Revista JURÍDICA PORTUCALENSE

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UNIVERSIDADE PORTUCALENSE
IJP
Instituto Jurídico Portucalense

Fundação para a Ciência e a Tecnologia

Nº 39 | Universidade Portucalense | Porto | 2026

https://doi.org/10.34625/issn.2183-2705(40.1)2026

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DOI: https://doi.org/10.34625/issn.2183-2705(40.1)2026.ic-10

Secção

Investigação Científica / Scientific Research*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review* / The articles in this section have undergone a blind peer review process.

Analysis of the Proportionality Principle in the Directive on Corporate Sustainability Due Diligence

Análise do Princípio da Proporcionalidade na Diretiva sobre a Devida Diligência em Matéria de Sustentabilidade Empresarial

Anja BOTHE[1]

ABSTRACT: the purposes of the Directive on Corporate Sustainability Due Diligence (DIRECTIVE (EU) 2026/470 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 February 2026 - CSDDD) are the supreme values of the European Union and the Member States, i.e., Human Rights, including the right to a safe, clean, healthy, and sustainable environment.
The proportionality analysis made by the legislators is based on imposing restrictions to the freedom to conduct a business and to the right to property. These measures must not be excessive, i.e. they should not require the businesses to abide by unnecessary or unreasonable legal restrictions.
Taking into account the legislator's duty to protect human rights and ecosystems, the central thesis of the present work is that the dilution of the subjective or objective scope that took place during the legislative process of the directive led to a prohibition by default, meaning an inability to comply with the proportionality principle, not for reasons of excessive enforcement but rather of insufficient protection (*Untermassverbot*).
KEYWORDS: corporate sustainability; environmental responsibility; human rights in transnational corporations; proportionality, due diligence obligations, compliance

RESUMO: os objetivos da Diretiva relativa ao dever de diligência das empresas em matéria de sustentabilidade Empresarial (DIRETIVA (UE) 2026/470 DO PARLAMENTO EUROPEU E DO CONSELHO, de 24 de fevereiro de 2026 - CSDDD) são os valores supremos da União Europeia e dos Estados-Membros, ou seja, os Direitos Humanos, incluindo o direito a um ambiente seguro, limpo, saudável e sustentável.
A análise de proporcionalidade feita pelos legisladores baseia-se na imposição de restrições à liberdade de exercer uma atividade comercial e ao direito à propriedade. Estas medidas não devem ser excessivas, ou seja, não devem exigir que as empresas cumpram restrições legais desnecessárias ou irrazoáveis.
Tendo em conta o dever do legislador de proteger os direitos humanos e os ecossistemas, a tese central do presente trabalho é que a diluição do âmbito subjetivo ou objetivo que ocorreu durante o processo legislativo da diretiva conduziu a uma proibição por defeito, ou seja, a uma incapacidade de cumprir o princípio da proporcionalidade, não por razões de aplicação excessiva, mas sim de proteção insuficiente (Untermassverbot).
PALAVRAS-CHAVE: sustentabilidade empresarial; responsabilidade ambiental; direitos humanos nas empresas transnacionais; proporcionalidade, obrigações de diligência empresarial, compliance

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1. Adequacy/ appropriateness of restrictions or proportionality in a narrow sense

The European Commission proposed the Corporate Sustainability Due Diligence Directive (CSDDD) on February 23, 2022. Between the proposal and the adoption of the directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 and even more of the directive (EU) 2026/470, of 24 February 2026, it was significantly watered down. The present text questions the grounds for one of the main arguments put forward in favour of such a reduction of the requirements placed on companies: dilution to achieve proportionality and adequacy of legal obligations. Or, to express the reasoning of the opponents of a less diluted directive in another way: they advocate the prohibition of excessive enforcement to avoid negative effects on ecosystems and human rights. Proportionality in a narrow sense (Verhältnismässigkeit) is understood as the principle of "just measure", of weighing up judgements to assess whether the means used are disproportionate to the aim.[2] The principle of proportionality, which has gained increasing international recognition in recent decades both in the practice and theory of constitutional justice, comprises three sub-principles: the principles of suitability, necessity and proportionality in the strict sense.[3] All three sub-principles reflect the idea of optimisation.[4] The principle of proportionality or prohibition of excess is a principle of control.[5] This control, reasonableness, adequacy, proportionality-necessity, is nowadays disseminated throughout Europe by the Court of Justice, Article 5 TEU. It is a control of an equitable nature which, without calling into question the constitutionality of competent powers to perform authoritative acts and without affecting the certainty of the law, contributes to the integration of the "moment of justice" on the stage of social conflict.[6] It is also used in the case law of the European Court of Human Rights in the concretisation and application of some rules of the European Convention on Human

[2] German Federal Constitutional Court Decision, BVerfGE 76, 1 (Pharmacy case), Bundesverfassungsgericht (Federal Constitutional Court), Order of 12 May 1987, *BVerfGE* 76, 1.
[3] STEINER, T., NETZER, L. and SULITZEANU-KENAN, R., 2022. Necessity or balancing: the protection of rights under different proportionality tests. *International Journal of Constitutional Law*, 20(2), pp. 642–663, p. 644.
[4] ALEXY, R. 2015, *A Theory of Constitutional Rights*. Oxford: Oxford University Press, p. 501
[5] Hartz IV decision, Bundesverfassungsgericht (Federal Constitutional Court), Judgment of 9 February 2010, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09, *BVerfGE* 125, 175.
[6] LI, J., 2025, A study on proportionality. *International Journal of Social Science Research and Review*, 8(1), pp. 218–232. Available at: https://doi.org/10.47814/ijssrr.v8i1.2489, p. 221.

