 2020 study by Ernest Young[196] highlighted critical issues preventing proactive corporate governance, leading to the Commission's Inception Impact Assessment of an Initiative on Sustainable Corporate Governance[197] and a related public consultation on the sustainable corporate governance initiative from 26 February 2020 to 8 February 2021.[198] Over 80% of respondents supported administrators addressing ESG issues and creating a due diligence framework for human rights and environmental concerns. Additionally, just over 70% believed directors should be legally mandated to implement measures to identify and prevent ESG risks.[199]

The European Commission announced its intention on 29 April 2020 to introduce mandatory cross-sectoral human rights and environmental due diligence requirements for companies, emphasizing the integration of stakeholders' interests alongside shareholders' interests and the embedding of

---

[192] Directorate-General for Financial Stability, Financial Services and Capital Markets Union, 'Final Report of the High-Level Expert Group on Sustainable Finance' (2018), 40, https://finance.ec.europa.eu/publications/high-level-expert-group-sustainable-finance-hleg_en.

[193] European Commission, 'Action Plan: Financing Sustainable Growth', Document 52018DC0097 COM/2018/097 § (2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0097.

[194] Principale, *Fostering Sustainability in Corporate Governance*, 48.

[195] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal', Document 52019DC0640 COM/2019/640 final § (2019), 17, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN.

[196] European Commission. Directorate General for Justice and Consumers. and EY., *Study on Directors' Duties and Sustainable Corporate Governance*.

[197] European Commission, 'Inception Impact Assessment, Proposal for Legislation Fostering More Sustainable Corporate Governance in Companies', Pub. L. No. Ares(2020)4034032 (2020), https://eur-lex.europa.eu/legal-content/EN/PIN/?uri=PI_COM%3AAres%282020%294034032.

[198] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 278.

[199] Principale, *Fostering Sustainability in Corporate Governance*, 50–52.

sustainability into corporate strategies.[200] Commissioner Didier Reynders referenced a study[201] commissioned by the European Commission on human rights and environmental due diligence in supply chains to support these legislative proposals.

Such legislative initiatives within the EU were expected to mark a significant advancement in directors' duties, particularly concerning the responsibility towards those affected by a company's adverse human rights impacts[202] and to potentially reshape directors' responsibilities, prompting more proactive monitoring of how companies identify and manage their human rights impacts.

In this context, the European Commission's proposal aligned with international business and human rights standards, notably the UN Guiding Principles on Business and Human Rights (UNGPs). These principles underscore states' obligations regarding corporate human rights impacts and emphasize companies' responsibilities to respect human rights through due diligence processes that identify, prevent, mitigate, and account for human rights impacts arising from their operations and supply chains.[203] The proposed reforms reflected a concerted effort to codify these responsibilities into EU law.

The European Parliament also called for action with its resolution of 17 December 2020 on sustainable corporate governance[204] and later supported a proposal focused on changes in corporate law and corporate governance in March 2021.[205] However, the initiative was rejected by the Regulatory Scrutiny Board in May 2021 and November 2021.[206] The regulation of directors' duties

---

[200] The commitment was made during a Webinar hosted by the Responsible Business Conduct Working Group of the European Union, 29 April 2020, available at: 'Speech by Commission Reynders in RBC Webinar on Due Diligence', RBC - European Parliament Working Group on Responsible Business Conduct, 30 April 2020, https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/.

[201] Directorate General for Justice and Consumers European Commission et al., *Study on Due Diligence Requirements through the Supply Chain – Final Report* (Publications Office, 2020), https://doi.org/doi/10.2838/39830.

[202]European Commission, Inception impact assessment, Proposal for legislation fostering more sustainable corporate governance in companies, 4.

[203] Sam Eastwood and James Ford, 'Business And Human Rights: Mandatory Human Rights Due Diligence – European Commission To Introduce A Legislative Initiative By 2021', Mayer Brown, 19 May 2020, https://www.mayerbrown.com/en/insights/publications/2020/05/business-and-human-rights-mandatory-human-rights-due-diligence-european-commission-to-introduce-a-legislative-initiative-by-2021#_edn2.

[204] European Parliament, 'European Parliament Resolution of 17 December 2020 on Sustainable Corporate Governance', Procedure 2020/2137(INI) P9_TA(2020)0372 § (2020), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html.

[205] Recarde Castells, '¿Puede el derecho contribuir a evitar o reducir los abusos de las empresas? No lo fíes a los ejecutivos; preocúpate de los bienintencionados; cuida la seguridad jurídica', 111.

See recital n. 45 of the Annex to the European Parliament, 'European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability', P9_TA(2021)0073 2020/2129(INL) § (2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title2.: "For due diligence to be embedded in the culture and structure of an undertaking, the members of the administrative, management and supervisory bodies of the undertaking should be responsible for the adoption and implementation of its sustainability and due diligence strategies".

[206] Federica Agostini and Michele Corgatelli, 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: Enlightened Shareholder Value or Pluralist Approach?', *European Company Law* 19, no. Issue 4 (1 August 2022): 3, https://doi.org/10.54648/EUCL2022016.

was finally incorporated into the Proposal for a Directive on Corporate Due Diligence on February 23, 22nd, despite initial expectations of separate legislative initiatives for sustainable corporate governance and due diligence obligations.[207] The Commission emphasized the need for directors to be involved in due diligence processes to ensure it becomes part of companies' overall functioning.[208] However, the corporate governance elements were omitted from the final text of the Directive adopted in April and May 2024.[209]

The proposal included specific articles, notably:

“Article 25

Directors’ duty of care

1. Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.
2. Member States shall ensure that their laws, regulations and administrative provisions providing for a breach of directors’ duties apply also to the provisions of this Article”.

Article 26

Setting up and overseeing due diligence:

8. Member States shall ensure that directors of companies referred to in Article 2(1) are responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5, with due consideration for relevant input from stakeholders and civil society organisations. The directors shall report to the board of directors in that respect.
9. Member States shall ensure that directors take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified pursuant to Article 6 and any measures taken pursuant to Articles 7 to 9”.[210]

[207] Olaerts, ‘Corporate Sustainability and the Duty of Care of Directors’, 279.

[208] ‘Just and Sustainable Economy: Commission Lays down Rules for Companies to Respect Human Rights and Environment in Global Value Chains’, European Commission, 23 February 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1145.

[209] European Parliament, ‘Position of the European Parliament Adopted at First Reading on 24 April 2024 with a View to the Adoption of Directive (EU) 2024/… of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859’, P9_TC1-COD(2022)0051 § (2024), https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html#title2.

[210] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 66.

Art. 25 was, until its deletion, what remained of the original ambitious plan to harmonize directors' duties as a driver for sustainable corporate governance.[211]

## 2. Scope, Content and Effect of the Proposed Duty of Care

Article 25 set out a duty of care for the board of directors of EU-incorporated companies that fall within the scope of the directive, requiring directors to take into account the consequences of their decisions for sustainability matters. However, the wording of Article 25 left some ambiguity regarding at least three aspects:

**(i) The hierarchy of interests involved.**

The Final Report of the High-Level Expert Group on Sustainable Finance in 2018 recommended to the Commission "to enhance director duties and corporate governance by explicitly incorporating sustainability, … [t]o act in a way the director considers in good faith is most likely to promote the success of the company for the benefit of its owners and other stakeholders", recommending an open-ended list of secondary interests ("the likely consequences of any decision in the longer term", "the interests of the company's employees", "the need to foster the company's business relationships with suppliers, customers and others").[212] Conversely, the Ernst & Young's Report heavily drew from the Sustainable Companies Project and the SMART Project, fully subscribing to the view that the shareholder primacy norm does not derive from the law of directors' duties but rather from an erroneous interpretation thereof and that provisions that allow directors to consider the interests of other constituencies as secondary would be insufficient to address the shareholder primacy.[213]

The Ernst & Young Report, reflecting the SMART Proposals, also recommended linking directors' duties to the long-term interests of the company. However, it arrived at a different and somewhat confusing conclusion: the Report mentioned in various sections that directors should fulfill this duty by "considering" or taking the interests of other entities "into account".[214] This wording appeared to still imply a hierarchy in which the interests of other constituencies are secondary, but, at the same time the Report also recommended to "balance" the long-term interests of the company, employees, customers, local and global environment, as well as the society at large,[215] which, on the contrary, seemed to endorse a purely pluralist approach. The Impact Assessment on the Initiative on Sustainable Corporate Governance seemed to steer away from the pluralist approach, proposing to

---

[211] Agostini and Corgatelli, 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence', 3.

[212] Directorate-General for Financial Stability, Financial Services and Capital Markets Union, Final report of the High-Level Expert Group on sustainable finance, 40.

[213] Agostini and Corgatelli, 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence', 6.

[214] European Commission. Directorate General for Justice and Consumers. and EY., *Study on Directors' Duties and Sustainable Corporate Governance*, 75.

[215] European Commission. Directorate General for Justice and Consumers. and EY., 75.

integrate the duty to take all stakeholders into consideration within the duty of care,[216] while the related public consultation raised again some confusion between the two different approaches employing both the terms "take account" and "balancing".[217] Eventually, the Proposal concluded in favor of retaining the "taking into account" wording for the definition of the general fiduciary duties and included a list of secondary interests as an antidote to shareholder primacy.

Art. 25 built on the domestic concept of "company interest", assuming that under all national laws within the Member States directors owe a duty of care to the company.[218] However, the concept of company's best interest varies across jurisdictions. The article did not specify what the interest of the company should entail, nor did it give guidance as to how the different interests involved should be balanced,[219] but instead left significant discretion to the national legislator.[220] Ultimately, the extent of the duty would have depended on the approach taken by the individual Member State. In Member States with a pluralist approach, where multiple stakeholder interests are considered, Article 25 may not have caused significant changes. In more shareholder-oriented systems, it could have required directors to consider and prioritize sustainability matters over shareholder interests.[221]

**(ii) Enforcement**

Article 25 did not establish specific rules for directors' liability, leaving significant room for national laws to define how directors can be held accountable for failing to fulfill their duties. In particular, it did not clarify whether the directors could have been sued for their lack of diligence in fulfilling their duty and in that case who would have been able to bring a claim: the shareholders, as provided for in company law or, indeed, the third parties entitled to these interests?[222] Instead, it only required Member States to ensure that their existing laws, regulations, and administrative provisions regarding breaches of directors' duties also apply to the duty of care for directors, thereby leaving enforcement mechanisms entirely up to national legislation.[223] The very modest formulations leads to think that art. 25 did not adopt the approach suggested by the EY study, which aimed to strengthen the enforcement of directors' duties by making them liable towards other stakeholders.

