

Fábio da Silva Veiga

Professor, Universidade Lusófona do Porto, Portugal

<https://orcid.org/0000-0002-9986-7813>

fabio.veiga@ulp.pt

The creation of value by socially responsible companies from the legal perspective of the social interest

Introduction

The present study aims to dissect, as an introduction, the first reflections on the creation of value of the socially responsible company from a perspective of the concept developed in corporate law, immanent to all *inter-* and *extra-*corporate relations, namely the social interest.

By itself, two questions are raised: how is the value creation of companies with sustainability proposals expressed, and, consequently, whether the representatives of the company, especially the directors, can be held liable for the adoption of ethically and legally sustainable practices? Seeking to approach a comparative analysis of the concept of social interest in the corporate legal systems of Portugal and Spain, we will reflect on the evidence, or not, of the violation of the social interest of the contemporary company with regard to the adoption of conduct that favours corporate sustainability as opposed to the immediate economic advantages of the company.

Conceptions of social interest

1. Contractual conception

Traditionally, the social interest is confronted by the so-called contractual and institutionalist theories. Basically, for the contractual, the company's interest is the communion of common interests of the partners as subjects with the same purposes: to obtain economic-financial income through the company's activity. In this economic logic, the partners are presented as holders of the corporate interest.

2. Institutionalist conception

On the other hand, for the institutional conception, the social interest is presented as a common interest not exclusive to the partners. Thus, the social interest should consider the interests of the workers, creditors, clients, or those who are affected in some way by some economic influence of the commercial company, namely the stakeholders.

Social interest consecrated in company law

The traditional aspect of corporate rules expresses the concept of corporate interest as that interest of the commercial company in which the economic-financial gain is aimed as the main objective of the company. The disposition of the company is the profit and its sharing among the owners, which logically immerses the creation of value in the economic-financial sense to the partners/shareholders. Likewise, in contemporary business culture, the more expressive the profit in a shorter period of time, the more convincing is its distribution among the owners. In this sense, the legal nature of the social interest has been combined with the selfish aspect of the partners' interests.

Thus, as a general rule, it is said that the corporate interest is “the common interest of all the partners”. Let us observe what the corporate rules of Spain and Portugal say with regard to the corporate interest:

Art. 227 of the *Ley de Sociedades de Capital*, in Spain:

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**.

It is inferred from Spanish law that the administrator must act in the best interests of the company. This means that those operations performed outside the company's interest, since the company is an autonomous legal entity different from the partners, whose acts cause damages, *by the letter of the law*, are considered illicit, since such acts would fall within the breach of the duty of loyalty to the company.¹ To the person with powers to represent it, the director, will fall the responsibility.

The same provision is found in the Portuguese company law, as transcribed below.

¹ See: V. Ribas Ferrer, *El deber de lealtad de los administradores*, Madrid: La Ley, 2010. F. da Silva Veiga, “El deber de lealtad de los administradores y el conflicto de interés en los grupos de sociedades españolas” [in:] *Imágenes contemporáneas de la realización de los derechos en la cultura jurídica iberoamericana*, Madrid: Dykinson, 2018, pp. 91–103.

Art. 64th, 1, Companies Act, Portugal:

1. The managers or directors of the company shall observe:

The duties of loyalty, **in the interest of the company**, attending to the **long-term interests of the shareholders** and **weighing the interests of other subjects relevant to the sustainability of the company**, such as its employees, customers and creditors.

Clearly, both texts protect the social interest in favour of protecting the interests of the company and of the partners, with special expressiveness for the Spanish legal text, where there is no trace of the adoption of the institutionalist theory of social interest.

However, the 2006 reform of the Portuguese Commercial Companies Code has brought a noble meaning to the concept of social interest of Portuguese commercial companies, in order to broaden its area of application. An institutionalist inspiration is noted, where the long-term interests of the partners are considered – as opposed to the immediate interests of the partners, especially those that are not institutional – as well as the consideration to *other relevant subjects for the sustainability of the company*.

Focusing on the Portuguese rule, even due to its capacity to improve the concretion of the (undetermined) concept of social interest, we may notice two relevant specifications: a) *the long-term interest*; b) *the sustainability of the company*. In this sense, the Portuguese rule expands the concept by understanding the reality of today's commercial companies, since in a highly competitive market environment, companies must be prepared to protect the long-term interest of the partners, that is, to take decisions that generate value to the company, even if such acts do not generate immediate profits. In the second claim of the rule, the social interest must aim at the sustainability of the company at the exact moment in which the value created in a first moment is consistent with the formation of values² with stakeholders and civil society. From the legal text, one can understand that the decisions taken due to the long term interest of the partners and the sustainability of the company, are decisions that corroborate with the concept of social interest and, therefore, exempt its decision-makers from liability when the decisions taken due to such circumstances do not generate immediate benefits to the company or even cause losses.

Although Spanish corporate law does not establish the concept of social interest with more specificity, as Portuguese law does, Spanish jurisprudence

² The company's value creation with external stakeholders – creditors, clients, public administration, among others – is somewhat abstract, depending on the strategic objectives of the company's administrative policy. However, one of the values to be considered refers to reputation before the consumer public and the market, since "reputable" companies are more economically sustainable.

has, however, moved ahead of the legislator. In the context of a case on Corporate Social Responsibility (CSR), judged by the *Audiencia Provincial de Madrid* (SAP Madrid 11-XI-2011 – JUR 2012, 6263), which dealt with the donation of 13,000 euros made by the directors of a given company in favour of a Foundation. The Trial Court had annulled the agreement as it was considered harmful to the social interest. Nevertheless, the *Audiencia*, resorting to the “culture of corporate social responsibility”, revoked the sentence and declared the agreement valid. In an analysis on this subject, Cándido Paz-Ares agrees with the decision adopted by the collegiate of the *Audiencia*, because, according to the author, “the decisions framed in the objectives of CSR – if characterized specifically as expenses or investments – [...] may / should be adopted by the management, even if they imply a decrease in the benefits to be shared, when they seem appropriate from the perspective of the reasonable compensatory advantages of CSR, considering in this case, the amount, size and economic situation of the company”.³