Rights such as Articles 8 and 11.[7]

The most general meaning of the prohibition of excess is, to avoid excessive coercive burdens or acts of unmeasured interference in the legal sphere of individuals. There is, however, another side of the protection that, instead of stressing the excess, focuses on the prohibition by defect, i.e., the states must not protect rights too little (*Untermassverbot*). A defect of protection exists when the entities on whom a duty of protection falls (*Schutzpflicht*) adopt insufficient measures to ensure a constitutionally adequate protection of fundamental rights.[8]

For the analysis of the CSDDD the authors of this article argue precisely that there will be no excessive interference in the legal sphere of companies, but rather that there has been a lack of effective measures, which perpetuates the enormous defect of protection of human rights and ecosystems.

The research is based on a critical review of academic and regulatory literature, including, in particular, an analysis of European Union law (EU law) and international law, as well as empirical studies on human rights, sustainability and business ethics. Environmental reports and statistics on experiences with the implementation of due diligence measures, as well as the positions taken by the responsible parties themselves, are also taken into account.

2. Aims of the directive

For the proportionality analysis we then must relate the purposes of the directive to its measures.

The aim of the directive is effectively enforcing the international treaties, some of which have been in force for decades, and the conventions whose contents represent the pillars of the European Union and its Member States. *"The Union is founded on the values of respect for human dignity, freedom [...] and human rights,*

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[7] STONE SWEET, A. and MATHEWS, J. 2008, Proportionality balancing and global constitutionalism. *Columbia Journal of Transnational Law*, 47, pp. 72–164, p. 139, 145.

[8] VYHNÁNEK, L et al., 2024, The dynamics of proportionality: constitutional courts and the review of COVID-19 regulations. *German Law Journal*, 25, pp. 386–406. Available at: https://doi.org/10.1017/glj.2023.96, p. 401.

...".[9] The guarantee of these rights include both value-norms and action-norms.[10] In a complex interplay of international legal instruments, regional agreements, domestic legislations, and judicial decisions, human rights are widely recognised as peremptory norms, *ius cogens*, binding as natural law. Human rights are to be fulfilled contributing to the promotion of dignity, equality, and justice. The significance and importance of the directive's objectives could not be greater.

3. Decades of existing but failed measures

An essential step in verifying the existence of proportionality is finding whether less costly measures would be able to achieve the intended purposes. For decades, attempts have been made to achieve the protections advocated by the directive through less intrusive instruments, such as voluntary international standards. The transition from soft laws to binding law is proving to be difficult.[11]

The content of the corporate due diligence directive is not new. Still in force since 1976, are the "Guidelines for Multinational Enterprises" of the Organisation for Economic Cooperation and Development and the Guiding Principles on Business and Human Rights - Implementation of the UN "Protect, Respect and Remedy" Framework, in vigour since 2011. It is stated in the explanatory memorandum of the Commission's proposal for the EU Directive on Corporate Sustainability Due Diligence (COM(2022) 71), that "*Voluntary action does not appear to have resulted in large scale improvement across sectors and, as a consequence, negative impacts on EU production and consumption are being observed instead both inside and outside the Union.*"

This process of "hardening" soft law has been widely analyzed in the literature as a distinctive feature of EU governance, combining normative ambition with regulatory

[9] Article 2 of the Treaty on European Union: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.* Article 3, n.º 5 *In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*

[10] SARTOR, G., 2013 The logic of proportionality: reasoning with non-numerical magnitudes. *German Law Journal*, 14(8), pp. 1419–1456. Available at: https://doi.org/10.1017/S2071832200002339, p. 1428.

[11] BOTHE, A. and LOBO, B. 2022 Diligência empresarial transnacional na tutela dos direitos humanos e do ambiente: a difícil passagem do soft law para legislação vinculativa. In: GUEDES VALENTE, M. M. and DELGADO, R. B., eds. *Estudos em Homenagem ao Prof. Doutor António Carlos dos Santos*. Coimbra: Almedina, pp. 69–97. Available at: https://repositorio.ual.pt/handle/11144/5472.

pragmatism embedded in both international normative frameworks and intra-EU institutional dynamics.[12]

The Corporate Sustainability Due Diligence Directive (CSDDD) does not emerge in isolation but forms part of a wider regulatory ecosystem that includes the Corporate Sustainability Reporting Directive (CSRD), the EU Taxonomy Regulation, and sector-specific instruments aimed at operationalising the European Green Deal and the EU's commitment to sustainable finance and responsible business conduct. In this sense, the CSDDD reflects a paradigmatic shift from disclosure-based governance towards substantive, preventive obligations imposed directly on undertakings and extending the obligations across value chains.[13]

At the same time, the Directive must be situated within the so-called "Brussels effect", whereby EU regulation exerts extraterritorial influence on global markets. Recent scholarship has, however, nuanced this assumption, pointing to potential "supply chain divergence" and fragmentation effects, particularly where third-country regulatory frameworks or economic incentives differ significantly.[14]

Finally, the CSDDD must be viewed against the backdrop of ongoing political and regulatory contestation within the EU. While initially conceived as a cornerstone of the Union's sustainability agenda, recent developments suggest a degree of recalibration, with debates focusing on regulatory burden, competitiveness, and the scope of application.

4. Evolution and debates on amendings of the CSDDD

Since the European Commission's initial 2022 proposal, which reflected a systemic and preventive approach, embedding due diligence into the core of corporate governance,[15] the legislative process has produced a considerably narrowed and more conditional regime, rather than a straightforward transformation of voluntary standards into binding obligations.

[12] CIACCHI, S., 2024. The newly adopted Corporate Sustainability Due Diligence Directive: an overview of the lawmaking process and analysis of the final text. *ERA Forum*, 25, pp. 29–48. Available at: https://doi.org/10.1007/s12027-024-00791-y, p. 44.
[13] SINNIG, J. and ZETZSCHE, D. A., 2025. The EU's Corporate Sustainability Due Diligence Directive: from disclosure to mandatory prevention of adverse sustainability impacts in supply chains. *European Journal of Risk Regulation*, 16(2), pp. 628–652. Available at: https://doi.org/10.1017/err.2024.100, p.645.
[14] BASTOS LIMA, M. G. and SCHILLING-VACAFLOR, A., 2024. Supply chain divergence challenges a 'Brussels effect' from Europe's human rights and environmental due diligence laws. *Global Policy*, 15, pp. 260–275. Available at: https://doi.org/10.1111/1758-5899.13326, p. 269.
[15] CIACCHI, S., 2024. The newly adopted Corporate Sustainability Due Diligence Directive, pp. 29–31.