**(iii) The relationship between due diligence requirements and directors' duties.**

---

[216] European Commission, Inception impact assessment, Proposal for legislation fostering more sustainable corporate governance in companies, 2,3.
[217] Agostini and Corgatelli, 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence', 8.
[218] Recital n. 63 of the proposed Directive.
[219] Regulatory Scrutiny Board, 'Regulatory Scrutiny Board Opinion. Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and Amending Directive (EU) 2019/1937', SEC(2022) 95 § (2021), 3.
[220] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 283.
[221] Olaerts, 284; Agostini and Corgatelli, 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence', 10,11.
[222] Recarde Castells, '¿Puede el derecho contribuir a evitar o reducir los abusos de las empresas? No lo fíes a los ejecutivos; preocúpate de los bienintencionados; cuida la seguridad jurídica', 114.
[223] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 284.

The article was meant to integrate due diligence obligations with directors' general duties but instead created confusion about whether it pertained specifically to due diligence requirements or a broader duty to consider sustainability in decision-making. Article 25 was included in a directive focused on due diligence obligations, which *per se* framed it as instrumental to these requirements.[224] Accordingly, the recitals of the proposed Directive indicated that Article 25 aimed to ensure directors' general duties aligned with the due diligence obligations,[225] suggesting the article emphasized implementing due diligence requirements.[226] On the other hand, there was already an article devoted to this aim: Article 26 explicitly addressed due diligence, stating that Member States must ensure directors are responsible for implementing and overseeing the due diligence actions mandated by the directive and adapting corporate strategy to account for identified adverse impacts.
A possible interpretation is that establishing an appropriate due diligence system, as outlined in the directive, could have been a factor in evaluating whether a director has met the general duty of care in Article 25.[227] This interpretation aligns with the Commission's intent to promote sustainable governance practices.

Given the above, the inclusion of Article 25 would not have fundamentally changed directors' duties but would have highlighted the need to consider sustainability matters in decision-making. Art. 25 would have not internalized human rights protection in corporate law creating a rule aimed at defending the interests of stakeholders other than shareholders. Its main effect would have been to require directors to consider human rights impacts when making decisions, which in shareholder-oriented systems might still prioritize shareholder interests. Furthermore, it was unclear whether third parties harmed by a breach of this duty could claim directly against directors.
Article 25 likely would not have changed directors' responsibilities but would have made explicit what is already expected or will soon be expected due to upcoming legislative changes. This implies that the same obligations exist even without Article 25.[228]
Due to the varying approaches of different jurisdictions to the concept of 'company's best interests,' as discussed in Chapter 2, reforming the general duties of directors is necessary. Harmonizing these duties based on existing national rules would not result in effective change.

[224] Agostini and Corgatelli, 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence', 10.
[225] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, para. 16; European Commission, para. 22; European Commission, para. 26.
[226] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 279, 280.
[227] Olaerts, 280.
[228] On this, see Olaerts, 281, who deems that boards are already required by the Corporate Sustainability Reporting Directive (CSRD) to have a sustainability with specific targets.

Article 25 seemed to fall short of the significant changes in company law considered necessary in Chapter 2. Without a concurrent reform of corporate purpose, its impact would have been even more limited. However, it should not be concluded that its exclusion from the directive was justified: Article 25 had a signaling function, raising awareness about the need to consider sustainability matters. [229]

## 3. Directors' Duties and Human Rights Due Diligence

This section explores the relationship between directors' duties and human rights due diligence, given the evolving regulatory landscape.

Directors' duties generally imply oversight and advice to the management of a company. In particular, they have a duty to assess company risks, implement measures to monitor and operationalize the assessment of these risks, evaluate the effectiveness of their responses, and communicate this information internally and externally. Consequently, if directors have established a robust risk management system that identifies, monitors, and addresses risks, including human rights risks, they would typically face limited liability.[230] Conversely, failure to manage such risks could result in a breach of their duties.

With the introduction of mandatory human rights and environmental due diligence (as will be required once Member States transpose the CSDDD) directors' existing risk management oversight obligations should encompass the management of the company's potential liability under the due diligence law. Failure to manage or even detect significant risks could put directors in breach of their duties. This raises the issue of directors' liability for either failing to set up risk management systems or failing to act upon signals from these systems.[231] Retaining Articles 25 and 26 of the CSDDD could have encouraged directors to monitor more proactively how companies identify and manage their human rights and environmental impacts.

Corporate human rights due diligence is intrinsically linked to potential reforms of directors' duties. If directors' duties were reformed to include the interests of human rights holders, implementing human rights due diligence would be a factor in assessing whether a director has fulfilled the general duty of care, potentially reducing their liability and the possibility of claims.[232] This interpretation aligns with the proposals from the SMART project, which suggest that sustainability due diligence

---

[229] Olaerts, 277.

[230] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 628.

[231] Cees De Groot, 'The CSDD, Oversight Liability and Risk Management Systems', *European Company Law* 21, no. Issue 1 (1 January 2024): 5, https://doi.org/10.54648/EUCL2024001.

[232] Beate Sjåfjell and Jukka Mähönen, 'The Story behind the Torturous Road towards the EU's Corporate Sustainability Due Diligence Directive', The Faculty of Law - University of Oslo, *Blogging for Sustainability* (blog), 24 May 2024, https://www.jus.uio.no/english/research/areas/sustainabilitylaw/blog/2024/story-behind-road-towards-eu-csddd.html.

can act as a defense mechanism if wrongdoings occur despite the company's best efforts to prevent them.[233] Conversely, failure to conduct sustainability due diligence in accordance with EU law should result in a presumption of liability for the company and its board.[234]
The desired corporate law reform should therefore also clarify whether corporate human rights due diligence "releases" the director from any responsibility for human rights impacts and how the duty of oversight over the company's other human rights related obligations, such as reporting or setting strategies, relates to the fulfillment of the general duty of care.

In conclusion, corporate sustainability due diligence is a crucial tool for corporate boards and a necessary component for transforming company operations. As also outlined in Chapter 2, its inclusion as a mandatory requirement shows a tendency to transition from profit maximizing to the consideration of wider social interest and therefore greater stakeholders' orientation. Ideally, it should have been incorporated into a comprehensive, sustainability-focused company law reform tackling also corporate governance. Nonetheless, if properly conducted, it will enable corporate boards to fully understand the business's positive and negative impacts on people, communities, and the environment. For those affected by corporate actions, sustainability due diligence will be a critical first step in stopping human rights abuses. Besides, is also a key tool in modern risk management, helping to mitigate the risk of lawsuits and other issues. Overall, due diligence is important for sound corporate decision-making and sustainable value creation.[235]

[233] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 280.
[234] Sjåfjell, 'Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of the Corporate Board', 8.
[235] Sjåfjell and Mähönen, 'The Story behind the Torturous Road towards the EU's Corporate Sustainability Due Diligence Directive'.

# Chapter 4: Enforcing Directors' Duties through Business and Human Rights Case Law

The aim of this chapter is to provide an overview of how directors' sustainability obligations are currently enforced in court, examining both procedural aspects and the legal grounds for such actions. This will help draw final conclusions on the enforcement of directors' duties.

Compliance with sustainability requirements is primarily the responsibility of the company itself rather than its directors. However, as outlined in Chapter 2, there is a growing trend towards holding company directors accountable for their decisions, which is also evident in public debates. While there are currently few examples of civil lawsuits against directors concerning sustainability compliance, notable cases are emerging. This increased scrutiny of management is also reflected in criminal law, with several reports and investigations explicitly considering directors' roles.[236]

Conceptually, actions against directors can be divided into two categories: derivative actions, initiated by a minority of shareholders representing the company, and actions brought by third parties. First, we will examine the potential of derivative actions to hold directors accountable for breaches of their sustainability obligations. Then, we will explore scenarios where the action is initiated by an aggrieved third party, which predominantly occurs in the criminal sphere. Finally, we will consider the implications of the introduction of mandatory Human Rights and Environmental Due Diligence (mHREDD).

## 1. Derivative Claims

### 1.1 ClientEarth v Board of Directors of Shell plc

Shell, a prominent London Stock Exchange-listed public limited company, ranks among the largest global oil and gas firms. It has committed to ambitious climate goals, including achieving 'net-zero' emissions by 2050, aligning with the Paris Agreement's target to limit global temperature rise to 1.5 degrees Celsius above pre-industrial levels.[237]

The company faced a landmark legal challenge[238] seeking to hold its directors accountable for mismanaging climate risks, alleging they failed to address foreseeable environmental threats adequately. Financial markets widely acknowledge climate change as a substantial commercial risk,

---

[236] Wouter den Hollander et al., 'ESG and Potential Director's Liability: Taking the Lead in the Transition to More Sustainable Business Operations', Stibbe, 22 December 2023.

[237] Nick Scott, 'Legal Insight: A Case Note on ClientEarth v Shell Plc', Hughes Hall, University of Cambridge, Centre for Climate Engagement, 14 May 2024, https://climatehughes.org/legal-insight-clientearth-v-shell-plc/#_ftnref6.

[238] Justice Trower, ClientEarth-v-Shell Plc, No. [2023] EWHC 1897 (Ch) (High Court of Justice Business and Property Courts of England and Wales Insolvency and Companies List(ChD) 24 July 2023).

encompassing physical, transition, and litigation risks collectively known as "climate risk". Shell's Board has recognized many of these risks in its Annual Reports.

The case primarily concerns transition risk, focusing on how Shell's leadership handles risks related to aligning operations with climate objectives. Central to this risk is the potential impact on demand and profitability of fossil fuel products, prompting some major shareholders to divest from Shell due to concerns over climate risk management.[239]

In a significant legal development, the Hague District Court ruled in May 2021 that Shell must slash its global carbon dioxide emissions by 45% from 2019 levels by 2030,[240] a decision Shell is currently appealing. In February 2023, ClientEarth filed a claim against the Board in the High Court of England and Wales.[241] The claim, brought by ClientEarth in their capacity as shareholders, was a derivative action alleging that the Board had breached its duties under sections 172, the duty to "promote the success of the company" and 174, the duty to "exercise reasonable care, skill and diligence", of the Companies Act 2006. Section 172 one of the clearest examples of expressed Enlightened Shareholder Value approach, indeed the "success of the company" under Section 172 centers on shareholders, but other stakeholders may be relevant when considering how decisions will impact shareholder value. Section 172(1) provides a non-exhaustive list of factors to which directors must have regard when fulfilling their duty, which includes impacts on the environment.[242] The central allegation was that by pursuing an inadequate energy transition strategy, the Board was mismanaging the foreseeable risks of climate change, thus breaching its legal duties to the company.[243]

The first-instance judge denied ClientEarth permission to continue the claim (necessary to represent the company in a derivative action) and the decision was upheld by the Court of Appeal in July 2023. The court ruling highlights significant considerations within a legal framework that embraces an Enlightened Shareholder Value (ESV) approach:

*(i)* Directorial Discretion: the court affirmed the principle that directors have discretion in determining the best interests of the company, including how to balance conflicting priorities such as environmental concerns and shareholder profitability;

[239] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot', Policy Report (London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, June 2024), 36, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf.

