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Corporate Governance of Charities in Scotland, a case study

O Governo Corporativo de Entidades da Economia Social na Escócia, um estudo de caso

João de Sousa ASSIS¹

ABSTRACT

This paper examines the governance of third sector organisations, particularly charities, within the Scottish jurisdiction. While corporate governance is widely debated in profit-driven contexts, the responsibilities of trustees in charitable organisations are seldom discussed by lawyers or academics in continental Europe. The decision-making processes of charity trustees are rarely scrutinised - let alone specifically regulated - in several continental European countries, Portugal being a notable example. This raises critical questions: how should these decision-making processes be regulated? If regulation is necessary, which principles should be followed? Who should oversee trustees' decisions? In Portugal, for instance, charity governance lacks clear legal guidance and is largely considered a private matter. This stands in stark contrast to Scotland's regulatory framework, where charities are subject to rigorous oversight. The Office of the Scottish Charity Regulator (OSCR), established in 2005, actively supervises trustees to ensure that decisions align with charitable missions, thereby enhancing both decision-making efficiency and public trust in the third sector. Seeking to highlight the need for greater accountability among decision-makers in not-for-profit organisations, this article advocates for improved regulatory frameworks that promote efficacy and community benefit. It proposes the Scottish model as a reference for jurisdictions such as Portugal, with the aim of fostering public trust and optimising the societal impact of not-for-profit entities.

KEYWORDS: CSR, Portugal, Scotland, Charity Law, Private Law, Third Sector, Not-for-Profit.

RESUMO

Este artigo explora a responsabilidade social corporativa de organizações do terceiro setor, particularmente de *charities*, no ordenamento jurídico escocês. Embora este tópico seja amplamente debatido para as sociedades comerciais, a responsabilidade dos administradores de organizações sem lucrativos é raramente discutida por académicos ou juristas na Europa continental. Estes processos de tomada de decisão são raramente examinados – ou especificamente regulamentados – em vários países da Europa continental, sendo Portugal um exemplo. Isso levanta diversas questões: deve esta matéria ser especificamente regulamentada? Caso a sua regulamentação seja necessária, que princípios devem ser seguidos? Quem o deve supervisionar? Em Portugal, como exemplo, esta matéria carece de normativo específico consolidado e é amplamente considerada uma questão do foro privado. Isso contrasta com a regulamentação escocesa. O Regulador Escocês de Instituições de

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Caridade (OSCR), criado em 2005, supervisiona a administração de *charities*, garantindo que as suas decisões estão alinhadas com o fim social da instituição, aumentando a eficiência da tomada de decisões e a confiança do público. Arguindo por uma maior responsabilização destes administradores, o presente artigo defende uma melhor regulamentação do terceiro setor e propõe o modelo escocês como referência para jurisdições como Portugal, com o objetivo de fomentar a confiança do público e o impacto das entidades sem fins lucrativos.

PALAVRAS-CHAVE: CSR, Portugal, Escócia, Direito das Entidades Sem Fins Lucrativos, Direito Privado, Terceiro Setor, Sem Fins Lucrativos.

1 Introduction

Third-sector organisations, such as charities and other benevolent bodies, are distinctive from for-profit entities. They are often perceived as organisations focused on the societal good, unlike for-profit organisations. It is often the case that actions and decisions of for-profit decision-makers are actively regulated under the Law², where the action of benevolent organisations' decision-makers often lacks specific supervision³.

This raises important questions such as, for example: why do we have this distinction? And if a distinction cannot be drawn, should not-for-profit/charitable decision makers be held accountable for their decisions in the same fashion as for-profit decision-makers are? One thing is sure: if the potential impact on communities where both organisations operate is deemed similar, their decision-makers' actions should follow the same principles, if not, these principles should be diverse.

Furthermore, the governance of charities is not often discussed in length within continental European jurisdictions, with Portugal being an example. However, if the actions of a charity have a significant impact on the communities in which they operate, then the manner how the charity is governed should be of considerable importance. In Portugal, for instance, the decision-making processes of charity trustees are rarely contested or specifically regulated. On the contrary, under Portuguese law, the governance of benevolent organisations such as associations or foundations lacks

² See CASIMIRO, Sofia de Vasconcelos. *A responsabilidade dos gerentes, administradores e directores pelas dívidas tributárias das sociedades comerciais*. Coimbra: Almedina, 2000. ISBN: 9789724014395; RIBEIRO, Maria de Fátima. *Sociedades comerciais (responsabilidade): o programa, o conteúdo e os métodos*. Coimbra: Almedina, 2005. ISBN: 9789898366849; DUARTE, Rui Pinto. Responsabilidade dos administradores: coordenação dos regimes do CSC e CIRE. In: *III Congresso de Insolvência*. Coimbra: Almedina, pp. 169–172. ISBN 9789724063355; OLIVEIRA, Nuno Manuel Pinto. Responsabilidade civil dos administradores - Entre Direito Civil, Direito das Sociedades e Direito da Insolvência. Coimbra: Coimbra Editora, 2015, pp. 232–233. ISBN: 9789723223347.