Even more so the subsequent “Omnibus” amendments: The subjective scope has been progressively restricted through increased thresholds and phased application, significantly reducing the number of companies captured by the Directive. At the same time, the objective scope has been curtailed through the narrowing of value-chain obligations, with increasing emphasis on direct business partners and a shift away from comprehensive coverage of indirect relationships unless specific risks are identified.

This dual narrowing reflects a broader shift from a systemic, risk-based governance model towards a more reactive and knowledge-contingent framework.[16]

The watering down is particularly evident in the treatment of civil liability and enforcement mechanisms, which were central to ensuring the effectiveness of due diligence obligations. The progressive attenuation of these mechanisms, alongside the contestation of directors’ duties and climate transition obligations, signals a retreat from the idea of corporate accountability as a legally enforceable standard.[17]

5. Broader spectrum of reasons driving the directive

When analysing proportionality, the intended objectives of the legislative act are fundamental to assessing restrictions on fundamental rights.

Primarily, the directive focuses on human rights protection and environmental conservation, but an even broader spectrum of reasons driving it, gets also evident from the 99 recitals of the directive and analyses in legal scientific literature: The political significance of the directive is aligning with global sustainability agendas and European Union´s commitment to ethical governance and responsible business practices, underscoring EU´s leadership in sustainability efforts on the international stage. Strategically seen, it emphasises potential to enhance the competitiveness of European industries by establishing uniform standards for corporate conduct. The directive acknowledges the influence of civil society responding to the concerns raised by NGOs, activist groups and citizens regarding human rights abuses, environmental degradation, and labour exploitation within corporate supply chains. Beyond mere legal compliance, there is a recognition of the ethical imperatives seeking a more ethical

[16] SINNIG, J. and ZETZSCHE, D. A., 2025. The EU’s Corporate Sustainability Due Diligence Directive: from disclosure to mandatory prevention of adverse sustainability impacts in supply chains. p. 628–629.
[17] BUENO, N., BERNAZ, N., HOLLY, G. and MARTIN-ORTEGA, O., 2024. The EU Directive on Corporate Sustainability Due Diligence (CSDDD): the final political compromise. *Business and Human Rights Journal*, 9(2), pp. 294–300. Available at: https://doi.org/10.1017/bhj.2024.10, p. 294–296.

business culture within the EU. Economically seen, benefits are highlighted: potential for cost savings, risk mitigation, and enhanced market access resulting from responsible business practices aim to bolster a long-term resilience and competitiveness of European businesses in a globalized economy.[18]

All these reasons and the specificity of human rights, including the right to a safe, clean, healthy, and sustainable environment, are the goal on which the proportionality of the measures must be evaluated.

6. Core controversial obligations

The following objects and instruments must be considered in relation to the objectives to be achieved to analyze their proportionality. The companies´ duties are the followings: description of the company's approach, including in the long term, to due diligence; appropriate measures to be taken by the companies to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries, as well as to prevent or - where prevention is not possible or not immediately possible - to at least minimize the extent of such impacts and adequately mitigate these impacts; companies have to provide a comprehensive plan and a monitoring procedure regarding the observation of the due diligence obligations, articles 1 and 7 to 16.

There are five main controversies regarding the extension of the legal instruments, which began at the latest with the European Commission's proposal of 23 February 2022 and continue even now that the most recent amendment process was concluded in February.

6.1. Subjective scope

The issue to which the over-measurement argument often resorts is the subjective scope.[19] With the current version (EU Directive 2026/470, of 26 of February), the EU Directive 2024/1760 the CSRD's scope is narrowed. The Directive will apply to companies: (i) with an average of over 5 000 employees and a worldwide net turnover of more than EUR 1.5 billion in the last financial year and (ii) with a net

[18] Cf. EUROPEAN COMMISSION. Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements. COM(2025) 81 final. Brussels: European Commission, 27 February 2025.
[19] CIACCHI, S., 2024. The newly adopted Corporate Sustainability Due Diligence Directive, p. 36.

turnover of more than EUR 1.5 billion in the Union in the financial year preceding the last financial year. The amending directive postpones the CS3D's transposition deadline by Member States into national law by another year, to 26 July 2028. Companies will have to comply with the new measures by July 2029. Very different was the version of the soft law "Guiding Principles on Business and Human Rights" approved in de United Nations resolution 17/4 of 16 June 2011, Principle 14: *"The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure."*

The initial proposal of the Commission limited applicability to companies with at least 500 employees.[20] The current version provides for the application of the Directive to around 6.000 large EU companies and around 900 non-EU companies. There are currently around 24 million companies in the EU.[21]

6.2. Objective Scope

The second issue confronting the inadequacy argument is the inclusion or not of all elements in the value chain: should legislation lower the requirements on indirect suppliers?

Articles 8 to 11 of the EU Directive 2024/1760 included obligations for indirect suppliers: *"[…] companies take appropriate measures to identify and assess actual and potential adverse impacts arising from their own operations or those of their subsidiaries and, where related to their chains of activities, those of their business partners […]".* That means, that assessing, preventing and bringing adverse impacts to an end, were as well requirements on indirect suppliers, defined as business partners within the *"'chain of activities"*.

However, with the amendment EU Directive 2026/470 the obligation for companies to proactively identify negative impacts of indirect business partners is to be reduced "*in order to avoid the burden of having to systematically examine all parts of often complex value chains [...]".*

The limitation of the scope of due diligence from a general to an exceptional

[20] CERQUA, C. W., 2023. *Understanding EU Company Law Politics: The Case of the Proposal for a Directive on Corporate Sustainability Due Diligence*. MA thesis. Università degli Studi di Padova. Available at: https://thesis.unipd.it/retrieve/5bcfcead-bc0a-420a-85e6-3c99b1b6c79f/Dissertation_SPGI_CWalker.pdf, p. 8.
[21] EUROPEAN PARLIAMENT, 2025. *Fact Sheets on the European Union: Company Law*. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/35/company-law.

inclusion of indirect business partners is another example of the legislators´ aim to improve the proportionality of the Directive.