[240] Milieudefensie et al. v. Royal Dutch Shell plc., No. HA ZA 19-379 (The Hague District Court 26 May 2021).

[241] ClientEarth, 'ClientEarth v Board of Directors of Shell Plc: Legal Briefing', January 2024, 1–3, https://www.clientearth.org/latest/documents/clientearth-v-board-of-directors-of-shell-plc-legal-briefing/.

[242] Scott, 'Legal Insight: A Case Note on ClientEarth v Shell Plc'.

[243] ClientEarth, 'ClientEarth v Board of Directors of Shell Plc: Legal Briefing', 4–7.

*(ii)* Complex Decision-Making: recognizing the complexity of managing climate risks within a global corporation like Shell, the courts noted that the Board's decisions involve intricate trade-offs and strategic choices. They indicated that courts are generally hesitant to interfere with these decisions unless there is clear evidence of unreasonable conduct or breach of legal duties.

*(iii)* Evidentiary Standards: the courts found ClientEarth's evidence insufficient to demonstrate that the Board's actions regarding climate risk were unreasonable or in breach of legal standards. The NGO was required to demonstrate that the there is a universally accepted methodology to achieve the targeted emissions reductions and that the Board's response was unreasonable.

*(iv)* Good Faith: the claim appeared not to be in good faith but aimed at advancing ClientEarth's agenda, given its small shareholding and that the majority of shareholders supported the Board's strategy, indicating that the claim did not represent the company's position.

Relying heavily on the directors' discretion, the judge does not go as far as explaining what it would have meant to implement directors' duties in this case.[244] The directors had already drawn that balance in adopting the energy transition strategy: the role of the court should have been to assess if they had any credible policies for achieving it. For this reason, the dismissal of ClientEarth's challenge to Shell's board's climate change policies without a trial was a missed opportunity to scrutinize the operation of the relevant Companies Act provisions.[245] While these decisions may provide immediate reassurance to the fiduciaries involved, they are unlikely to offer long-term guidance for them or others on fulfilling their duties substantively.[246]

Nonetheless, the case provides an intriguing example of using derivative action to enforce directors' obligations, particularly in terms of environmental sustainability, in a strategic way.[247] This modality, however, has also several critical aspects to consider.

[244] Richard Hoyle, 'The Fiduciary's Divestment Dilemma: ESG and the Age of Climate Change', *Butterworths Journal of International Banking and Financial Law* 9 (2023): 612, https://essexcourt.com/wp-content/uploads/2023/10/The-Fiduciarys-Divestment-Dilemma-ESG-and-the-Age-of-Climate-Change-Hoyle-JIBFL-October-2023.pdf; ClientEarth, 'ClientEarth v Board of Directors of Shell Plc: Legal Briefing', 12.

[245] Robert Carnwath, *ClientEarth v Shell: What Future for Derivative Claims?* (London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 2024), 6, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/02/ClientEarth-v-Shell-what-future-for-derivative-claims.pdf.

[246] Hoyle, 'The Fiduciary's Divestment Dilemma: ESG and the Age of Climate Change', 615.

[247] This approach is part of a broader trend in climate litigation where claimants use legal mechanisms to influence corporate policy and promote broader societal goals. In cases like the one at hand, climate change activists become shareholders of some of the world's 'carbon majors' in order to then bring a shareholder action against the company in

Notably, the NGO's claim frames proactive climate governance as integral to financial interests rather than merely a secondary concern conflicting with profit maximization.[248] This perspective aligns closely with the ESV approach, where directors are expected to act in shareholders' long-term interests, including environmental considerations. In jurisdictions prioritizing shareholder primacy, arguing a breach of directors' duties would likely be more challenging if focused solely on short-term profit. Shell's directors' decisions might have been considered consistent with the company's best interest.

Indeed, shareholder primacy might as well expose directors to claims for prioritizing environmental concerns over shareholders' interests. Consider for example the claim filed in the New York state courts in May 2023 in Wong v New York City Employees Retirement System:[249] the plaintiffs allege that the trustees/administrators of various public pension schemes have breached their fiduciary duty by adopting investment policies that consider ESG factors, such as divesting from fossil fuel holdings. They argue that this approach has failed to maximize returns and has improperly pursued a specific policy agenda. The case was dismissed because claimants failed to demonstrate actual financial harm, even in the short-term, but it nonetheless serves as a reminder that not all not all litigation is concerned with an attempt to introduce more ESG focus into the decision-making process of fiduciaries.[250]

These litigations raise the question of whether treating climate risk as a typical business concern adequately addresses its existential threat and potential market disruptions over time.[251] At the same time, it underscores the potential value of an explicit stakeholder orientation within directors' duties as grounds for a potential claim. Adopting a stakeholderist approach could expand protections to external parties affected by directorial actions, potentially elevating environmental factors in fiduciary decision-making.

The Shell case is also interesting for analyzing the obstacles to bring a derivative action to enforce breaches of directors' sustainability obligations. The requirement to be a shareholder in the company and the heavy reliance on the business judgment rule are obvious impediments.

---

whom they hold shares. See: Jess Thomas, Lucy Waddicor, and Alice Matthews, 'Disputes Quick Read: ClientEarth v Shell – Climate Change Litigation Shifts Focus to UK Companies', Taylor Wessing, 31 March 2022, https://www.taylorwessing.com/en/insights-and-events/insights/2022/03/disputes-quick-read-climate-change-litigation-against-uk-companies---clientearth-v-shell. In the Shell case, the plaintiffs frame climate risk as a significant financial risk. This allows them to leverage fiduciary duty rules to argue that the directors have failed to act in the long-term interests of the shareholders as mandated by the Companies Act, which encompasses environmental considerations.

[248] Sara Barker, 'Directors' Personal Liability for Corporate Inaction on Climate Change', *Governance Directions* 67, no. 1 (2015): 22.

[249] Wong v. New York City Employees' Retirement System, No. 652297/2023 (New York Supreme Court 2023).

[250] Hoyle, 'The Fiduciary's Divestment Dilemma: ESG and the Age of Climate Change', 615.

[251] See Hoyle, 615. The author compares the status that should be given to environmental stakeholders due to the existential risk posed to the corporation by climate rchange to the privileged status recognized to creditors in the case of corporate failure .

Furthermore, the judge considered the claim of the NGO not be in good faith as ClientEarth was advancing its own agenda ("where the primary purpose of bringing the claim is an ulterior motive in the form of advancing ClientEarth's own policy agenda with the consequence that, but for that purpose, the claim would not have been brought at all, it will not have been brought in good faith").[252] The judge justifies this assessment on the basis that ClientEarth's agendas diverges from Shell's interests.[253] Additionally, the court considered ClientEarth's very small shareholdering to give rise to a "very clear inference that its real interest is not in how best to promote the success of Shell for the benefit of its members as a whole".[254]

These affirmations cannot but lead us to ask if the implication is that only derivative actions with majority shareholder support would pass the very first hurdle.[255] If that was the case, this would significantly limit the utility of the derivative claim to defend sustainability claims.

### 1.2 The Ostroleka C Case

In the months following the ClientEarth case proceedings, there have been several significant developments indicating the evolving legal context around transition risk. One notable case emerged in December 2023 when Polish energy company Enea decided to sue several of its former directors. These directors had supported investments in the controversial Ostroleka C coal-fired power station project, which was ultimately canceled. The project faced financing difficulties and was eventually replaced with a gas project. An Enea resolution indicated that the former directors had failed to exercise adequate due diligence regarding the project, leading to over US$160 million in losses. This lawsuit was backed by 87% of Enea's shareholders at an extraordinary general meeting.

The Ostroleka C case followed years of civil society campaigns against the power station, including litigation over the shareholder resolution questioning the project's financial viability.[256] ClientEarth, filed a claim against Enea arguing that the approval of the power plant's construction harmed the company's economic interests due to climate-related financial risks. These campaigns and the surrounding political controversy should have served as warnings to the directors about the potential for the project to become a 'stranded asset.' Despite these red flags, the directors proceeded with their investments.[257]

This case shows how directors' liabilities related to climate risk have come under increased scrutiny

---

[252] Trower, ClientEarth-v-Shell Plc paragraph 92.
[253] Trower, paragraph 87.
[254] Trower, paragraph 92.
[255] ClientEarth, 'ClientEarth v Board of Directors of Shell Plc: Legal Briefing', 11.
[256] ClientEarth v. Enea, No. I AGa 219/19 (Poznań Regional Court 1 August 2019).
[257] Setzer and Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot', 36.

in the wake of ClientEarth v. Shell:[258] in both cases, it is discussed whether a drop in company value can be attributed to poor management.[259] Again, climate risk is framed as a significant financial risk in order to leverage fiduciary duties obligations. As the company operates under a different legal system (Poland, which is not clearly aligned with any of the three approaches outlined in Table 1), the judge's decision will be particularly significant. This is especially true in terms of how it interprets the relevant corporate law provisions concerning directors' duties.

### 1.3 Beyond Climate Litigation

Abstracting from climate litigation, one might wonder whether the same observations made for the above two cases also apply to directors' decisions impacting human rights (beyond the right to a healthy and safe environment). The key difference is that ignoring environmental sustainability obligations poses an existential risk to the company. In contrast, human rights impacts may not present the same type of risk but rather pose reputational and image risks. Therefore, it will be interesting to see whether the same logic will be applied in this case as well: derivative action against directors for mismanaging the financial risk that would accrue to the company from human rights violations. There is no doubt that the extreme consequences of reputational or image damage could even be severe: companies associated with human rights issues may suffer significant financial damage, including lost sales, contracts or operating licenses, exclusion from tenders, declines in share price value and even insolvency.[260] Claims could therefore go as far as to demand higher standards of proactivity and engagement from corporate boards on these issues as well in order to satisfy directors' duties to act in the best interest of the company. However, one might encounter an obstacle in the fact that the science on climate change has now solidified and it has been ascertained that the economic consequences of climate change are significant – if not unparalleled.[261] The long-term financial risk in terms of image for a company that violates human rights may not be perceived as equally significant.