³ As previously discussed in ASSIS, João de Sousa. Responsabilidade social e organizações sem fins lucrativos – uma reflexão legal. In: ABREU, Luís Vasconcelos. *Estudos em Homenagem ao Professor Doutor Manuel Pita*. Coimbra: Almedina, 2022, pp. 287–311. ISBN: 9789894001119.

specific guidance and supervision, as it is generally regarded as a private matter⁴.

But not in Scotland. The Office of the Scottish Charity Regulator (furthermore referred to as 'OSCR') was established in 2005 with the purpose of regulating charities and to set rules and guidance on how trustees should approach their decision-making process. The OSCR's powers were also recently reviewed under the 'Charities (Regulation and Administration) (Scotland) Act 2023', aiming to provide it with further power to review trustees' decisions, and to even direct - in some cases - these decision-makers actions towards the perceived good.

The Scottish regulation, as it will be reviewed below, seems to follow the idea that if charity trustees are accountable for their decisions, then – potentially - their decisions are going to be more efficient and in line with the (benevolent) purpose of the charity, which will, in turn, prove beneficial to the community. In addition, actively regulating and supervising benevolent organisations such as 'charities' aims to enhance public trust and confidence in these organisations, and in the third sector in general.

A critical review of the Scottish model will be presented below, analysing it as a case study for jurisdictions such as Portugal, which lack specific regulatory frameworks addressing the governance of not-for-profit entities like foundations or associations.

1.1 Portugal

In many European countries, including Portugal, the decision-making processes of those managing benevolent organisations often go unchallenged, as the law does not impose specific duties on the managers of not-for-profit entities, treating them instead as ordinary agents⁵. If we take the Portuguese case as an example, we will be able to find a lack of explicit legal guidance towards the operation of benevolent organisations, such as associations or foundations. Bearing in mind that charities and other benevolent organisations may organise themselves under different vests in Portugal, the most common types are (i) associations, (ii) foundations, and (iv) cooperatives⁶,

⁴ ASSIS, João de Sousa. Responsabilidade social e organizações sem fins lucrativos – uma reflexão legal. In: ABREU, Luís Vasconcelos. *Estudos em Homenagem ao Professor Doutor Manuel Pita*. Coimbra: Almedina, 2022, p. 291. ISBN: 9789894001119.

⁵ As seen before at ASSIS, João de Sousa. Responsabilidade social e organizações sem fins lucrativos – uma reflexão legal. In: ABREU, Luís Vasconcelos. *Estudos em Homenagem ao Professor Doutor Manuel Pita*. Coimbra: Almedina, 2022, p. 288. ISBN: 9789894001119.

⁶ Following the data available at THE PORTUGUESE SOCIAL SECURITY DATABASE. [online, 31 January 2025]. Available from: <https://www.seg-social.pt/publicacoes?bundleId=16414310>.

excluding charities operating under Canon law⁷.

Further review of the not-for-profit organisations, regulated under Portuguese law, is therefore necessary. Bellow, the most relevant ones⁸ will be subject to review. These are: (i) associations, (ii) foundations, and (iii) cooperatives.

1.1.1 Associations

Associations are legal entities formed by groups of individuals who come together to pursue a not-for-profit common interest or objective⁹. These legal persons are defined under Articles 157 to 184 of the Portuguese Civil Code, where a significant freedom is provided upon incorporation towards the social objective, governing bodies and managers powers¹⁰.

A notable gap exists in the Portuguese Civil Code regarding the specific decision-making processes of association managers, in fact, Articles 163 and 164 only stipulates that the statutes should outline the powers, duties, and liability of the managing board, and in the absence of such statutory provisions, the general principles of agency will apply¹¹. Article 1161 of the Portuguese Civil Code defines as generic duties of the agent to follow the principal's orders, to provide information regarding his agency and to immediately communicate a problem to the principal, to render accounts, and to deliver to the principal what was received while acting as agent¹². But these seem empty provisions when transferred to the reality of the association, where no principal exists to supervise the (all powerful) decision-maker

⁷ Article 4 of the Portuguese Basic Law for Social Economy, enacted under Law 30/2013, is clear about the possibility to enter the social economy sector (or third sector) through the establishment of multiple legal entities, including those which are regulated under canon law, the "*Pessoas Jurídicas Canónicas*", regulated under the Concordat celebrated between the Portuguese state and the Holy See in 18 May 2004.

⁸ Following MEIRA, Deolinda Maria Moreira Aparício. A lei de bases da economia social portuguesa: do projeto ao texto final. In: *Revista Jurídica* [online]. Valencia: CIRIEC-España, December 2013, no. 24/2013 [31 January 2025]. ISSN: 1577-4430. Available from: <https://ciriec-revistajuridica.es/wp-content/uploads/024-002.pdf>.

⁹ PINTO, Carlos Alberto Mota. *Teoria geral do direito civil*. 4. ed. Coimbra: Coimbra Editora, 2005, p. 292. ISBN: 9789723221022.