Another limitation of due diligence obligations results from the definition of the term “appropriate measures”. When, in earlier stages of the legislative process, the applicability was also intended for medium-sized companies, the term “proportionality” was used explicitly twice in the definition of “appropriate measures”.

In what way is the concept of “appropriate measures” an operationalisation of the proportionality? The company itself is required to identify the least burdensome effective measure, but even this constitutes an obligation of means, rather than result, embedded ex ante in corporate decision-making.[22]

There are three levels of due diligence obligations: the approach that best achieves the legislation's objectives is prevention through the integration of human rights due diligence into risk management systems; a weaker approach is correction through information management; and the legislation's objective is no longer achievable through remediation and compensation, within which the prioritisation of adverse sustainability impacts takes place, cfr. articles 7 to 11 and 13 of the CSDDD.[23]

Among the three levels of operation and within each of them, companies must strive to achieve the best possible protection within the constraints.

6.3. Civil liability

Although this analysis is not intended to be exhaustive, it cannot fail to mention the controversy over the civil liability of transnational corporations for damages caused by their business partners in the value chain. The EU Directive 2026/470 remits to national law: “*Businesses will be liable at a national level (rather than EU level) for failure to apply the rules correctly and could face fines of up to a maximum cap of 3% of the company’s net worldwide turnover, with the Commission issuing the necessary guidelines in this regard.”*[24]

6.4. Effectiveness of core obligations

[22] BUENO, N., BERNAZ, N., HOLLY, G. and MARTIN-ORTEGA, O., 2024. The EU Directive on Corporate Sustainability Due Diligence (CSDDD): the final political compromise, p. 297.

[23] SINNIG, J. and ZETZSCHE, D. A., 2025. The EU’s Corporate Sustainability Due Diligence Directive: from disclosure to mandatory prevention of adverse sustainability impacts in supply chains, p. 638.

[24] EUROPEAN PARLIAMENT, 2026. *Certain Corporate Sustainability Reporting and Due Diligence Requirements (Omnibus I)*. Legislative Observatory, 2025/0045(COD), 26 February 2026.

To increase the effectiveness of these legal obligations, a complaint and notification mechanism has been enshrined. The amending directive of 2026 precluded the right to appeal in cases of solely indirect damage, Article 3(1) n).

7. Comparisons with cases judged

Naturally, the authors of all legislative proposals consider them to be in accordance with the constitutional law and the Charter of Fundamental Rights of the European Union. "The freedom to conduct a business in accordance with European Union law and national laws and practices is recognized." Article 16 of the Charter of Fundamental Rights of the European Union (CFREU) corresponds in several elements of its content and in its applications to the more traditional rights of right to work[25] and right to property[26].[27] The Court of Justice of the European Union, CJEU,[28] and the national courts of the member states apply the freedom to conduct a business as a balancing weight against labor rights, human rights, including the right to a healthy environment. The CFREU itself provides for restrictions on freedoms in "observance of the principle of proportionality [...]".[29]

7.1. Analogy with established European jurisprudence

In the present analysis the central legal question is therefore whether such restrictions can be justified under the principle of proportionality.

A fruitful method to assess this question is through analogy with established European jurisprudence - both from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) - in which economic freedoms have been restricted in pursuit of public interest objectives. The purpose of this contribution is twofold: first, to demonstrate why such analogies are legally probative for understanding the constitutional architecture of the CSDDD; and second, to identify their limits, given the distinctive regulatory nature of the Directive.

[25] Article 15 CFREU Freedom to choose an occupation and right to engage in work.
[26] Article 17 CFREU.
[27] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, 2015. *Freedom to Conduct a Business: Exploring the Dimensions of a Fundamental Right*. Luxembourg: Publications Office, p. 7.
[28] Mark Alemo-Herron and Others v Parkwood Leisure Ltd. Judgment of 18 July 2013. ECLI:EU:C:2013:521
[29] Article 52 CFREU Scope and interpretation of rights and principles 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

At the human rights level, there are, in terms of content, elements of freedom to conduct a business, freedom to own property[30],[31] and freedom of expression in the European Charter of Human Rights[32],[33] and the right to work in the European Social Charter[34] and the International Covenant on Economic, Social and Cultural Rights[35].

The freedom to conduct a business - the right to set up and run a business - is not absolute and may be restricted for imperative reasons of general interest.[36] The following analyses of certain judgments and interpretations of European Union law handed down by the CJEU focus on restrictions on the freedom to conduct a business that are in accordance with EU law. This comparison will help to support whether the measures provided for in the CSDDD, which interfere with business autonomy, cost structures and strategic decision-making, are appropriate for achieving its objectives, which are the enforcement of human rights and the protection of ecosystems.