## 2. Actions of Third Parties against Directors

[258] Claudia De Meulemeester, 'Polish Lawsuit Puts Board Directors' Due Diligence Obligations in Spotlight', Sustainable Views, 26 February 2024, https://www.sustainableviews.com/polish-lawsuit-puts-board-directors-due-diligence-obligations-in-spotlight-e9516ee6/.
[259] Setzer and Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot', 36.
[260] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 626.
[261] Barker, 'Directors' Personal Liability for Corporate Inaction on Climate Change', 22.

## 2.1 Antuzis & Ors v DJ Houghton LTD[262]

The Claimants, Lithuanian nationals employed on farms, alleged that their employer, DJ Houghton Catching Services Ltd, subjected them to exploitative treatment, breaching various statutory obligations. They filed claims citing breach of express or implied terms in their employment contracts, including unpaid wages, unlawful deductions, fees, and absence of holiday pay.

The Court held the directors personally responsible for conduct amounting to modern slavery, linking it to their duties under section 172 of the UK's Companies Act. The High Court determined that the directors could be held personally liable for inducing the company to breach the claimants' employment contracts, as they had not acted in good faith toward the company, as required by case law. By causing the company to commit statutory breaches of employment law, the directors tarnished the company's reputation and led to the revocation of its gangmasters' license, essential for employing workers. As a result, they were jointly and severally liable to the claimants for inducing the company's breaches of contract.[263]

At first glance, this case may seem alarming for company directors, suggesting they could be personally liable whenever the company breaches its employment contracts. However, this is not the case. This decision must be viewed in the context of the unusually extreme circumstances: the directors were knowingly and intimately involved in the mistreatment of workers.[264] This case establishes that if the breach of contract has a statutory element, it may indicate a failure on the director's part to comply with their duties to the company, potentially making them liable to a third party (such as their employees) for inducing the breach of contract. However, for a director to be found to have failed in their duties in this way, there must be evidence of their unlawful and deliberate actions and how these actions were clearly detrimental to the company. In this case, this was unusually established based on the facts and the judge's critical view of the witness evidence provided by directors, leading to a finding that they lacked credibility.

The factual scenario of this case is unusual among directors of large multinational companies. Nevertheless, it is intriguing due to the broader principle it illustrates: directors can breach their duties by actions that harm the company's reputation.[265]

---

[262] Justice Lane, Antuzis & Ors v DJ Houghton Catching Services Ltd & Ors, No. [2019] EWHC 843 (QB) (England and Wales High Court (Queen's Bench Division) Decisions 8 April 2019).

[263] Helen Almond, 'Antuzis & Ors V DJ Houghton LTD', Addleshaw Goddard LLP, 30 May 2019, https://www.addleshawgoddard.com/en/insights/insights-briefings/2019/employment/employment-up-to-date-may-2019/antuzis-ors-v-dj-houghton-ltd/.

[264] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 623.

[265] McCorquodale and Neely, 623.

### 2.2 Criminal Charges

In France, eight former directors of Lafarge have been charged under the French Criminal Code with complicity in war crimes and crimes against humanity.[266] This is due to their actions in making commercial agreements with the Islamic armed group ISIS in Syria, which endangered their employees and implicated them in abductions. Between 2012 and 2014, Lafarge allegedly paid up to 13 million euros to various armed groups in Syria, including the Islamic State, to keep its cement factory operational during the Syrian civil war and its associated atrocities. Lafarge kept its Syrian employees working on-site despite the highly dangerous conditions, repeated kidnappings, and life-threatening risks. In November 2016, Sherpa, the European Center for Constitutional and Human Rights (ECCHR), and eleven former Syrian employees of Lafarge filed a complaint in France against Lafarge, its Syrian subsidiary, and several executives.

Another example is the Italian case of ENI's current CEO and a former director being investigated for alleged international corruption in Nigeria (charges have now been dropped).[267]

Finally, the concept of ecocide is gaining traction, reflected in new legislation in Belgium and proposed EU directives addressing environmental crimes. The new Belgian law[268] acknowledges that business actions are ultimately carried out by individuals, including directors and executives. The proposed EU directive[269] includes an expanded list of environmental crimes committed by individuals and company representatives.

Efforts have also been made to involve the International Criminal Court in climate issues, with initiatives suggesting that the Rome Statute should be amended to include crimes related to climate disinformation promoted by corporate actors, such as in the case of the UK Youth Climate Coalition v. Board of BP.[270]

## 3. Conclusions: the Potential of Mandatory HREDD Litigation

Instances of directors' personal liability for corporate human rights abuses are currently uncommon. Even in jurisdictions with pluralist approaches, fiduciary duties are not yet interpreted broadly enough

---

[266] Bonnal, Cass. Crim., 16 janvier 2024, No. N 22-83.681 FS-B (Cour de Cassation, Chambre Criminelle 16 January 2024).

[267] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 626, 627. Marco Tremolada, Mauro Gallina, and Alberto Carboni, No. RG TRIB 1351/1 (Corte d'Appello di Milano 17 March 2021).

[268] 'Code Pénal', Pub. L. No. 55K0186 (2023), art. 136ter.

[269] 'European Parliament Legislative Resolution of 27 February 2024 on the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and Replacing Directive 2008/99/EC', Pub. L. No. P9_TA(2024)0093 (2024), https://www.europarl.europa.eu/doceo/document/TA-9-2024-0093_EN.pdf.

[270] NZ Students for Climate Solutions and UK Youth Climate Coalition v. Board of BP (n.d.) in; Setzer and Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot', 50.

to allow third parties to bring claims against directors, and the use of derivative action to enforce sustainability obligations is still emerging. The Shell case, set in a jurisdiction explicitly adopting the ESV approach, illustrates the potential of fiduciary duties that require consideration of other stakeholders. In a shareholderist jurisdiction, it would likely have been more challenging to bring an action against directors for neglecting environmental considerations. Despite this, there are doubts about the applicability of such actions to human rights issues. Directors can incur personal criminal liability for offenses committed for the company's benefit, but this avenue is impractical if the director's conduct does not constitute a criminal offense.

Nevertheless, directors should be aware of the potential adverse consequences of ignoring human rights risks when considering the company's best interests. With mandatory human rights due diligence now required, directors' duties extend to implementing a human rights monitoring system, even though the CSDDD no longer explicitly mandates board oversight. This raises the possibility of derivative action against directors for failing to oversee mandatory human rights due diligence or act on its findings.

In countries with mandatory human rights and environmental due diligence, no lawsuits against directors have been filed to date. Such litigation would be insightful for understanding: (i) whether courts interpret the duty to implement and oversee mandatory human rights due diligence as part of directors' duty of care, even without explicit provision; and (ii) how to assess whether this duty has been properly fulfilled.

As to the second point, the approach taken by the Delaware Chancery Court in In re McDonald's Corp. Stockholder Derivative Litigation[271] is instructive. Shareholders claimed that the officer breached fiduciary duties by allowing a corporate culture where misconduct and sexual harassment occurred. The court distinguished between "information-systems claims" (where no information systems or controls are in place) and "red-flags claims" (where systems are in place but follow-up by directors and officers is lacking). The court found that directors could be liable for oversight violations if a problem arose, the directors knew about it, and acted in bad faith, hence disloyally.[272] It would be valuable if European jurisprudence developed similarly, providing guidance on interpreting directors' fiduciary duties in light of new mandatory human rights due diligence legislation.

[271] In Re McDonald's Corp. Stockholder Derivative Litigation (Delaware Court of Chancery 26 January 2023).

[272] De Groot, 'The CSDD, Oversight Liability and Risk Management Systems', 5, 6. The case was actually against an executive officer ("global chief people officer") who was not a member of the board of directors. However, the court found that officers owe duties of oversight comparable to those of directors.

# Conclusion

This thesis has explored the pivotal role that corporate directors play in preventing human rights violations and enhancing corporate accountability. At the heart of this research lies the debate between shareholder primacy, championed by Milton Friedman, and stakeholder theory, advocated by Edward Freeman. While the former emphasizes profit maximization for shareholders, often sidelining broader social and environmental considerations, the latter promotes a holistic approach where directors consider the interests of all stakeholders, including employees, customers, suppliers, and the community at large.

The research sought to answer two main questions: whether stakeholder orientation within directors' duties is the most effective approach for protecting human rights, and how directors' duties should be practically framed to enhance human rights protection.

Chapter 1 explores the debate between shareholder-centric and stakeholder-centric models in corporate governance, particularly in the context of human rights protection. It outlines the traditional shareholder model, which prioritizes profit maximization for shareholders, and contrasts it with stakeholder theory, which advocates for considering the interests of all stakeholders, including employees, customers, and the community. This chapter provides an overview of these theories and examines their implications for directors' duties within Corporate Social Responsibility (CSR) and Business and Human Rights (BHR) frameworks. The findings suggest that integrating stakeholder considerations into directors' duties can enhance corporate accountability and respect for human rights. However, the stakeholder theory's practical implementation remains debated. The chapter concludes that while empirical data is needed, adopting a stakeholder-oriented approach in directors' duties shows promise for promoting human rights within corporate governance.

Chapter 2 addressed the second research question, exploring whether fiduciary duties should be legally reformed and how. Through a comparative analysis of European regulations on directors' duties, the chapter highlighted the dominance of shareholder primacy as a social norm rather than a legal duty. Concurrently, it identified a gradual shift towards integrating stakeholders' considerations into directors' duties. The chapter proposed reforms to reorient the corporate law paradigm towards a stakeholderist approach, recommending that directors be mandated to protect human rights holders' interests as an additional duty while managing the company and establishing direct liability of directors to the protected group.

Chapter 3 examined the Corporate Sustainability Due Diligence Directive (CSDDD), assessing its potential to transform corporate governance by embedding human rights and environmental

considerations into directors' core duties. Although the proposed Article 25 did not ensure meaningful corporate accountability, the chapter concluded that with mandatory human rights due diligence now in place, the obligation to oversee its implementation falls under the general director's duty to exercise risk management. Effective due diligence would serve as a measure of directors' responsibility towards third parties whose human rights have been violated.

Chapter 4 focused on the enforcement of directors' duties concerning human rights and sustainability obligations through an examination of case law. It found that cases holding directors personally liable for corporate human rights abuses are rare. Fiduciary duties are not broadly interpreted to allow third parties to sue directors, and derivative actions to enforce sustainability obligations are just emerging. While directors may face criminal liability for offenses committed for the company's benefit, this only applies if the conduct constitutes a criminal offense. The chapter concluded that, since mandatory human rights due diligence might extend directors' duties to implementing specific human rights monitoring system, future lawsuits could clarify the extent of directors' duty of care in this context.