¹⁰ The duties of an agent under Article 1161 of the Portuguese Civil Code are as follows: the agent must carry out the acts required by the mandate in accordance with the principal's instructions; provide any information requested by the principal concerning the status of the management; promptly inform the principal upon execution of the mandate or, if it has not been executed, explain the reasons for such failure; render accounts at the end of the mandate or whenever the principal requests them; and deliver to the principal anything received in the course of executing the mandate or in connection with it, unless such items have been properly expended in fulfilling the contract.

¹¹ Article 1161 of the Portuguese Civil Code.

¹² See GOMES, Manuel Januário Costa. *Contrato de mandato*. Porto: Porto Editora, 2007, pp. 93–105. ISBN: 9789720000651.

manager.

1.1.2 Foundations

Foundations are primarily governed under the Portuguese Civil Code and Framework-Law No. 24/2012 in Portugal¹³. These legal persons are defined as entities established with a specific (not-for-profit) purpose and endowed with sufficient assets to fulfil their social objective¹⁴.

Basically, the founder decides to allocate a portion (or all) of their assets to a newly created juridical person, which will then pursue a specific goal / statutory object (either by an *inter vivos* deed or *mortis causa* testament¹⁵). Here, a managing board will serve as the executive body, responsible for managing the foundation's assets and making decisions on significant matters, including potential changes to the statutes or even the dissolution of the foundation.

Similarly to what was discussed for associations, no concrete duties are imposed on these managers. Instead, the articles of incorporation are expected to provide boundaries to the managers/trustees' actions – and if no provisions are drafted regarding their duties, the law of agency¹⁶ shall apply¹⁷.

1.1.3 Cooperatives

Cooperatives, on the other hand, are regulated under the Portuguese Cooperative Code¹⁸, and are defined as legal persons formed by a group of individuals who collaborate to achieve shared economic, social, or cultural goals¹⁹, which is not for profit.

Contrary to what happens with other not-for-profit organisations regulated under Portuguese law, the managers/decision-makers of cooperatives must follow specific duties such as to 'ensure their adherence to cooperative principles and the best

¹³ CORDEIRO, António Menezes. O regime das fundações. *Revista de Direito das Sociedades*, Coimbra: Almedina, 2013, vol. V, no. 4, p. 724. ISSN 1647-1105.

¹⁴ Article 3/1 of Law n. 24/2021 reads "*The foundation is a not-for-profit legal entity, endowed with sufficient assets and irrevocably allocated to the pursuit of a purpose of social interest*" [author's translation].

¹⁵ PINTO, Carlos Alberto Mota. *Teoria geral do direito civil*. 4. ed. Coimbra: Coimbra Editora, 2005, p. 309. ISBN: 9789723221022.

¹⁶ In particular, the duties imposed on the civil agent shall apply, according to article 1161 of the Portuguese Civil Code.

¹⁷ Article 29/1 of Law n. 24/2012.

¹⁸ The Portuguese Cooperative Code was enacted under Law n. 119/2015, of 31st August.

¹⁹ Article 2 of the Portuguese Cooperative Code.

interests of the cooperative'²⁰. These duties include acting diligently, avoiding conflicts of interest, and making decisions that align with the cooperative's objectives.

Furthermore, The Portuguese Cooperative Code establishes civil liability for cooperative managers who breach these duties²¹, aiming to promote responsible and ethical management within the cooperative sector²². These are duties similar to those imposed upon managers of companies and other for-profit business organisations under the Portuguese Companies Code²³.

1.2 Scotland

In Scotland, on the other hand, the Scottish Charity Regulator was set up in 2005²⁴ to regulate, supervise and maintain a registry for all charities operating in Scotland²⁵. Under the provision 1(5) of the Charities and Trustee Investment (Scotland) Act 2005, as amended, the Office of the Scottish Charity Regulator's (referred furthermore as "OSCR") general functions include, among others, determining whether organisations qualify as charities, maintaining a public register of charities, encouraging, facilitating, and monitoring compliance with the Act's provisions.

In addition, the OSCR is tasked with identifying and investigating potential misconduct in the administration of charities, taking remedial or protective measures, provide information, advice, or proposals to the Scottish Ministers on matters related to its functions²⁶. Therefore, the OSCR supervises over 'benevolent bodies' such as community groups, religious charities, schools, universities, charities, among others,

²⁰ Article 71 of the Portuguese Cooperative Code,

²¹ Article 71 of the Portuguese Cooperative Code,

²² Article 71/2 of the Portuguese Cooperatives Code establishes that Directors shall be liable, in particular, for damages caused by the following acts: "a) *Undertaking, on behalf of the cooperative, acts that are unrelated to its purpose or interests, or allowing such acts to be carried out; b) Making payments of sums not owed by the cooperative; c) Failing to collect debts, resulting in their becoming statute-barred; d) Distributing fictitious surpluses in breach of this Code, any supplementary legislation applicable to the various branches of the cooperative sector, or the cooperative's statutes; e) Exploiting their mandate, whether or not involving the use of the cooperative's assets or credit, for their own benefit or for the benefit of other individuals or legal entities*" [author's translation].