7.2. Public Health and Consumer Protection

In Deutsches Weintor eG v Land Rheinland-Pfalz the CJEU upheld a prohibition on misleading health claims regarding alcoholic beverages.[37] The Court considered the measure appropriate to ensure a high level of public health protection. Similarly, in Dextro Energy GmbH & Co. KG v European Commission, the General Court confirmed

[30] Article 1 of Protocol No. 10 to the European Convention on Human Rights (right to enjoy one's property).
[31] Smith Kline and French Laboratories v. the Netherlands, European Court of Human Rights Judgment of 4 October 1990.
[32] Freedom of (commercial) expression, Article 10 ECHR: "(1) Everyone has the right to freedom of expression. This right shall include freedom of opinion and freedom to receive or impart information or ideas without interference by public authority and regardless of frontiers.... (2) The exercise of this freedom, inasmuch as it involves duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as may be prescribed by law and which are necessary in a democratic society for national security, territorial integrity or public safety, for the defence of law and order and the prevention of crime, for the protection of health or morals, for the protection of the honour or rights of others, for preventing the disclosure of confidential information, or for ensuring the authority and impartiality of the judiciary."
[33] Krone Verlag GmbH & Co KG v. Austria, European Court of Human Rights Judgment of 6 November 2003; Casado Coca v. Spain, European Court of Human Rights Judgment of 24 February 1994; Barthold v. Germany, European Court of Human Rights Judgment of 25 March 1985.
[34] Article 1 Right to work - With a view to ensuring the effective exercise of the right to work, the Parties undertake: 1) To recognise as one of their primary objectives and responsibilities the attainment and maintenance of the highest possible and most stable level of employment with a view to achieving full employment; 2) To protect effectively the right of the worker to earn his or her living by means of work freely undertaken; [...]
[35] Article 6 - 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
[36] TRIDIMAS, T., 2020. The General Principles of EU Law. 3rd ed. Oxford: Oxford University Press.
[37] Judgment of 6 September 2012, ECLI:EU:C:2012:526.

the lawfulness of refusing health claims relating to glucose products.[38]

These cases demonstrate that even significant restrictions on commercial communication and marketing practices are permissible when grounded in scientifically supported public health concerns. By analogy, the CSDDD's objective of protecting human rights and the environment—interests of at least comparable constitutional weight—can justify equally intrusive regulatory measures.

7.3. Transparency and Disclosure Obligations

In Interseroh Scrap and Metals Trading GmbH (C-1/11), the CJEU held that the protection of business secrets does not preclude obligations to disclose the identity of waste producers under EU environmental law.[39] The restriction on economic freedom was deemed appropriate and necessary.

This reasoning is directly relevant to the CSDDD, which imposes extensive transparency and due diligence obligations across supply chains. The case confirms that information asymmetries and environmental risks justify intrusions into business confidentiality, supporting the legitimacy of similar obligations under the Directive.

7.4. Economic Burden and Regulatory Costs

In DK Recycling und Roheisen GmbH v European Commission the Court rejected arguments that the absence of a hardship clause rendered the emissions trading system disproportionate.[40] The Advocate General emphasized that economic disadvantages do not necessarily affect the essence of business freedom.

The case law suggests that economic burden alone is insufficient to establish disproportionality, provided that the core ability to conduct a business is not extinguished.

7.5. Positive Obligations Imposed on Businesses

In McDonagh v Ryanair Ltd. the CJEU upheld obligations imposed on airlines to assist passengers in cases of extraordinary circumstances, even without temporal or financial limits.[41] The Court found that such obligations did not excessively interfere

[38] Judgment of 16 March 2016, ECLI:EU:T:2016:150.
[39] Judgment 29 March 2012, ECLI:EU:C:2012:194.
[40] Judgment of 20 September 2016, ECLI:EU:C:2016:717.
[41] Judgment of 31 January 2013, ECLI:EU:C:2013:43.

with Articles 16 and 17 CFR.

This case is especially probative for the CSDDD, as it confirms that ongoing and potentially costly obligations can be imposed on private actors in pursuit of public policy objectives.

7.6. Appropriate restrictions of economic freedom

The analogies discussed above are legally probative for several reasons.

First, they demonstrate a consistent constitutional pattern: the freedom to conduct a business is subject to limitations justified by high-ranking public interests.

Second, they confirm that intrusive measures—including disclosure obligations, marketing restrictions and financial burdens—are compatible with Article 16 CFR, provided they are proportionate.

Third, they illustrate that EU law accepts preventive and risk-based regulation, even where the harm is not immediate or certain. This is particularly relevant for the CSDDD, which addresses systemic risks in global supply chains.

Fourth, they show that proportionality operates as a flexible and context-sensitive standard, capable of accommodating complex regulatory objectives.[42]

Comparisons tend to be incomplete. Therefore, a proportionality test will be carried out in all its stages, drawing on numerous existing scientific publications.

8. Legitimate objectives, appropriate and least intrusive means

Quoting the EU Charter of Fundamental Rights "*Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*"

8.1. Arguments for a diluted CSDDD

What are the main arguments in favour of a watered-down CSDDD?

A central objection concerns regulatory overreach and extraterritoriality. The CSDDD extends obligations to non-EU subsidiaries and business partners, a so called

[42] VYHNÁNEK, L. et al., 2024. The dynamics of proportionality: constitutional courts and the review of COVID-19 regulations. *German Law Journal*, 25, pp. 386–406. Available at: https://doi.org/10.1017/glj.2023.96.

"legal transplant".[43] Critics argue that such an approach risk exporting EU standards beyond its jurisdiction without adequate democratic legitimacy.[44]

The main argument in favor of a watered-down CSDDD is the protection of the economic region, weighed against the protection of human rights: concerns are raised invoking innovation, competitiveness and regulatory overload, which could deter investment, reduce global competitiveness of EU firms, and incentivize relocation to less regulated jurisdictions.[45]

The final and strongly watered down text of the CSDDD reflects this intense contestation between economic and human rights priorities.

Several scholars based on empirical modelling suggest that due diligence focused on bilateral supplier relationships may be ineffective, as harmful practices are diffuse and embedded within networked supply chains; consequently, firms may incur high compliance costs without achieving meaningful risk mitigation, especially given the structural opacity of global production networks.[46]

This argument therefore specifically concerns disproportionate measures, in the sense that restrictions that are perceived as severely limiting business freedom do not achieve the intended objectives. The specific tools of the directive must be examined to see to what extent they are suitable for preventing or mitigating adverse impacts on human rights. And this is precisely where we conclude basing on scientific legal literature that an overly diluted subjective or objective scope can undermine the targeted effectiveness. The authors of the amendment directive do not share our view.[47]

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[43] BERKOWITZ, D., PISTOR, K. and RICHARD, J.-F., 2003. Economic development, legality, and the transplant effect. *European Economic Review*, 47(1), pp. 165–195, p. 188; WATSON, A., 1974. *Legal Transplants: An Approach to Comparative Law.* Charlottesville: University Press of Virginia.