Through a comprehensive analysis, several key conclusions emerge, shedding light on the transformative potential of integrating human rights considerations into corporate governance.

- Integration of Human Rights in Corporate Governance and Enhanced Accountability:

Although it does not reform national corporate law regarding fiduciary duties, the CSDDD mandates human rights and environmental due diligence, thereby expanding the scope of directors' traditional fiduciary duties. This is due to directors' responsibility to oversee compliance with the due diligence process. This on its own represents a significant advancement in corporate governance, a broader shift from a shareholder-centric focus to one that includes stakeholder welfare and sustainable business practices.

Overall, even without the introduction of art. 25, the CSDDD still retains some potential to enhance directors' accountability and corporate accountability in general: directors will hopefully oversee more proactively the implementation a robust risk management system to address human rights risks effectively, with proactive engagement in due diligence processes to avoid potential liability.

- The Role of Legal Reforms:

In light of the different approached in national European legislations, the thesis highlights the necessity of legal reforms to support the integration of human rights due diligence into directors' duties. Future legal reforms should clarify the extent of directors' duties regarding human rights impacts and provide guidance on balancing various stakeholders' interests. Such reforms would enhance legal certainty and promote a holistic approach to corporate governance.

- Implications for Future Research and Practice:

The conclusions underscore the need for ongoing research and dialogue in corporate governance and human rights. Future studies should examine the practical implications of the CSDDD's implementation in diverse legal and regulatory frameworks across EU Member States. Additionally, exploring stakeholders' roles, including civil society and investors, in shaping corporate human rights practices will provide valuable insights into the directive's effectiveness.

Leveraging directors' duties to promote sustainability has been previously suggested and met with various criticisms. The differing perspectives on directors' duties and approaches to sustainability indicate that achieving a true *ius commune* remains distant.[273] Although the proposed Article 25 did not make it into the final version of the CSDDD, the concept of using directors' duties to foster sustainable decision-making is still worth exploring. By reimagining the role of corporate directors and embedding human rights considerations into the very fabric of corporate governance, we can make significant strides towards a more just and equitable global economy.

[273] Olaerts, 'Corporate Sustainability and the Duty of Care of Directors', 277.

# Bibliography

## Articles and books


Agostini, Federica, and Michele Corgatelli. 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: Enlightened Shareholder Value or Pluralist Approach?' *European Company Law* 19, no. Issue 4 (1 August 2022): 92–99. https://doi.org/10.54648/EUCL2022016.

Bainbridge, Stephen M. 'In Defense Of The Shareholder Wealth Maximization Norm: A Reply To Professor Green'. *Washington and Lee Law Review* 50, no. 4 (1993): 1423–47. https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1781&context=wlulr.

Barker, Sara. 'Directors' Personal Liability for Corporate Inaction on Climate Change'. *Governance Directions* 67, no. 1 (2015): 21–25. https://search.informit.org/doi/10.3316/informit.943602113626710.

Barton, Dominic, and Mark Wiseman. 'Focusing Capital on the Long Term'. *Harvard Business Review*, Features, January-February 2014 (2014). https://hbr.org/2014/01/focusing-capital-on-the-long-term.

Bebchuk, Lucian A., and Roberto Tallarita. 'The Illusory Promise of Stakeholder Governance'. *SSRN Electronic Journal*, 2020. https://doi.org/10.2139/ssrn.3544978.

Berle, Adolf Augustus, and Gardiner C. Means. *The Modern Corporation and Private Property*. New Brunswick London: Transactions, 1991.

Bilchitz, David, and Laura Ausserladscheider Jonas. 'Proportionality, Fundamental Rights and the Duties of Directors'. *Oxford Journal of Legal Studies* 36, no. 4 (December 2016): 828–54. https://doi.org/10.1093/ojls/gqw002.

Blair, Margaret M., and Lynn A. Stout. 'Director Accountability and the Mediating Role of the Corporate Board'. *SSRN Electronic Journal*, 2001. https://doi.org/10.2139/ssrn.266622.

Blair, Margaret M., and Lynn A. Stout. 'Specific Investment: Explaining Anomalies in Corporate Law'. *Journal of Corporation Law* 31, no. 3 (2006): 719–44. https://ssrn.com/abstract=819365.

Borden, Jonathan, and Xiaochen Angela Zhang. 'Towards a Conceptualization of Corporate Accountability: A Consumer Perspective'. *Management Communication Quarterly* 38, no. 2 (May 2024): 307–30. https://doi.org/10.1177/08933189231180132.

Bowen, Howard R. *Social Responsibilities of the Businessman*. University of Iowa Press, 2013. https://doi.org/10.2307/j.ctt20q1w8f.

Cedillo, Cristina. 'Better Access to Remedy in Company-Community Conflicts in the Field of CSR: A Model for Company-Based Grievance Mechanisms'. *Dovenschmidt Quarterly* 1, no. 4 (December 2013): 198–215. https://doi.org/10.5553/DQ/221199812014001004006.

Chandrakant, Raut, and R. Rajesh. 'Social Sustainability, Corporate Governance, and Sustainability Performances: An Empirical Study of the Effects'. *Journal of Ambient Intelligence and Humanized Computing* 14, no. 7 (July 2023): 9131–43. https://doi.org/10.1007/s12652-022-04417-4.

Choudhury, Barnali. 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough'. *Business and Human Rights Journal* 8, no. 2 (June 2023): 180–96. https://doi.org/10.1017/bhj.2023.29.

De Groot, Cees. 'The CSDD, Oversight Liability and Risk Management Systems'. *European Company Law* 21, no. Issue 1 (1 January 2024): 4–6. https://doi.org/10.54648/EUCL2024001.

Donaldson, Thomas, and Lee E. Preston. 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications'. *The Academy of Management Review* 20, no. 1 (January 1995): 65. https://doi.org/10.2307/258887.

Eccles, Robert G., Ioannis Ioannou, and George Serafeim. 'The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance'. *SSRN Electronic Journal,* 2011. https://doi.org/10.2139/ssrn.1964011.

Evan, William M., and R. Edward Freeman. A Stakeholder Theory of the Modern Corporation : Kantian Capitalism, 1988.

Ferrarini, Guido. 'Corporate Purpose and Sustainability'. *SSRN Electronic Journal*, 2020. https://doi.org/10.2139/ssrn.3753594.

Freeman, R. Edward. *Strategic Management: A Stakeholder Approach*. Cambridge (GB): Cambridge university press, 2010.

Freeman, R. Edward, and Sergiy Dmytriyev. 'Corporate Social Responsibility and Stakeholder Theory: Learning From Each Other'. *Symphonya. Emerging Issues in Management*, no. 1 (21 December 2017): 7–15. https://doi.org/10.4468/2017.1.02freeman.dmytriyev.

Friedman, Milton. 'A Friedman Doctrine – The Social Responsibility of Business Is to Increase Its Profits', 13 September 1970. https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

Garcia-Madariaga, Jesus, and Fernando Rodríguez-de-Rivera-Cremades. 'Corporate Social Responsibility and the Classical Theory of the Firm: Are Both Theories Irreconcilable?' *Innovar* 20 (May 2010): 5–19. https://www.redalyc.org/pdf/818/81818989002.pdf.

Garriga, Elisabet, and Domènec Melé. 'Corporate Social Responsibility Theories: Mapping the Territory'. *Journal of Business Ethics* 53, no. 1 (1 August 2004): 51–71. https://doi.org/10.1023/B:BUSI.0000039399.90587.34.

Gerner-Beuerle, Carsten, Philipp Paech, and Edmund-Philipp Schuster. 'Study on Directors' Duties and Liability in Europe'. *SSRN Electronic Journal*, 2013. https://doi.org/10.2139/ssrn.3886382.

Gerner-Beuerle, Carsten, and Edmund-Philipp Schuster. 'The Evolving Structure of Directors' Duties in Europe'. *European Business Organization Law Review* 15, no. 2 (June 2014): 191–233. https://doi.org/10.1017/S1566752914001104.

Gutterman, Alan. 'On the Purpose of the Corporation'. *SSRN Electronic Journal*, 2020. https://doi.org/10.2139/ssrn.3833599.

Gutterman, Alan. 'Sustainability and Corporate Governance'. *SSRN Electronic Journal*, 2023. https://doi.org/10.2139/ssrn.4493058.

Hoyle, Richard. 'The Fiduciary's Divestment Dilemma: ESG and the Age of Climate Change'. *Butterworths Journal of International Banking and Financial Law* 9 (2023): 612–15. https://essexcourt.com/publication/the-fiduciarys-divestment-dilemma-esg-and-the-age-of-climate-change/ .

Jensen, Michael C. 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function'. *Journal of Applied Corporate Finance* 22, no. 1 (January 2010): 32–42. https://doi.org/10.1111/j.1745-6622.2010.00259.x.

Kolk, Ans, and Jonatan Pinkse. 'The Integration of Corporate Governance in Corporate Social Responsibility Disclosures'. *Corporate Social Responsibility and Environmental Management* 17, no. 1 (January 2010): 15–26. https://doi.org/10.1002/csr.196.

Lafferty, William M., Lisa A. Schmidt, and Donald J. Jr. Wolfe. 'A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law'. *Dickinson Law Review* 116, no. 3 (2012). https://ideas.dickinsonlaw.psu.edu/dlra/vol116/iss3/6.

Macey, Jonathan. 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties'. Stetson Law Review 21, no. 1 (1991). http://hdl.handle.net/20.500.13051/964.

Martin, Jena. 'Business and Human Rights: What's the Board Got to Do with It?' West Virginia University Legal Studies Research Paper, no. 11 (2013). https://ssrn.com/abstract=2297567.

Matej, Lahovnik. 'The Transition of Joint Stock Companies in Slovenia: Shareholder-Value Approach versus Stakeholder-Value Approach'. *South East European Journal of Economics*

*and Business* 4, no. 2 (2009): 71-79. https://intapi.sciendo.com/pdf/10.2478/v10033-009-0018-z.

McCorquodale, Robert, and Stuart Neely. 'Directors Duties and Human Rights Impacts: A Comparative Approach'. *Journal of Corporate Law Studies* 22, no. 2 (3 July 2022): 605–39. https://doi.org/10.1080/14735970.2021.2016147.