²³ Article 64 of the Portuguese Companies Code requires administrators and managers of business organisations to fulfil both duties of care and loyalty. They must act with diligence, technical competence, and a thorough understanding of the business organisation's affairs, as would be expected of a prudent and methodical manager/administrator. Additionally, they are obliged to act in the best interests of the business organisation, considering the long-term interests of shareholders and balancing the needs of other key stakeholders, such as employees, clients, and creditors, to ensure the organisation's sustainability.

²⁴ Under the Charities and Trustee Investment (Scotland) Act 2005.

²⁵ FORD, Patrick. Supervising charities: a Scottish-civilian alternative. In: *Edinburgh Law Review*, Edinburgh: Edinburgh University Press. September 2006, vol. 10, no. 3, p. 353. ISSN: 1364-9809.

²⁶ Provision 1(5) of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

and as stated by several acts of the Scottish Parliament, the OSCR's action is aimed at increasing public confidence in charities and their work²⁷. As a non-ministerial office, the OSCR is appointed by the Scottish Government and it is supervised by the Scottish Parliament, considering the fundamental role charities and other benevolent bodies play in the Scottish society.

In fact, there are around 25.000 charities operating in Scotland, and dully registered in the Scottish Charity Register²⁸, where 181,258 charity trustees are involved. It is also worth mention that most of the charities in the register exist for the benefit of children or young people (45% of all registered charities)²⁹.

Unlike what happens to associations and foundations in Portugal, it is clear which duties are imposed upon charity administrators in Scotland, under Chapter 9 (Charity Trustees) of the Charities and Trustee Investment (Scotland) Act 2005, where it is clearly defined that charity trustees are responsible for overseeing all aspects of the charity, being subject to the legal duty of diligence, aimed at ensuring the fulfilment of their fiduciary duties towards the relevant charity. Due to its relevance, this topic will be further developed bellow.

2 The Scottish Charity Regulator

As mentioned before, the OSCR is an independent body, which collaborates with the Scottish Government under shared principles, which are set in place in order to provide this entity with (i) a bridge for easy collaboration with the Scottish Government, (ii) independence, (iii) political neutrality, and (iv) transparency³⁰. This understanding is necessary considering that the Scottish Government is responsible for the legal framework applicable to charities, while the OSCR is responsible for independently

²⁷ As it is noticeable in the documents related to the CHARITIES (REGULATION AND ADMINISTRATION) (SCOTLAND) BILL. Bill amending the Charities and Trustee Investment (Scotland) Act 2005 and originating the Charities (Regulation and Administration) (Scotland) Act 2023. [online]. August 2023 [31 January 2025]. Available at: <https://www.parliament.scot/bills-and-laws/bills/s6/charities-regulation-and-administration-scotland-bill>.

²⁸ Regulated under the CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005. Part 1 – Charities; Chapter 2 – Scottish Charity Register.

²⁹ SCOTTISH CHARITY REGULATOR. *Submission by the Scottish Charity Regulator (OSCR)* [online]. May 2024 [31 January 2025]. Available from: <https://www.parliament.scot/-/media/files/committees/social-justice-and-social-security-committee/correspondence/2024/the-scottish-charity-regulator--written-submission.pdf>.

³⁰ SCOTTISH GOVERNMENT. *Scottish Government and Scottish Charity Regulator Framework Document* [online]. February 2025 [31 January 2025]. Available at: <https://www.oscr.org.uk/media/4784/scottish-government-and-oscr-framework-document-2024.pdf>.

regulating, guiding, classifying and registering Scottish charities³¹.

The OSCR is responsible for defining if an organisation may be considered a 'charity' under Scots Law, maintaining an updated register of all charities operating in Scotland, and acting as supervisor for charities' action, activities, resources, reorganisation, mergers, among others³². Therefore, the OSCR receives complaints regarding services provided by charities, trustees' decisions regarding a charity's assets – especially if these assets are at risk –, complaints that some persons are profiting from a charity when they shouldn't, or that an organisation is acting as a charity, but it's not, among other complaints³³.

Therefore, the OSCR supervises the fulfilment of legal duties by charities and their trustees, mainly in what concerns to legal asset management³⁴. Even though the financial aspects of charities are supervised by the OSCR, this regulator cannot deal with issues connected to fundraising or private relations maintained by the charity (under contract law, as an example)³⁵. This means that all fundraising issues, as well as the fulfilment of contractual obligations by charities (such as those related to employment, debts or similar) are beyond the powers of the OSCR³⁶.

According to public records, the most significant pieces of work performed by the OSCR over the last year were³⁷: direct engagement with charities through multiple platforms, helping them to fulfil duties such as submitting their accounts in time,

³¹ Under the Charities and Trustee Investment (Scotland) Act 2005, as amended.