[44] SINNIG, J. and ZETZSCHE, D. A., 2025. The EU's Corporate Sustainability Due Diligence Directive: from disclosure to mandatory prevention of adverse sustainability impacts in supply chains. *European Journal of Risk Regulation*, 16(2), pp. 628–652. Available at: https://doi.org/10.1017/err.2024.100, p. 14.

[45] DRAPER, P., FREYTAG, A., MC DONAGH, N. and MENTER, M., 2025. The impact of due diligence legislation on international trade and business: analysis of potential trade-offs. *Global Policy*, 16, pp. 1075–1086. Available at: https://doi.org/10.1111/1758-5899.70096, p. 1082; PARLAK DE OLIVEIRA SERRA, S., 2025. *Corporate Governance and Due Diligence Analysis Under the Corporate Sustainability Due Diligence Directive (CSDDD): Legal and Extraterritorial Challenges*. SSRN. Available at: https://ssrn.com/abstract=5140853. Available at: https://doi.org/10.2139/ssrn.5140853, p. 65.

[46] HURT, J., LEDEBUR, K., MEYER, B., FRIESENBICHLER, K., GERSCHBERGER, M., THURNER, S. and KLIMEK, P., 2023. Supply Chain Due Diligence Risk Assessment for the EU: A Network Approach to Estimate Expected Effectiveness of the Planned EU Directive. *arXiv preprint*, arXiv:2311.15971v2, p. 16.

[47] The underlying policy objective of this proposal is precisely to further strengthen the proportionality of the Directive with a view to increase its efficiency in achieving its goals, reflecting on calls from some stakeholders who consider that the CSDDD as currently in force, would have placed excessive burden

8.2. Arguments for a systemic CSDDD

It was a fundamental insight and motivation for CSDD that human rights violations occur particularly at the beginning of the chain of activities. The EU Directive 2024/1760 already contained requirements that reflected a scale back compared to the initial proposals trying to avoid supposedly unnecessary restrictions. However, in particular, under the pretext of excessive restrictions on companies' economic freedoms, there has been and continues to be debate regarding a further decrease in the demands placed on companies:[48]

- Extension of the scope of maximum harmonization, with due diligence generally targeting direct business partners;
- Removal of the obligation to terminate the business relationship as a last resort;
- Narrowing of the definition of 'stakeholder';
- Restriction of the steps in the due diligence process that require stakeholder involvement;
- Extending the intervals at which companies must regularly monitor the adequacy and effectiveness of due diligence measures;
- Clarifying the principles for penalty payments and abolishing the 'minimum cap' on fines;
- Deleting aspects of the civil liability clause;
- Deletion of aspects of the provisions on collective claims;
- Amendment of the provisions on the implementation of transition plans to mitigate the effects of climate change;
- Deletion of the review clause relating to financial services;
- Bringing forward the adoption of the first package of (general) implementing guidelines by the Commission;
- the obligation to identify risks imposed by the directive is limited to cases when the companies have "plausible information pointing to" adverse impacts.

on businesses. Targeting the obligations with respect to indirect business partners in the value chain, reducing the required frequency of the periodic monitoring exercises, as well as streamlining the definition of stakeholders and better targeting engagement to relevant stakeholders and limiting the due diligence steps when engagement is required are all examples for the proposed elements that are designed to make the Directive more proportionate. (COM/2025/81 final).

[48] EUROPEAN COMMISSION. Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements. COM(2025) 81 final. Brussels: European Commission, 27 February 2025.

All the analyzed watering-down measures may be examples of how the reduction of the scope of the directive undermine the appropriateness of the HRDD measures by turning instruments defective or too weak to achieve the objectives:

- In that sense, it is shown that local-level enforcement is crucial for achieving the intended human rights and environmental objectives.[49] However, the instruments just mentioned reduce monitoring obligations and prevention incentives precisely at the beginning of the chain of activities, i.e. where the risks are highest.
- A fundamental finding of efficiency studies on environmental protection is that it should not be limited anthropocentrically to directly endangered or harmed individuals but should aim to prevent ecological damage as such; see, for example, the Aarhus Convention. This integrative approach also applies to environmental protection through HRDD.[50] However, as already outlined, the EU Directive 2026/470 moved in the opposite direction, i.e. they limit the stakeholders for risks of environmental damage to directly affected persons, Article 3 (2) n).
- The provision of remedy is a core component of corporate accountability.[51] Nevertheless, as mentioned, restrictions have also been introduced here; see above chapter 6.

This lowering of requirements contradicts the fundamentally positive results of the CSDD instruments with regard to their objectives. Thus, the assessment of 127 companies from the food and agriculture products, ICT manufacturing and automotive manufacturing sectors on their human rights performance ([52]) resulted in key findings that confirm the link between CSDD processes and positive human rights impacts.

There are other studies that also highlight further tools that are not included in the directives analyzed here but which can make CSDD more effective, such as a

[49] SOLAR, J., IVANOVA, Y. and OBERLACK, C., 2025. Human rights and environmental due diligence regulations for deforestation-free value chains. *Global Policy*, pp. 1–13. p. 2, 9.
[50] DEHBI, F. and MARTIN-ORTEGA, O., 2023. An integrated approach to corporate due diligence from a human rights, environmental, and TWAIL perspective. *Regulation & Governance*, 17, pp. 927–943, p. 929, 939.
[51] DEHBI, F. and MARTIN-ORTEGA, O., 2023. An integrated approach to corporate due diligence from a human rights, environmental, and TWAIL perspective. p. 939.
[52] WORLD BENCHMARKING ALLIANCE, 2022. Corporate Human Rights Benchmark Insight Report. Available at: https://assets.worldbenchmarkingalliance.org p. 8, 9, 11, 13.

sustainability committee and board diversity.[53]

Based on the studies presented, we have reached the following interim conclusions:

- The observation that CSDD measures have a positive impact on the achievement of objectives prevails.
- However, there are also voices that predict the opposite.
- The companies affected are themselves proposing and testing other, in some cases more far-reaching, CSDD instruments.
- Some of the dilutions of the CSDDD that have already taken place and are currently being debated are decisions that run counter to solid findings.