McPhail, Ken. 'From Stakeholder to Rightsholder Perspectives The UNGPs, SDGs and New Paradigms for Corporate Accountability'. *Accounting and Management Review | Revista de Contabilidade e Gestão* 26, no. 1 (24 November 2022). https://doi.org/10.55486/amrrcg.v26i.5a.

Muchlinski, Peter. 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation'. *Business Ethics Quarterly* 22, no. 1 (January 2012): 145–77. https://doi.org/10.5840/beq20122218.

Olaerts, Mieke. 'Corporate Sustainability and the Duty of Care of Directors'. *Ondernemingsrecht*, Special: The Proposal for a Corporate Sustainability Due Diligence Directive, 5, no. 38 (2023): 277–86. https://www.stibbe.com/sites/default/files/2023-03/Tijdschrift%20Ondernemingsrecht%20%E2%80%93%20the%20leading%20Dutch%20company%20law%20Journal.pdf.

Phillips, Robert A. 'Stakeholder Theory and A Principle of Fairness'. *Business Ethics Quarterly* 7, no. 1 (January 1997): 51–66. https://doi.org/10.2307/3857232.

Principale, Salvatore. *Fostering Sustainability in Corporate Governance: Analysis of the EU Sustainable Corporate Governance and Due Diligence Directives*. SIDREA Series in Accounting and Business Administration. Cham: Springer Nature Switzerland, 2023. https://doi.org/10.1007/978-3-031-30354-8.

Quinn, John. 'The Sustainable Corporate Objective: Rethinking Directors' Duties'. Sustainability 11, no. 23 (27 November 2019): 6734. https://doi.org/10.3390/su11236734.

Ramasastry, Anita. 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability'. Journal of Human Rights 14, no. 2 (3 April 2015): 237–59. https://doi.org/10.1080/14754835.2015.1037953.

Recarde Castells, Andrés Juan. '¿Puede el derecho contribuir a evitar o reducir los abusos de las empresas? No lo fíes a los ejecutivos; preocúpate de los bienintencionados; cuida la seguridad jurídica'. In *Empresas transnacionales, derechos humanos y cadenas de valor: nuevos desafíos*, 2023.

Rhee, Robert J. 'A Legal Theory of Shareholder Primacy'. *Minnesota Law Review* 102 (2018): 1951. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1121&context=mlr.

Roe, Mark J., Holger Spamann, Jesse M. Fried, and Charles C. Y. Wang. 'The European Commission's Sustainable Corporate Governance Report: A Critique'. SSRN Electronic Journal, 2020. https://doi.org/10.2139/ssrn.3711652.

Ronnegard, David, and N. Craig Smith. 'Shareholder Primacy vs. Stakeholder Theory: The Law as Constraint and Potential Enabler of Stakeholder Concerns'. *SSRN Electronic Journal*, 2018. https://doi.org/10.2139/ssrn.3165992.

Sacconi, Lorenzo. 'Corporate Social Responsibility and Corporate Governance'. *EconomEtica*, no. 38 (June 2012): 42. https://ssrn.com/abstract=2102116.

Scherer, Andreas Georg, and Guido Palazzo. 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and Its Implications for the Firm, Governance, and Democracy'. *Journal of Management Studies* 48, no. 4 (2011): 899–931. https://doi.org/10.1111/j.1467-6486.2010.00950.x.

Sjåfjell, Beate. 'Realising the Potential of the Board for Corporate Sustainability'. In *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, edited by Beate Sjåfjell and Christopher M. Bruner, 1st ed., 696–710. Cambridge University Press, 2019. https://doi.org/10.1017/9781108658386.056.

Sjåfjell, Beate. 'Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate

Purpose and Duties of the Corporate Board'. *Sustainability* 12, no. 15 (3 August 2020): 6245. https://doi.org/10.3390/su12156245.
Sjåfjell, Beate, Jukka Mähönen, Mark Taylor, Eléonore Maitre-Erken, Maja van der Velden, Tonia Novitz, Clair Gammage, Jay Cullen, Marta Andhov, and Roberto Caranta. 'Supporting the Transition to Sustainability: SMART Reform Proposals'. *University of Oslo Faculty of Law Legal Studies*, 2019. https://ssrn.com/abstract=3503310.
Sjåfjell, Beate, and Benjamin J. Richardson, eds. *Company Law and Sustainability: Legal Barriers and Opportunities*. United, Kingdom; New York: Cambridge University Press, 2015.
Spence, Crawford, Javier Husillos, and Carmen Correa-Ruiz. 'Cargo Cult Science and the Death of Politics: A Critical Review of Social and Environmental Accounting Research'. *Critical Perspectives on Accounting* 21, no. 1 (January 2010): 76–89. https://doi.org/10.1016/j.cpa.2008.09.008.
Stout, Lynn A. 'New Thinking on "Shareholder Primacy"'. *Accounting, Economics, and Law* 2, no. 2 (2012). https://doi.org/doi:10.1515/2152-2820.1037.
Tamvada, Mallika. 'Synthesising Synergies between CSR and BHR for Corporate Accountability: An Integrated Approach'. *International Journal of Corporate Social Responsibility* 8, no. 1 (December 2023): 9. https://doi.org/10.1186/s40991-023-00084-6.
Van De Ven, Bert. 'Human Rights as a Normative Basis for Stakeholder Legitimacy'. *Corporate Governance: The International Journal of Business in Society* 5, no. 2 (April 2005): 48–59. https://doi.org/10.1108/14720700510562659.
Wettstein, Florian. *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*. 1st ed. Cambridge University Press, 2022. https://doi.org/10.1017/9781009158374.
Winner, Martin. 'The Duty of Care and Business Judgment Rule in Austrian Company Law'. *AUC IURIDICA* 68, no. 3 (14 September 2022): 9–22. https://doi.org/10.14712/23366478.2022.32.

**Reports and other official documents**

Carnwath, Robert. *ClientEarth v Shell: What Future for Derivative Claims?* London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 2024. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/02/ClientEarth-v-Shell-what-future-for-derivative-claims.pdf.
ClientEarth. 'ClientEarth v Board of Directors of Shell Plc: Legal Briefing', January 2024. https://www.clientearth.org/latest/documents/clientearth-v-board-of-directors-of-shell-plc-legal-briefing/.
Dallas, George, and David Pitt-Watson. 'Corporate Governance Policy in the European Union'. CFA Institute, 2016. https://rpc.cfainstitute.org/-/media/documents/article/position-paper/corp-gov-policy-in-european-union-through-investor-lens.pdf.
Danish Committee on Corporate Governance. 'Danish Recommendations on Corporate Governance'. 2 December 2020. https://corporategovernance.dk/sites/default/files/2023-08/Danish-recommendations-corporate-governance-02122020.pdf.
DLA Piper. 'Global Guide to Directors' Duties', 2022. https://www.dlapiperintelligence.com/directorsduties.
Edelman. 'Edelman Trust Barometer 2021'. 2021. https://www.edelman.com/sites/g/files/aatuss191/files/2021-01/2021-edelman-trust-barometer.pdf.
Global Compact Network Germany. 'What Makes Stakeholder Engagement Meaningful? 5 Insights from Practice'. Insight Series – Keys to Effective Human Rights Due Diligence, n.d. https://www.globalcompact.de/fileadmin/user_upload/Dokumente_PDFs/UN_GCD_Insights_Series_HR_Due_Diligence_Stakeholderengagement_english.pdf.
Nortone Rose Fullbright. 'German Stock Corporation Act (Aktiengesetz): English Translation as at May 10, 2016', 2016.

Ruggie, John. 'Just Business: Multinational Corporations and Human Rights'. 2013 Raymond and Beverly Sackler Distinguished Lecture. Storrs: Thomas J. Dodd Research Center, 2013. https://humanrights.media.uconn.edu/wp-content/uploads/sites/3236/2022/05/2013-UN-Guiding-Principles-for-Business-and-Human-Rights_John-Ruggie.pdf.

Setzer, Joana, and Catherine Higham. 'Global Trends in Climate Change Litigation: 2024 Snapshot'. Policy Report. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, June 2024. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf.

Shift. 'Bringing a Human Rights Lens to Stakeholder Engagement'. Workshop Report. New York, August 2013. https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Shift-Workshop-Report-3-Bringing-a-Human-Rights-Lens-to-Stakeholder-Engagement.pdf.

**Webpages**

Almond, Helen. 'Antuzis & Ors V DJ Houghton LTD'. Addleshaw Goddard LLP, 30 May 2019. https://www.addleshawgoddard.com/en/insights/insights-briefings/2019/employment/employment-up-to-date-may-2019/antuzis-ors-v-dj-houghton-ltd/.

Blair, Margaret M. 'What Must Corporate Directors Do? Maximizing Shareholder Value versus Creating Value through Team Production'. Centre for Effective Public Management at Brookings, June 2015. https://www.brookings.edu/wp-content/uploads/2016/06/Blairrevised-61115.pdf.

Clean Clothes Campaign. 'Justice Still Outstanding: An Update of Legal Cases Related to Rana Plaza Eight Years On', 28 April 2021. https://cleanclothes.org/news/2021/justice-still-outstanding-an-update-of-legal-cases-related-to-rana-plaza-eight-years-on.

De Meulemeester, Claudia. 'Polish Lawsuit Puts Board Directors' Due Diligence Obligations in Spotlight'. Sustainable Views, 26 February 2024. https://www.sustainableviews.com/polish-lawsuit-puts-board-directors-due-diligence-obligations-in-spotlight-e9516ee6/.

Eastwood, Sam, and James Ford. 'Business And Human Rights: Mandatory Human Rights Due Diligence – European Commission To Introduce A Legislative Initiative By 2021'. Mayer Brown, 19 May 2020. https://www.mayerbrown.com/en/insights/publications/2020/05/business-and-human-rights-mandatory-human-rights-due-diligence-european-commission-to-introduce-a-legislative-initiative-by-2021#_edn2.

Eastwood, Sam, Johannes Weichbrodt, Teresa Gerhold, and Oliver Williams. 'Business and Human Rights: Meaningful Stakeholder Engagement in Due Diligence'. Mayer Brown, 14 September 2022. https://www.eyeonesg.com/2022/09/business-and-human-rights-meaningful-stakeholder-engagement-in-due-diligence/.

European Commission. 'Just and Sustainable Economy: Commission Lays down Rules for Companies to Respect Human Rights and Environment in Global Value Chains', 23 February 2022. https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1145.

Hollander, Wouter den, Monique Van der Linden, Guan Schaiko, Stefanie François, and Florence Volckaert. 'ESG and Potential Director's Liability: Taking the Lead in the Transition to More Sustainable Business Operations'. Stibbe, 22 December 2023.