³² The applicable legislation on how Scottish charities must operate is set under the Charities and Trustee Investment (Scotland) Act 2005, available at: <https://www.legislation.gov.uk/asp/2005/10>; and the Charities (Regulation and Administration) (Scotland) ACT 2023, available at: <https://www.legislation.gov.uk/asp/2023/5>.

³³ Under the Charities and Trustee Investment (Scotland) Act 2005, as amended.

³⁴ Under the Charities and Trustee Investment (Scotland) Act 2005 (as amended by the Charities (Scotland) Act 2010), charity trustees must prioritise the charity's interests over their own interest or connected persons to them, exercise reasonable care and diligence, comply with legal obligations, manage conflicts of interest, ensure proper use of the charity's assets, act when needed on behalf of the charity (not to remain passive when an issue arises for the charity), and report serious incidents to the OSCR.

³⁵ Charity fundraising in Scotland primarily operates under a self-regulatory framework, with OSCR, local authorities, and the courts holding statutory authority to intervene in fundraising-related matters. However, for complaints regarding fundraising activities by Scottish charities, the competent authority is the Scottish Fundraising Adjudication Panel. For more information, please see the terms of reference of the SCOTTISH FUNDRAISING ADJUDICATION PANEL. *Terms of Reference of the Independent Fundraising Standards* [online]. January 2024 [31 January 2025]. Available from: <https://goodfundraising.scot/wp-content/uploads/2024/01/Terms-of-Reference-of-the-Independent-Fundraising-Standards-012024.pdf>.

³⁶ Under the Charities and Trustee Investment (Scotland) Act 2005, as amended.

³⁷ According to SCOTTISH CHARITY REGULATOR. *Submission by the Scottish Charity Regulator (OSCR)* [online]. May 2024 [31 January 2025]. Available from: <https://www.parliament.scot/-/media/files/committees/social-justice-and-social-security-committee/correspondence/2024/the-scottish-charity-regulator--written-submission.pdf>.

introducing a new platform for charities to fulfil their reporting duties, provided straightforward information to charities via online channels such as Facebook³⁸ or YouTube³⁹, among others.

This work has happened following the Charities (Regulation and Administration) (Scotland) Act 2023 (the 2023 Act) gained Royal Assent on 9 August 2023. Its purpose is to amend the existing Charities and Trustee Investment (Scotland) Act 2005, filling some gaps in the existing legal regime applicable to charities in Scotland, while expanding the powers of the OSCR⁴⁰.

This new act is expected to be implemented in 3 stages: the first phase started when the statute came into force on 1 April 2024, by summer 2025 the second phase is expected to start, where the new record of charity mergers will be fully functional, while finally, by the end of 2025, the Scottish Charity Register will include the names of charity trustees and provide public information on charities' accounts and assets⁴¹.

Furthermore, Scottish Parliament public records shed further light on how the new 2023 Act is being implemented, after substantial changes to the powers of the OSCR, allowing for the expansion of its role as supervisor⁴². It is worth mention that the 2023 Act increased OSCR's powers when inquiring into charities' actions, in order to protect their assets⁴³. For the first time, OSCR has concrete powers to direct charities to take particular actions, to appoint interim trustees, to inquire into former charities and former charity trustees, and even power to remove charities from the register⁴⁴, as it will be

³⁸ See <https://www.facebook.com/ScottishCharityRegulator/> [31 January 2025].

³⁹ See <https://www.youtube.com/@OSCRScottishCharityRegulator> [31 January 2025].

⁴⁰ As stated by the Social Justice Secretary Shirley-Anne Somerville, Scottish Government, "*the charity sector plays a vital role in society and support for charities is high amongst the public who volunteer and donate to thousands of charities across the country. This legislation makes practical improvements and updates to existing charity regulation increasing transparency and to help ensure public trust is maintained*", full testimony available at SCOTTISH GOVERNMENT. *Charities Regulation Bill passed* [online]. June 2023 [31 January 2025]. Available from: <https://www.gov.scot/news/charities-regulation-bill-passed/>.

⁴¹ As stated by Yvonne Evans at her article EVANS, Yvonne. Succession: charity legacies made simpler. *Journal of the Law Society of Scotland*, Edinburgh: Law Society of Scotland. September 2023, vol. 68, no. 9, [p. 36, 10 December 2024]. ISSN: 0458-8711. Available from: <https://www.lawscot.org.uk/media/1pxo30ux/lss-journal-sept-2023.pdf>, and at the OSCR's annual report 2023-24, available at SCOTTISH CHARITY REGULATOR. *Annual Report and Accounts 2023-24* [online]. August 2024 [10 December 2024]. Available from: <https://www.oscr.org.uk/media/4873/oscr-annual-report-and-accounts-2023-24.pdf>.

⁴² For further information, see SCOTTISH CHARITY REGULATOR. *The Implementing the Charities (Regulation and Administration) (Scotland) Act 2023*, [online]. May 2024 [31 January 2025]. Available from: <https://www.parliament.scot/-/media/files/committees/social-justice-and-social-security-committee/correspondence/2024/the-scottish-charity-regulator--written-submission.pdf>.