In summary, the consideration of the *social interest* focuses on the subjects that must be comprised in the referred concept, and, therefore, the subjects whose benefit must be guided by the corporate activity,⁴ whether the common interest, exclusive of the partners or additionally other interests, such as those destined to the care with the workers, clients, consumers, creditors, civil society, public power, among others. From this last interest, it is clear that the creation of value of the company passes through ethically approved actions, such as corporate social responsibility implemented by a policy of good corporate governance.⁵

New legal nuances of the social interest: corporate social responsibility

Once it is understood that the social interest may exceed the limits of the selfish interest of the partners, especially by the configuration of the Portuguese rule of art. 64, 1, b, CSC, and the interpretation of corporate social

³ Cf. C. Paz-Ares, *¿Derecho común o derecho especial de grupos? Esa es la cuestión*, Cizur Menor (Navarra): Civitas-Thomson Reuters, 2019, pp. 127–128. Nossa tradução.

⁴ Cf. J. Megías López, “La creación de valor tolerante: Un modelo de compatibilidad jurídica entre interés social y responsabilidad social corporative”, *Diario La Ley*, 2017, n.º 9019, pp. 11–21.

⁵ Corporate governance, here understood as the system of legal rules, practices and behaviours related to the decision-making powers structure (including the administration and other management bodies) and the supervision of these companies, comprising namely the determination of the functional profile and legal position of the organisational actors and holders of organisational bodies and the relations between them, the holders of capital and other subjects legally interested with the company’s decisions – namely the stakeholders. Cf. P. Câmara, B. Ferreira, “A identidade Lusófona da Governação de Sociedades”, [in:] P. Câmara et al., *A Governação de Sociedades Anónimas nos Sistemas Jurídicos Lusófonos*, Coimbra: Almedina, 2013, p. 9.

responsibility in the legal-corporate environment, it is clearly perceived that such normative and interpretative conceptions absorb a dose of moderate institutionalism. In this sense, it is understandable that art. 64, 1, letter b) of the Portuguese CSC now accepts the application, even if generic, of corporate social responsibility. This understanding reflects, considerably, in the regime of directors' liability, due to the broadened understanding of the duty of loyalty embedded in the same legal provision.⁶

Therefore, considering the application of CSR within the scope of social interest, especially by the elements of *sustainability* and the *long-term interests* of the partners, it can be seen that the intention of such elements is to advocate the creation of value of the company in a sustainable manner. Sustainability does not come, therefore, with the selfish interest of the partners – and, occasionally, legitimate – but what is expected is to apply plausible legal elements of a new corporate and social reality. The company, pragmatic expression of the commercial company, is no longer seen as an element associated only to the economic-financial initiative of the partners (its legitimate owners), but, the reality of the contemporary company, is inserted in a context of the impact it produces on its surroundings, on the harmful or beneficial effects it may generate on the occasion of its economic activities.

Therefore, from the legal-corporate perspective of social interest, one finds behind the actions of corporate social responsibility the elements of value creation of the socially responsible company. In this sense, the appliers of the law contained in art. 64 of the CSC, must ponder the purpose of the company beyond the common interests of the partners, considering the acts decided in favour of the other stakeholders as legally legitimate actions.

Conclusions

As conclusions, some reflections on the text should be abstracted, basically on the following points:

1. The social interest consecrated in the rules of corporate organisation is not circumscribed only to the will of the company (interest of the company itself), as announced by the law, which is shaped in the selfish will of the partners: maximum profit with minimum expenditure (which means, not spending on intermediate issues such as the interest of stakeholders).

⁶ The objective of this work is not to enter in the debate on the duty of loyalty of the directors, whose precept is inexorably linked to the concept of corporate interest. However, we can advance that the consideration of the application of CSR in art. 64, 1, b, of the CSC, delimits to a greater extent the duty of loyalty of the director, since the partners will not be able to request the directors to be held responsible for the decisions made in the scope of the social responsibility of the company, such as, for example, donations to philanthropic entities or to NGO's, when made in a pondered manner.

2. At the legal level, the *stakeholders'* interest started to have meaning since the law and the jurisprudence started to understand the commercial company as an economic entity that aims at long term sustainability and, in this sense, the social interest was broadened and started to value intermediary agents, those who have a relationship of interest with society (creditors, clients, consumers, civil society etc.).
3. With the understanding of the existence of an expanded social interest, instruments such as corporate social responsibility have gained attention at the heart of the debate on social interest, because, after all, CSR is a mechanism for providing for the interests of certain stakeholders, such as the application of policies of compliance with standards of transparency, information (disclose), commitment to their peers, reduction of environmental impact, compliance with state regulations, adoption of upright behaviour by the administration of companies, and a list of conducts that inspire morality and business ethics.

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Abstract

The creation of value by socially responsible companies from the legal perspective of the social interest

This article aims to present the concept of social interest applied within the scope of Corporate Law and interpret it according to its application in Portuguese and Spanish Law, in order to subsequently find out if the theoretical concept is applied differently in the normative-legal context of these countries. As a result of this theoretical-interpretative analysis, an attempt will be made to understand whether the concept has evolved towards an understanding of the value creation of the socially responsible company from the same perspective of corporate social responsibility.

Key words: social interest, corporate social responsibility, directors' duties