Kusbiantoro, Rosa. 'Human Rights, Access to Remedy, and Stakeholder Engagement'. BSR, 18 June 2019. https://www.bsr.org/en/blog/human-rights-access-to-remedy-and-stakeholder-engagement.

Lidman, Erik. 'The Role of Corporate Governance in Sustainability and Why the Commission's CSDDD Proposal Might Do More Harm than Good'. *ECGI* (blog), n.d.

https://www.ecgi.global/publications/blog/the-role-of-corporate-governance-in-sustainability-and-why-the-commissions-csddd.

RBC - European Parliament Working Group on Responsible Business Conduct. 'Speech by Commission Reynders in RBC Webinar on Due Diligence', 30 April 2020. https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/.

Scott, Nick. 'Legal Insight: A Case Note on ClientEarth v Shell Plc'. Hughes Hall, University of Cambridge. Centre for Climate Engagement, 14 May 2024. https://climatehughes.org/legal-insight-clientearth-v-shell-plc/#_ftnref6.

Sjåfjell, Beate, and Jukka Mähönen. 'The Story behind the Torturous Road towards the EU's Corporate Sustainability Due Diligence Directive'. The Faculty of Law - University of Oslo. *Blogging for Sustainability* (blog), 24 May 2024. https://www.jus.uio.no/english/research/areas/sustainabilitylaw/blog/2024/story-behind-road-towards-eu-csddd.html.

Thomas, Jess, Lucy Waddicor, and Alice Matthews. 'Disputes Quick Read: ClientEarth v Shell – Climate Change Litigation Shifts Focus to UK Companies'. Taylor Wessing, 31 March 2022. https://www.taylorwessing.com/en/insights-and-events/insights/2022/03/disputes-quick-read-climate-change-litigation-against-uk-companies---clientearth-v-shell.

**EU legislation and documents**

European Commission. Action Plan: Financing Sustainable Growth, COM/2018/097 § (2018). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0097.

European Commission. Directorate-General for Financial Stability, Financial Services and Capital Markets Union. Final report of the High-Level Expert Group on sustainable finance (2018). https://finance.ec.europa.eu/publications/high-level-expert-group-sustainable-finance-hleg_en.

European Commission. 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, Document 52011DC0681 COM/2011/0681 final § (2011). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681.

European Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal, Pub. L. No. COM/2019/640 final (2019). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN.

European Commission. Inception impact assessment, Proposal for legislation fostering more sustainable corporate governance in companies, Pub. L. No. Ares (2020)4034032 (2020). https://eur-lex.europa.eu/legal-content/EN/PIN/?uri=PI_COM%3AAres%282020%294034032.

European Commission. Regulatory Scrutiny Board. Regulatory Scrutiny Board Opinion. Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937, SEC (2022) 95 § (2021). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:SEC(2022)95&from=PL.

European Commission. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 § (2022). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0071.

European Commission. Directorate General for Justice and Consumers. and EY. *Study on Directors' Duties and Sustainable Corporate Governance: Final Report.* LU: Publications Office, 2020.

https://data.europa.eu/doi/10.2838/472901.
European Commission. Directorate-General for Justice and Consumers, F. Torres-Cortés, C. Salinier, H. Deringer, C. Bright, et al. *Study on Due Diligence Requirements through the Supply Chain – Final Report*. LU: Publications Office, 2020. https://data.europa.eu/doi/10.2838/39830.
European Parliament. 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 Text with EEA relevance, Pub. L. No. 2014/95 (2014). https://eur-lex.europa.eu/eli/dir/2014/95/oj.
European Parliament. Resolution of 17 December 2020 on sustainable corporate governance, P9_TA (2020)0372 § (2020). https://www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html.
European Parliament. Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL) § (2021). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021IP0073.
European Parliament. Legislative resolution of 27 February 2024 on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, Pub. L. No. P9_TA(2024)0093 (2024). https://www.europarl.europa.eu/doceo/document/TA-9-2024-0093_EN.pdf.
European Parliament. Position of the European Parliament adopted at first reading on 24 April 2024 with a view to the adoption of Directive (EU) 2024/… of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, P9_TC1-COD (2022)0051 § (2024). https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html#title2.

**National Legal sources**

Åpenhetsloven (Norwegian Transparency Act), Pub. L. No. Lov om rett til innsyn i dokument i offentleg verksemd (offentleglova) (2021).
Articolo 2476 del Codice Civile (Italian Civil Code), Pub. L. No. R.D. 16 marzo 1942, n. 262 (1942).
Code Pénal (Belgian Criminal Code), Pub. L. No. 55K0186 (2023).
Lieferkettensorgfaltspflichtengesetz (LkSG) (German Act on Corporate Due Diligence Obligations in Supply Chains), Pub. L. No. BGBl. I S. 2959 (2021).
Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (French Law on The Duty of Vigilance), Pub. L. No. 2017–399, ECFX1509096L NOR (2017).
United Kingdom Companies Act 2006, Pub. L. No. c. 46, § Part 10, Chapter 2 (2006).
United Kingdom Modern Slavery Act 2015, Pub. L. No. c. 30 (2015).
Wet Zorgplicht Kinderarbeid (Dutch Labor Due Diligence Act), Pub. L. No. Staatsblad 2019, 401 (2019).

**International legal sources**

United Nations. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*. New York, Geneva: United Nations: Office of the High Commissioner for Human Rights, 2011.
Organization for Economic Cooperation and Development. *OECD Due Diligence Guidance for Responsible Business Conduct*. OECD, 2018. https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

**Case Law**

Antuzis & Ors v DJ Houghton Catching Services Ltd & Ors, No. [2019] EWHC 843 (QB) (England

and Wales High Court (Queen's Bench Division) Decisions 8 April 2019).
App. Milano, 17 Marzo 2021, No. RG TRIB 1351/1 (Corte d'Appello di Milano 17 March 2021).
Cass. Crim., 16 janvier 2024, No. N 22-83.681 FS-B (Cour de Cassation, Chambre Criminelle 16 January 2024).
ClientEarth v. Enea, No. I AGa 219/19 (Poznań Regional Court 1 August 2019).
ClientEarth-v-Shell Plc, No. [2023] EWHC 1897 (Ch) (High Court of Justice Business and Property Courts of England and Wales Insolvency and Companies List (ChD) 24 July 2023).
In Re McDonald's Corp. Stockholder Derivative Litigation (Delaware Court of Chancery 26 January 2023).
Milieudefensie et al. v. Royal Dutch Shell plc., No. HA ZA 19-379 (The Hague District Court 26 May 2021).
Peoples Department Stores Inc (Trustee of) v Wise, No. 29682 (Supreme Court of Canada 29 October 2004).
NZ Students for Climate Solutions and UK Youth Climate Coalition v. Board of BP (International Criminal Court).
Regal (Hastings) v Gulliver, No. 2 AC 134 (United Kingdom House of Lords 1967).
Smith v. Van Gorkom, No. 488 A.2d 858 (Delaware Supreme Court 1985).
Wong v. New York City Employees' Retirement System, No. 652297/2023 (New York Supreme Court 2023).

# Annex

## Table 1 – Directors' Duty to Act in the Best Interest of the Company in European Jurisdictions.[274]

| Country | Provision | Addressee | Interpreted as/Specified as being | Approach |
|---|---|---|---|---|
| Austria | Stock Corporation Act ("AktG"), article 70: The board shall, under its own responsibility, manage the company in such a manner as the best interests of the enterprise require, taking into account the interests of the shareholders and employees as well as the public interest.[275] | Company | Shareholders, employees, public interest | ST |
| Belgium | Duties are not codified in company law but derived from the general duty to act in good faith (art. 1134(3) Civil Code), as well as the sections of the Companies Code providing for liability of directors. Substantial clarification has been given by case law. Art. 1134(3) is interpreted as the basis of the duty to act in the company's interest. | Company | Shareholders, group interests under certain conditions | SV |
| Bulgaria | Commercial Act, s. 237(2): | Company | Shareholders | SV |

[274] The information is mainly taken from Gerner-Beuerle, Paech, and Schuster, 'Study on Directors' Duties and Liability in Europe'. The latter has been integrated with additional sources (see footnotes).
[275] Martin Winner, 'The Duty of Care and Business Judgment Rule in Austrian Company Law', *AUC IURIDICA* 68, no. 3 (14 September 2022): 12, https://doi.org/10.14712/23366478.2022.32.

| | | | | |
|---|---|---|---|---|
| | The members of the boards shall be obliged to perform their functions with the care of a diligent merchant in the interest of the company and all stockholders. | | | |
| Croatia | Companies Act, s. 252(1):<br>‘dobrobit društva’ (well-being of the company). | Company | Profitability of the future business, not the same as the interests of the majority or all shareholders. | Not clear |
| Cyprus | The duty to act in good faith for the benefit of the company is not codified.[276] | Company | Shareholders primarily but may also include creditors. | SV |
| Czech Republic | Commercial Code, s. 194(5):<br>Members of the board of directors shall exercise their range of powers with due managerial care and not disclose confidential information and facts to third parties, if such disclosure might be detrimental to the company […]. | Company | S. 194 is interpreted as companies are managed by the directors for the benefit of the shareholders. | SV |
| Denmark | Companies Act:<br>General provision for liability, s. 361(1): directors who, in the performance of their duties, have intentionally or negligently | Company | Not clear, for the literature, interests of the members as a whole | ESV[277] |

[276] Gerner-Beuerle, Paech, and Schuster, ‘Study on Directors’ Duties and Liability in Europe’, 31.
[277] The most recent set of recommendations, updated on December 2, 2020, emphasizes long-term value creation, sustainability, stakeholder engagement, and transparency in executive remuneration and corporate purpose.See ‘Danish Recommendations on Corporate Governance’ (Danish Committee on Corporate Governance, 2 December 2020), https://corporategovernance.dk/sites/default/files/2023-08/Danish-recommendations-corporate-governance-02122020.pdf.