⁴³ See section 70 of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

⁴⁴ See section 3 and 4 of the Charities (Regulation and Administration) (Scotland) Act 2023.

reviewed below.

3 Transparency and accountability under Scots Law

Considering the above, it is possible to state that, under the Charities and Trustee Investment (Scotland) Act 2005, as amended in 2023, the OCDR is not only the guardian of a public record of charities operating in Scotland, but works as a powerful supervisor to the actions of charities' trustees in order to promote transparency in the Scottish third sector, through the public display of charities' accounts and other relevant public information.

This approach could be effectively applied in Portugal. By establishing a regulatory body similar to the Scottish Charity Regulator, Portugal could provide greater transparency and accountability within its third sector. This would address the perceived lack of oversight and detailed legal guidance in the governance of not-for-profit organisations in Portugal, fostering a more transparent and accountable sector.

3.1 Trustees

One of the crucial aspects of the Charities and Trustee Investment (Scotland) Act 2005 is that charities' trustees have now clear obligations for the benefit of the public good. If they fail to comply with the duties of care and diligence imposed by the Act, the OSCR may (and hopefully will) intervene. Therefore, under Chapter 9 (Charity Trustees) of this Act's Part 1, charity trustees are responsible for overseeing all aspects of the charity, being subject to the legal duty of diligence, aimed at ensuring the fulfilment of their fiduciary duties towards the relevant charity.

First, as per their legal duty, trustees must prioritise the charity's interests over their own personal interests, their family members, or others connected to the charity⁴⁵. They are expected to exercise due care and diligence in managing the charity's assets, and their decisions must respect the social objective of the charity. They are also (legally) obliged to disclose conflicting interests, and to abstain from decisions which prioritise their own personal interests⁴⁶.

Secondly, trustees are responsible for ensuring that the charity complies with its

⁴⁵ See section 3 and 4 of the Charities (Regulation and Administration) (Scotland) Act 2023.

⁴⁶ Section 66 of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

duties⁴⁷. This includes maintaining updated accounts, submitting them in time, as well as complying with other duties imposed under the law. This means that trustees must actively take measures in order for the relevant charity to comply with its duties – they cannot be inert or absent from fulfilling their duties. A breach of these duties, especially when serious or persistent, may lead to disciplinary action, including removal from the board of trustees by the OSCR⁴⁸.

That is why Section 69 of the Charities and Trustee Investment (Scotland) Act 2005, as amended, discusses the disqualification from being a charity trustee for individuals who, among others, have been convicted of offences involving dishonesty, undischarged bankruptcies, who were removed from managing or controlling an organisation, have been removed from the position of charity trustee by court order, or are subject to a disqualification order undertaking under company directors' disqualification legislation⁴⁹.

Such provisions should be adopted in Portugal to ensure that individuals who have demonstrated untrustworthiness, in particular towards other not-for-profit entities such as foundations or associations, are not permitted to serve as their managers in the future. Implementing these safeguards would enhance public confidence in the third sector, promote higher standards of governance, and protect these entities' assets from potential misuse. By introducing a clear disqualification criterion, Portugal would align itself with the international best practices and help ensure that only suitable individuals are entrusted with the management of not-for-profit organisations.

3.2 The OSCR

But the most innovative thing, in our opinion, of Scots Charity Law, particularly after the 2023 Act, is the provision of active (and shall we say 'interventive') powers to the OSCR as charities supervisor. The OSCR has the power to request information and documents from charities, to remove trustees on its own accord, upon request of the relevant charity or interested third parties, and to direct the trustees' actions(!).

First, the OSCR has the power to obtain information from charities, procuring

⁴⁷ Charity trustees are required to act in the best interests of the charity, ensuring its activities align with its purposes, and exercise the care and diligence expected of someone managing another's affairs.

⁴⁸ Charities and Trustee Investment (Scotland) Act 2005, Part 1 – Charities, Chapter 9 – Charity trustees, section 66.

⁴⁹ Section 69 of the Charities and Trustee Investment (Scotland) Act 2005.

any document or explanation regarding facts under its jurisdiction⁵⁰. Secondly, the OSCR may, on request of the charity, or on its own accord appoint charity trustees⁵¹. In this case, the appointment of charity trustees may occur, as example, on request of the charity when new trustees need to be appointed according to its constitution, and the constitution does not set out a procedure for doing so (this could potentially apply to cases of death, impeachment, or lack of stakeholders). Action may also be undertaken by the OSCR, acting on its own initiative or at the request of an interested party, if a charity has no trustees, if all existing trustees are uncontactable or inactive, or if the charity is unable to formally request assistance due to the absence of anyone with the authority to act on its behalf⁵².

Third, the OSCR has the power to direct the trustees' decision-making process, and therefore, the relevant charities' actions. This may occur after setting an inquire under sections 28 and 29 of the Charities and Trustee Investment (Scotland) Act 2005, where the OSCR may request information or documents to trustees, the charity, bodies not entered into the Scottish Register of Charities or connected persons.