9. Degree of burden on companies

On the one hand side, the CSDDD is expected to have negative financial effects on certain stakeholders, particularly smaller companies and vulnerable actors in the supply chain. But it is equally important to bear in mind that due diligence obligations are regarded as economically valuable investments for companies.[54] These kinds of research results cast the intrusion by CSDDD obligations in a somewhat less rigid light.

In order to better tackle the challenges, calls for equitable cost-sharing mechanisms, political support, and funding schemes to mitigate the economic burden are being raised.

In the meanwhile, some authors pose the question about disproportionate obligations with a different preconception: Do companies that implement a good HRDD process benefit from better financial performance?[55] Based on over a thousand interviews of companies´ decision makers, empirical evidence was gathered in the section on market practice and was analyzed and drawn the conclusion by investigators of the economic field, that the due diligence obligations are not limitations,

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[53] TORELLI, R., FIANDRINO, S. and SCARPA, F., 2025. Value-enhancing drivers of corporate governance. *Corporate Social Responsibility and Environmental Management*, 32, pp. 1279–1290. p. 1286.

[54] HAUPT, S., LICHTER, J. and MAY, F. C., 2021. *Sorgfaltspflichten entlang globaler Lieferketten - Eine ökonomische Analyse*. Berlin: Handelsblatt Research Institute. Available at: https://research.handelsblatt.com/wp-content/uploads/2024/06/Studie_BMZ_Lieferkettengesetz.pdf p. 66, 67.

[55] TORELLI, R., FIANDRINO, S. and SCARPA, F., 2025. Value-enhancing drivers of corporate governance, p. 1287.

burdens or restrictions, but rather investments.[56]

There are dissenting views on this point: A study about the clothing industry, which refers to several other studies as well as interviews, presents the "worry about brands simply hunting for already-compliant suppliers rather than helping their current partners rise to the challenge."[57]

There are also differing opinions as to who will ultimately pay any additional costs resulting from the CSDD obligations: Stadler, Bonatti and Mithöfer take the view that there is a risk that larger companies may shift the financial burden of compliance onto suppliers, particularly those in low-income countries, exacerbating existing power imbalances.[58] On the contrary, Haupt, Lichter and May defend that the costs associated with due diligence end up being incorporated into the price of products without creating any harm to businesses.[59]

The referred assessment naturally depends on influencing factors, including legal and administrative ones. The absence of this level playing field might result in an unfair competition. While an increasing proportion of consumers and jobseekers value the environmental and social impacts of the goods they buy or produce, the difficulty of accessing such information creates an adverse selection of companies that do not act with due diligence on a voluntary basis, creating widespread social harm. Mandatory CSDD legislation addresses this kind of market failures that result from information asymmetry.

What costs are we talking about in concrete terms? Training of employees and suppliers, setting up appropriate information systems, in addition to the labor costs of people in charge of the increased management needs of the supply chain, payments for third party services and the preparation of regularly incurred reports. Haupt, Lichter and May sought to determine the ratio between the costs associated with CSDD

[56] EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, CIVIC CONSULTING and LSE, 2020. *Study on Due Diligence Requirements Through the Supply Chain: Final Report*. Luxembourg: Publications Office. Available at: https://data.europa.eu/doi/10.2838/39830 p. 44; HAUPT, S., LICHTER, J. and MAY, F. C., 2021. *Sorgfaltspflichten entlang globaler Lieferketten - Eine ökonomische Analyse*, p. 19.
[57] STADLER, E., BONATTI, M. and MITHÖFER, D., 2025. Unraveling complex impacts pathways of EU sustainability regulation. *Regulation & Governance*, pp. 1–20. p. 9.
[58] STADLER, E., BONATTI, M. and MITHÖFER, D., 2025. Unraveling complex impacts pathways of EU sustainability regulation. p. 9.
[59] HAUPT, S., LICHTER, J. and MAY, F. C., 2021. *Sorgfaltspflichten entlang globaler Lieferketten - Eine ökonomische Analyse*, p. 19.

obligations and the revenues associated with sales.[60] According to the results for the sample of private companies studied, the cost represents between 0.005% and 0.1% of sales, while for the group of smaller companies supporting legislation in this sense the costs represent between 0.06% and 0.6%. The EU Commission study calculates ratios of 0.01% for companies with more than 250 employees and 0.14% for small and medium-sized enterprises.[61] These costs are higher at an early stage, as the transformation and introduction of due diligence processes requires a significantly higher allocation of work in the first year than in later years when processes are well established.

These figures reflect burdensome costs if it is assumed that due diligence human rights and environmental protection efforts will not prevail. However, if they do prevail, what results from several studies they bring legal certainty and clarity, as well as competitive advantages in terms of access to market share.[62]

10. Omnipresent proportionality

The obligations of due diligence are not prohibitions like they are, for instance, in the cases presented in chapter 7, and the obligations of due diligence are always linked to the principle of proportionality, as shown in the definition of “appropriate measures”[63].

Under this concept, companies themselves have the responsibility to comply with the requirement for optimization and to weigh up the necessary considerations. Opponents criticize open-textured obligations—such as “appropriate measures” or “best efforts”—for generating excessive interpretative ambiguity, arguing that uncertainty increases litigation risk and may lead to defensive compliance strategies rather than substantive behavioral change.[64]

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[60] HAUPT, S., LICHTER, J. and MAY, F. C., 2021. *Sorgfaltspflichten entlang globaler Lieferketten - Eine ökonomische Analyse*, p. 21.