| | | | | |
|---|---|---|---|---|
| | caused damage to the company, shareholder, or third parties, are liable to pay damages.<br>S. 108: The general meeting may not pass a resolution if it is clear that such resolution is likely to give certain shareholders or others an undue advantage over other shareholders or the limited liability company. | | | |
| Estonia | Civil Code, art. 35:<br>The members of a directing body of a legal person shall perform their obligations arising from law or the articles of association with the diligence normally expected from a member of a directing body and shall be loyal to the legal person.<br>Commercial Code, art. 315:<br>(1) A member of the management board shall perform his or her duties with due diligence.<br>(2) Members of the management board who cause damage to the public limited company by violation of their obligations shall be jointly liable for compensation for the damage caused […]. | Company | Stakeholder theory | ST |
| Finland | Companies Act, Chapter 1, section 8:<br>"The management of the company shall act with due care and promote the interests of the company".<br>Ch. 22, s. 1(1): directors are liable to the company for breaches of the duty of care. | Company | Shareholders | SV |

| | | | | |
|---|---|---|---|---|
| | Ch. 22, s.1(2): directors are liable to the company, shareholders **or third parties** for breaches of other provisions of the Companies Act: Ch. 22, s. 1(2).<br>Ch. 1, s. 5: the purpose of a limited company is to generate profits for the shareholders. | | | |
| France | Commercial Code<br>Art. 1848 Civil Code: Within the relationships among members of the company, the director may perform all acts of management required by the interests of the company ("intérêt de la societé"). | Company | Differently Interpreted depending on the context:<br>1. Conception contractuelle: the company's interests are equivalent to the shareholders' interests.<br>2. Conception *institutionnelle*: the company is regarded as having its own interests, which go beyond the shareholders' interests; can be found in different provisions. | SV/ST |

| Germany | Stock Corporation Act, s. 93(1):<br>In conducting business, the members of the management board shall employ the care of a diligent and conscientious manager. They shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company [..].[278] | Company | Stakeholder theory: acting in the interests of the company requires that the interests of all affected constituencies are taken into consideration, including those of society at large. | ST |
|---|---|---|---|---|
| Greece | Law 2190/1920, art. 22(a): duty of care to achieve the objectives of the corporation with the due diligence of a prudent businessman and not to use the position of director for personal benefits to the company's detriment. | Company | The best interest of the company does not merely equate with the interests of the shareholders. Some articles refer to the interests of other stakeholders, however there is no general shift towards a stakeholder model. | SV |

[278] Nortone Rose Fullbright, 'German Stock Corporation Act (Aktiengesetz): English Translation as at May 10, 2016', 2016.

| | | | | |
|---|---|---|---|---|
| Hungary | General fiduciary principles of the Civil Code apply to define the duty of care. “Company’s best interest” not specified in Hungarian company law nor case law. | Company | No definition or prevailing theory. Uncertainties regarding the meaning of the term. | Not clear |
| Ireland | Mainly case law: duty to act in the best interest of the company.<br>Companies Act 1990, s. 52:<br>(1) The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.<br>(2) Accordingly, the duty imposed by this section on the directors shall be owed by them to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors. | Company | The interests of the company are equated with the collective interests of the shareholders, but in some contexts the interests of other stakeholders can become relevant. | SV |
| Italy | Art. 2392(1) Civil Code:<br>The directors shall perform the duties imposed on them by law and the articles of association with the diligence required by the nature of their office and their specific competences. They shall be jointly and severally liable towards the company for any damages resulting from the non-observance of such duties, unless they relate to the powers of the executive committee or to functions concretely assigned to one or more directors. | Company | Shareholders | SV |

| | | | | |
|---|---|---|---|---|
| | No general definition of "company's b.st interest"; there are references to the interest of the company in art. 2358, 2373 and 2441. | | | |
| Latvia | Commercial Law 2000: general duty to act as a prudent and careful manager. Case law and the legal literature interpret it to give rise to the duty of care. The duty to act in the best interest of the company is interpreted as an element of the duty of loyalty, which is not explicitly regulated in company law; it follows from the law of agency (Civil Code, s. 2304) and the fiduciary nature of the director's role as an agent. The other element of the duty of loyalty is to act loyal towards the shareholders as an aggregate. | Company | Shareholders | SV |
| Lithuania | Art. 2.87 Civil Code:<br>1) Duty of care<br>2) Duty to act in good faith<br>3) Duty of loyalty<br>4) Duty to avoid conflicts of interest<br>5) Duty to avoid commingling the property of the company and private property<br>6) Duty to declare interest in proposed<br>Transactions<br>7) A member of a managing body of a legal person who fails to perform or performs improperly his duties specified in the given Article or incorporation documents must redress all damage | Company<br>Members of other bodies of the company | Lithuanian Supreme Court: the interests of the company and the interests of the shareholder may be different. Corporate governance code and literature: the general duty of loyalty requires the director to act for the benefit of the company, its shareholders, | ST |

| | | | | |
|---|---|---|---|---|
| | incurred on a legal person except as otherwise provided by law, incorporation documents, or an agreement. | | creditors, employees, and the public welfare. | |
| Luxembourg | The duty to exercise powers in the best interest of the company is derived from:<br>Art. 1134 of the Civil Code: duty of parties to a contract to execute their obligations under the contract in good faith.<br>General duty of loyalty which derives from the position of the director.<br>The agency relationship between the director and the company.<br>Art. 59 Companies Act: general liability provision for contractual breaches or management mistakes (breaches of the duty of care).<br>The 'l'intérêt de la société' is mentioned in art. 1859(2) Civl Code. | Company, | It is a fluctuant and case-law defined concept that does not correlate with the interests of the shareholders. What the corporate interest is depends on the nature of the corporate activities; for some types of company the shareholder value theory might be adequate, whereas for other types the stakeholder theory applies. | SV/ST |
| Malta | Companies Act Art. 136A(1):<br>Duty to act honestly and in good faith in the best interests of the company. | Company | Duties are generally not owed directly to the shareholders nor other stakeholders, although there may be exceptions | SV |

| | | | | |
|---|---|---|---|---|
| | | | under limited circumstances. Relevant are both the short-term interests of the present members and the long-term interests of future members. | |
| Netherlands | Interest of the company not defined in statutory law but understood as "inclusive" system. However, Article 2:129 of the Dutch Civil Code: management in "the interests of the Corporation and of the enterprises connected with it" | Company | Stakeholders | ST |
| Poland | Mentioned several times throughout the Code of Commercial Companies, e.g. Art. 249 ("The resolution of shareholders who contravene the company's contract or the good customs and the interests of the company or which is intended to hive the partner may be challenged by way of an action brought against the company for the repeal of the resolution"). | Company | The meaning is not settled. The literature argues that the interests of the company are derived from the economic interests of the groups involved in it (shareholders and other stakeholders), but that | Not settled |

| | | | | |
|---|---|---|---|---|
| | | | shareholder interests should have the strongest influence on the interpretation of the concept of the company's interests. | |
| Portugal | Art. 64(1)(b) Code of Commercial Companies:<br>"The company's managers or directors must observe:<br>a) Duty of care […].<br>b) Duty of loyalty, pursuant to the company's interest, meeting the long-term interests of the shareholders and considering the interests of other individuals relevant for the company's sustainability, such as the employees, customers and creditors. […]"<br>Art. 72(1):<br>"The managers or directors answer before the company for the damages caused to it by acts or omissions practiced against the legal or contractual obligations, unless it is proven that they acted without any fault".<br>Art. 79(1):<br>"The managers or directors also answer, in general terms, before the shareholders and third-parties for the damages directly caused to them within the exercise of their functions". | Company | Art. 64(1)(b): The interests of the company are equated with 'the long-term interests of the partners and taking into account the interests of other relevant parties such as employees, clients and creditors in ensuring the sustainability of the company'. It is argued by the literature and held by some courts that priority should be given to the interests of the shareholders. | ESV |

| | | | | |
|---|---|---|---|---|
| Romania | The duty to promote exclusively the interests of the company is one of the formerly fiduciary duties arising from the agency relationship (mandate) between the director and the company, but since 2006 codified in the Companies Act. It is included in the duty of loyalty encompassed in art. 144(1):<br>"The members of the board of directors shall exercise their term of office with loyalty, in the company's interest". | Company | Not defined in the Companies Act or the New Civil Code.<br>High Court of Cassation: the company's interests are represented by the common intention of the shareholders to associate with a view to obtaining a profit.<br>Literature: the company's interest comprises the common, collective, and legitimate interest of the shareholders to have a share in the profits (influenced by the neoliberal French doctrine of the 'intérêt social'). The majority of | SV |

| | | | | |
|---|---|---|---|---|
| | | | the literature argues that directors do not have to take the interests of stakeholders into account. | |
| Slovakia | S. 194(5) Commercial Code: duty to exercise powers in accordance with the interests of the company / duty of loyalty. No definition in the statute or in case law. | Company | Literature: Shareholder primacy | SV |
| Slovenia | For example, in Art. 508 Companies Act (ZGD-1): the general meeting must be convened if it is necessary for the interests of the company. | Company | The company's interests are understood as including the shareholders, management, employees, other market participants (e.g., suppliers, banks), the state, and the public at large. The shareholders' interests shall take priority but limited by | ESV[279] |

[279] Lahovnik Matej, 'The Transition of Joint Stock Companies in Slovenia: Shareholder-Value Approach versus Stakeholder-Value Approach', *South East European Journal of Economics and Business*, South East European Journal of Economics and Business. - De Gruyter Open. - Vol. 4.2009, 2, p. 71-79 (De Gruyter Open, 2009).

| | | | | |
|---|---|---|---|---|
| | | | the interests of other stakeholders. | |
| Spain | Art. 226 Ley de Sociedades de Capital:<br>In the area of strategic and business decisions, which are subject to entrepreneurial discretion, the standard of care of a prudent businessman will be deemed to be met when the director has acted in good faith, without personal interest in the matter under decision, with sufficient information and in accordance with an appropriate decision-making procedure.<br>Art. 227(1): Directors shall perform their duties with the loyalty of a faithful representative, acting in good faith and in the best interests of the company. | Company | The concept is not well developed in Spanish law. Frequently, the interests of the company are equated with those of the majority shareholders.<br>Supreme Court: to be interpreted in line with Shareholder primacy. | SV |
| Sweden | Various sections of the Companies Act | Company | No general definition, but understood as going beyond a pure shareholdercentric approach. | ST |
| United Kingdom | Companies Act of 2006, Section 172:<br>Promote the success of the company. Directors must act in the way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its | Company | Stakeholders are included but directors must primarily consider | ESV[281] |

[281] McCorquodale and Neely, 'Directors Duties and Human Rights Impacts', 610.

| | | | | |
|---|---|---|---|---|
| | members as a whole, having regard (amongst other matters) to: (1) the long term consequences of decisions; (2) the interests of the company's employees; (3) the need to foster the company's business relationships with customers, suppliers and others; (4) the impact of the company's operations on the community and the environment; (5) the desire to maintain a reputation for high standards of business conduct; and (6) the need to act fairly between members. [280]<br><br>Section 112: The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members. | | the interests of the shareholders. | |

[280] DLA Piper, 'Global Guide to Directors' Duties'.