In order to achieve this effect, under Chapter 4 (Supervision of charities etc) of the same Act, if the OSCR finds evidence of misconduct in the administration of a charity or a body controlled by a charity, and it deems necessary to protect charitable property, it may issue directives to be followed by the charity or its administrators. These directives specify the steps to be taken and a timeline, as deemed appropriate by the OSCR⁵³. OSCR's powers include the ability to change the directions given or to extending deadlines, however, the OSCR cannot issue directives that go against existing laws, the charity's constitution, or that are inconsistent with the charity's purposes⁵⁴. Finally, actions taken under the authority of the OSCR, as a rule, should not impact on existing contractual obligations⁵⁵.

In short, OSCR bears the power to investigate potential misconduct by trustees, and their actions relating to charities or bodies controlled by those charities, and whether it identifies misconduct or the need to protect a relevant charity's assets, the OSCR may issue a command to the charity. No such provision exists for jurisdictions

⁵⁰ Section 22 of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

⁵¹ Section 70A of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

⁵² Section 77A of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

⁵³ Section 30B, (1) of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

⁵⁴ Section 30B, (2) of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

⁵⁵ Section 30B of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

such as Portugal, where cases related to the misuse of not-for-profit entities' resources is Sheldon known to the public, with only a few notable examples⁵⁶.

In jurisdictions such as Portugal, the actions of not-for-profit administrators are typically governed by the articles of association or, in their absence, by the general rules of agency, as reviewed before in this text, and as is the case for associations and foundations. While it could be argued that the general duties of an agent (such as following instructions, providing information, promptly reporting issues, rendering accounts, and delivering to the principal any assets received⁵⁷) should bind administrators, these obligations often prove ineffective in practice.

This is because, within associations and foundations, there is usually no principal to supervise or hold the decision-maker accountable, resulting in a lack of meaningful oversight. For this reason, the adoption of the Scottish model in Portugal is justified. The Scottish approach imposes clear and specific duties on charity trustees and ensures robust external supervision, thereby promoting transparency, accountability, and public trust (qualities that are currently absent from the Portuguese framework).

3.3 Transparency, accounts and public information

Finally, it must be mentioned a final relevant advancement made by Scots Charity Law since 2005 towards the promotion of transparency and trust of the public in the third sector. This was achieved by the creation of a record, available to the public, where anyone, at any given time, may gain knowledge on which charities are operating in Scotland, share the relevant charity's work, and even providing clear information the charities' accounts, trustees, mergers, and others: the Scottish Charity Register⁵⁸.

Therefore, since 2005, it is clear which organisations are deemed charities under Scots Law. Their inclusion in the Scottish Charity Register provides the public

⁵⁶ Few cases are known to the public. One such cases involved the former president of the Portuguese association Raríssimas, who received a two-year suspended prison sentence and was ordered to pay €12,800 in compensation after being found guilty of misusing the association's assets for personal benefit. Although initially accused of further offences, she was convicted solely of abuse of trust. The case, which gained public attention after a 2017 television investigation, also led to her dismissal and the resignation of the Secretary of State for Health, as reported by Portuguese social media (for further information, see <https://shorturl.at/kOkpM> [31 January 2025]).

⁵⁷ GOMES, Manuel Januário Costa. *Contrato de mandato*. Porto: Porto Editora, 2007, pp 93–105. ISBN: 9789720000651.

⁵⁸ Regulated under Part 1 – Charities, Chapter 2 of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

with assurance that all organisations included in it have passed the “charity test”⁵⁹, in other words, if it is clear that its objectives are exclusively charitable and it delivers, or intends to deliver, a public benefit either within Scotland or beyond⁶⁰.

If the charity test is successfully passed, the relevant charity is to be included in the Scottish Charity Register, and public benefit is to be presumed. Therefore, only charities included in the register may claim such status, referring to itself as a “charity”, a “charitable body”, a “registered charity” or a “charity registered in Scotland”⁶¹, and a removal from the Register will occur where a charity no longer has connection to Scotland⁶². This promotes public trust in all charities in the register, considering that they have passed the tests set up by a public authority.

This initiative mirrors similar measures in jurisdictions such as Portugal, where Law 30/2013, which established the Portuguese Basic Law of the Social Economy, requires the government to create a database of not-for-profit entities operating in the country⁶³. However, despite this statutory requirement, the objectives of the law have yet to be fulfilled, as this comprehensive database has not yet been completed. At present, not-for-profit legal entities are registered under the National Registry of Legal Entities⁶⁴, and while a single Registry of Foundations is expected to be implemented soon, its rollout remains unfinished⁶⁵.