[61] EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, CIVIC CONSULTING and LSE, 2020. *Study on Due Diligence Requirements Through the Supply Chain: Final Report.* Luxembourg: Publications Office. Available at: https://data.europa.eu/doi/10.2838/39830

[62] FREY OF NIELSEN, S., BAR AM, J., DOSHI, V., MALIK, A. and NOBLE, S., 2023. *Consumers care about sustainability—and back it up with their wallets*. McKinsey & Company.; SIMON-KUCHER, 2024. *Sustainability 2024: Navigating Consumer Behavior.* Available at: https://www.simon-kucher.com/en/insights/sustainability.

[63] See *supra* chapter 6.2.

[64] PARLAK DE OLIVEIRA SERRA, S., 2025. *Corporate Governance and Due Diligence Analysis Under the Corporate Sustainability Due Diligence Directive (CSDDD): Legal and Extraterritorial Challenges*. p. 58.

As recent scholarships have noted, this represents a shift from judicial proportionality to regulatory proportionality, where private actors perform the balancing exercise themselves.[65]

11. Conclusion

The instruments of the Directive were examined in this analysis from several angles to determine whether they pose a risk of violating the principle of proportionality: Less intensive measures have been failing for decades.[66] Therefore, it is not an exaggeration to replace soft law with hard law.

The debate on the most important subjective and objective areas of application of the directive[67] has resulted in the following:

With the amendment currently being negotiated, CSDD obligations would only apply to 0.025% of European companies,[68] i.e. the very largest ones.

Although one of the main motivations behind the CSDDD is that HR violations occur at the beginning of the activity chain, the latest debate on amendments aims to reduce the requirements in precisely this area, arguing that the effort required by companies is disproportionate.[69]

The compensation obligations of European companies for damage at the beginning of the activity chains were also once a core concern of CSDD. However, they were restricted, see Article 29 of CSDDD.

Decades of experience with environmental law and the degree to which it has been implemented have led to an increase in transparency and to the expansion of active legitimation in administrative and judicial action on environmental issues, see, for example, the Aarhus Convention. In connection with the CSDDD, a further reduction in the scope of the stakeholder concept was introduced.[70]

Due diligence obligations are not framed as strict prohibitions; rather, they constitute process-oriented duties conditioned by the principle of proportionality, as reflected in the notion of "appropriate measures." Within this framework, companies are required to operationalize an optimization exercise, autonomously balancing

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[65] SINNIG, J. and ZETZSCHE, D. A., 2025. *The EU's Corporate Sustainability Due Diligence Directive: from disclosure to mandatory prevention of adverse sustainability impacts in supply chains*. p. 24.
[66] See chapter 3.
[67] See Chapter 6. above.
[68] See Chapter 6.1 above.
[69] See section 6.2 above.
[70] See above chapter 6.4.

competing considerations in light of their specific risk exposure and capacities.

Proportionality is required because freedoms and rights are being restricted. In the case of the CSDDD, the right to work, to property and the freedom to conduct a business are being restricted.

Bearing in mind the results of the economic analysis referred previously, we return to the central thesis of this paper: The dilution of the subjective and objective scope of the obligations of due diligence of firms will perpetuate the defect of protection, whereas with none of the alternatives under discussion there will be a violation of the principle of proportionality due to excessive restrictions to the freedom to conduct a business. The verification of an insufficiency of State legality must take into account the nature of the legal positions threatened and the intensity of the danger of damage to fundamental rights. The control of the insufficiency presupposes the verification "whether the protection meets the minimum requirements in its efficiency and whether the legal goods and interests opposed are not overvalued. [...]"[71] The "nature of the threatened legal positions" is no less than one of the core values of the European Union: human rights.[72] The "countervailing legal goods and interests" are impositions on firms, i.e., restrictions on the freedom to conduct a business. Economic analysis shows that due diligence obligations lead companies to make investments of small amounts that are revenue-generating: small because they amount to between 0.01 and 0.14 % of annual turnover.[73] And cost-effective, because companies themselves point out that observing due diligence obligations brings them reputational benefits with consumers, improved quality of preliminary products and greater resilience of their supply chain.[74] The same surveys show that companies with more practical experience in implementing due diligence obligations value them more positively.

The comparative analysis of judgements of the Court of Justice of the European Union, CJEU, on the adequacy of restrictions of freedom to conduct a business, lead to the conclusion that the controversial due diligence obligations are less severe than

[71] See above chapter 2

[72] See above Chapter 3, and Article 2 TEU: "The Union is founded on the values of respect [...] for human rights, [...]".

[73] See above Chapter 8 quoting EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, CIVIC CONSULTING and LSE, 2020. *Study on Due Diligence Requirements Through the Supply Chain: Final Report.*

[74] See above Chapter 8 quoting HAUPT, S., LICHTER, J. and MAY, F. C., 2021. *Sorgfaltspflichten entlang globaler Lieferketten - Eine ökonomische Analyse.*

measures considered adequate by the CJEU.[75]

The preamble and numerous provisions reflect how entrenched the principle of proportionality is in protecting against excessive interference with entrepreneurial freedom.[76]

Actually, as long as property rights and business freedom are prioritized and their restrictions are reduced to a minimum, human rights violations and ecological damage will increase. The respective numbers are well known. Well known is also the failure of less severe restrictions, i.e., just *soft law*[77]. The suitability of the CSDDD may be called into question if further watering down prevails, in particular the drastic reduction in the number of addressees, the exclusion of responsibility for indirect trading partners, and active legitimization only for those directly affected. If these defective measures, then fail to achieve their objectives, they will go down in history as unnecessary interference in entrepreneurial freedom, and human rights violations will remain the norm.

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[75] See above chapter 6.
[76] See Chapter above 9 .
[77] among others Guiding Principle 14 UNITED NATIONS, 2011. *Guiding Principles on Business and Human Rights*.: The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.

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Data de submissão do artigo: 23/02/2026

Data de aprovação do artigo: 12/05/2026

Edição e propriedade:
Universidade Portucalense Cooperativa de Ensino Superior, CRL

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