For this reason, it can be stated that Portugal does not have a fully consolidated or easily accessible database of not-for-profit entities, other than the National Registry of Legal Entities. Such a resource would enhance transparency within the third sector and foster greater public trust, as it would enable the public to verify, via a user-friendly platform, the mission, administrators, and even the legal status of any relevant third

⁵⁹ The ‘charity test’ is described under section 7 of the Charities and Trustee Investment (Scotland) Act 2005, as amended, where it is stated that “*A body meets the charity test if (a) its purposes consist only of one or more of the charitable purposes, and (b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere*”.

⁶⁰ The Charities and Trustee Investment (Scotland) Act 2005, as amended, defines charitable purposes broadly, including the prevention or relief of poverty, advancement of education, religion, health, saving lives, or the promotion of the arts, culture, science, sport, and recreation. It also covers the advancement of human rights, conflict resolution, equality and diversity, environmental protection, the relief of those in need, advancement of animal welfare, and other.

⁶¹ Section 13 of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

⁶² Under Section 30A of the Charities and Trustee Investment (Scotland) Act 2005, as amended.

⁶³ Under article 6 of Law 30/2013.

⁶⁴ For more, see <https://www2.gov.pt/empresas/Services/Online/Pedidos.aspx?service=CCPFCCPC> [31 January 2025].

⁶⁵ GONÇALVES, Rui, POTES, Madalena, *Portugal – Legal Environment for Philanthropy in Europe 2024* [online]. 2024 [31 January 2025], p. 35. Available from: <https://philea.eu/wp-content/uploads/2024/11/Portugal-Philea-2024-Legal-Environment-for-Philanthropy-in-Europe.pdf>.

sector organisation.

4 Concluding remarks

Charity law is a well-developed area of Scots Law from a southern European perspective. And further action is to be taken in 2025, where Scottish charities will be requested to publish annual reports and accounts, the trustees' names will be made public, a record of charity mergers will be created, and further updates will come connected to disqualification criteria for charity trustees⁶⁶.

Further incentive to good practices among Scottish charities is also to be pushed through several measures, including a soft approach, where the OSCR advises and reaches out to charity trustees, in order to promote good practices, while informing them of their rights and duties, helping them to improve their action and knowledge on Scots Charity law⁶⁷.

Contrary to what happens in Portugal, where the governance of third sector organisations lacks focus and regulation, Scotland has enacted several statutes where the decision-making process of charity trustees is clear and well regulated. Furthermore, a supervisor with interventive powers exists, being able to safeguard the public interest by commanding the action of Scottish charities and their decision-makers, therefore protecting the charities' assets and their interests – while promoting public trust in these organisations.

The OSCR was established in 2005 with the purpose of regulating charities and to set rules and guidance to how trustees should approach their decision-making process, gaining further powers in 2023, where it was empowered to effectively make charity trustees accountable for their wrongful actions, and its action is to be regarded as an example of a good practice, which should translated to countries lacking rules and regulations towards not-for-profit organisations' decision makers.

Furthermore, Scots law recognises the vital societal role of decision-makers in not-for-profit organisations, a responsibility that must only be trusted to individuals with

⁶⁶ As described in length by the SCOTTISH CHARITY REGULATOR. *Changes to charity law after the Charities (Regulation and Administration) (Scotland) Act 2023* [online]. [31 January 2025]. Available from: <https://www.oscr.org.uk/about-charities/charity-law/changes-to-charity-law-after-the-charities-regulation-and-administration-scotland-act-2023/>.

⁶⁷ As an example, we may find the OSCD Guidance and Good Practice for Charity Trustees guide, available at SCOTTISH CHARITY REGULATOR. *Guidance and Good Practice for Charity Trustees* [online]. June 2016 [31 January 2025]. Available from: https://inspiringscotland.org.uk/wp-content/uploads/2021/03/OSCR-v10_guidance-and-good-practice-for-charity-trustees.pdf.

the competence and integrity to fulfil the role of trustees effectively. For this reason, the Charities and Trustee Investment (Scotland) Act 2005 establishes strict obligations for charity trustees to prioritise public benefit and strong fiduciary duties. Trustees must act with due care, manage charity assets responsibly, avoid conflicts of interest, and disclose any perceived conflicts. They are also mandated to ensure legal compliance, including timely financial reporting. Breaches, particularly severe or repeated ones, may trigger intervention by the OSCR, leading to disciplinary actions such as removal⁶⁸.

The present review of Scots Charity Law reveals the existence of a well-defined accountability framework governing not-for-profit decision-makers in Scotland. This structure, underpinned by statutory duties outlined in the Charities and Trustee Investment (Scotland) Act 2005, fosters transparency and public trust within the charitable sector. In contrast, jurisdictions such as Portugal lack a comparable framework.

The absence of clear guidance delineating the responsibilities and conduct expected of not-for-profit decision-makers in Portugal underscores the need for reform. Adopting elements of the Scottish model could enhance governance standards in such jurisdictions and these reforms would benefit donors, volunteers, and beneficiaries alike, by promoting integrity and accountability within these jurisdictions' third sector.

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⁶⁸ Under section 69 of the Charities and Trustee Investment (Scotland) Act 2005.

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