

CORPORATE SUSTAINABILITY: A COMPARATIVE ANALYSIS OF THE LEGAL DISCIPLINE OF THE NON-FINANCIAL INFORMS (BRAZIL AND EUROPEAN UNION)

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Received: 2016-07-27. Accepted: 2016-11-01.

Abstract: From the theoretical reference of the sustainability, the article analyses the question of the incorporation of both social and environmental order considerations to the business and operations carried out by the companies, through the public dissemination of the performances in such areas. The research, focused on the quality, under a exploratory profile, and based in the bibliographic and documental review techniques, such as the data collection, is herein developed with the goal of identifying and analyzing, comparatively, the normative treatment applied to the scope of the public divulging of non-financial reports (the so called sustainability informs or reports), accordingly to both the Brazilian and European perspectives. As noted, in Brazil, there is no legal obligation to publish the sustainability reports, although the publishing is recommended to the companies by BM&FBOVESPA (administrative institution of the capital market), since December of 2011, through an instrument that characterizes a “soft” Law. On the other hand, in the European Union (EU) scope, there has been a recognition of the necessity to increase the transparency of social and environmental information by certain corporate societies and groups of companies, which is considered an imperative element for their social

responsibility. Therefore, both the European Parliament and the European Union Council edited directives (2013/2014), regarding the subject of the publishing of non-financial information. The legislative acts in question are destined to all the members of the EU, compelling them to intervene in the national legal structures (“hard” Law) in order to transpose, to the respective structures, under mandatory character and established deadline, the general norms that consecrate certain common parameters regarding the subject.

Keywords: Sustainability - Company - Sustainability Reports (non-financial) - Brazil - European Union

1. INTRODUCTION

In the final quarter of the twentieth century, the sustainability is elevated to the stage of structuring element of the Constitutional State, presented by some as the new paradigm of the post modernity¹ right. As such, it becomes the background of the debates that impact the comprehension of the social, economic and legal realities. No longer restricted to the environmental or ecological aspects, such discussion currently also contains other perspectives such as the economic and social. Consequently, it imposes challenges to the governance of the public and private actors, from whom was now expected a larger commitment to the social and environmental responsibility.

The central focus of such discussions seems to be the company and the enterprise². Once the new perspectives concerning the sustainability matter are applied, the company is found before the necessity of enhancement of the social responsibilities and of the redefinition of missions and roles in the society, which imposes a broader view to its relations, in the meaning of embody considerations of social and environmental orders to the business and operations therein developed. Therefore, it is discussed if the demonstration of the behavior of the

1 Paulo Márcio Cruz e Zenildo Bodnar (2011, p. 78) emphasize that the term “paradigm” does not have only one conception and suffers, in the fields of social science, ideological and sociocultural influences. For the purpose of this present work, the concept formulated by the authors will be adopted, which is: “the criteria of reflexive epistemological rationality that prevails, informs, guides and directs the resolution of problems, challenges, conflicts and the own functioning of society. It is a reference to be followed and that enlightens the production and application of law”.

2 The notion of enterprise adopted by the Brazilian Civil Code of 2002 will not be used (enterprise = organized economic activity), due to its restricted consideration in face of its polysemic view. The enterprise is understood as a human construction, and economic and social institution, and not as a mere expression of an economic activity.

companies before the public and all society encompasses the necessity, or not, of the public disclosure of non-financial reports or informs that prove their social and environmental performances, as well as the impact of their activities and eventual risk assessment measures.

Facing this specific research problem, the present work takes on the purpose of investigate the matter of the public disclosure of the economic, social and environmental performances of the companies as social actors, the so called sustainability reports (or non-financial reports), with a specific cut in the presentation and comparative analysis of the different perspectives in the treatment of the matter, accordingly to the current realities in Brazil and in the European Union scope.

The applied methodology, in the first part of the research, is comprised of the analysis of the literature concerning the subject of sustainability and its repercussions in the resizing of the roles of companies. For the development of the second part of the research, a international-leveled data collection was carried out, especially in the United Nations scope, concerning the relations between the company, the sustainability and the transparency, followed by the investigation in both the internal and international legislative fields, seeking the identification, in Brazil and in the European Union, of the existence or not of the legal obligation towards the disclosure of reports or informs about sustainability. In the end, the description and comparison of a specific institute – the non-financial report/inform about sustainability - were carried out in distinct legal frameworks (the Brazilian rights and the institutional rights of the European Union). The main characteristics concerning the treatment of the matter in these two realities were comparatively observed, with focus on their differences.

2. THE SUSTAINABILITY IN ITS BROADER PERSPECTIVE AND THE IMPACT IN THE REDEFINITION OF THE ROLES OF THE SOCIAL ACTORS

The idea of the sustainability “grows in body and in expression politically as the term “development” is characterized, as a fruit of the perception of a globally environmental crisis” (NASCIMENTO, 2012, p. 52). The first references to the development appeared in the fifties, through the perception, by humanity, of the existence of a common risk due to a process of environmental degradation (CHAVES; FLORES, 2015, p. 3). As of that moment, both subjects became topics of discussions in the political and academic scopes.

At that moment, the notion of sustainability was anchored solely to its environmental aspect, referred to as *ecodevelopment*³. Such

3 Regarding the *ecodevelopment*, it is important to point out the lesson of Gilberto MontibellerFilho (1993, p. 133): “The *ecodevelopment* presupposes, thus, a synchroni solidarity with the current generation, as it dislocates the logic of production to the prism of the

perspective, considered limited nowadays, was justified in face of the impacts caused by the studies and conclusions of the Club of Rome – in the meaning of recognition of the necessity of imposition of limits to the growth considering the already established environmental degradation and the scarcity of natural resources⁴ – and, especially in recognition of the concern towards the performance of numerous nuclear tests between the years of 1945 and 1962, which culminated in radioactive rains over the Nordic countries and caused Sweden, in 1968, to propose to the United Nations the gathering of a world-level conference, to discuss the reductions of the emissions of the elements considered responsible for the acid rains. (NASCIMENTO, 2012, p. 53).

Such conference took place in 1972, in Stockholm, as the 1st United Nations Conference on the Human Environment. The final document of the Conference, the Stockholm Declaration, in its Principles, imposed to men the “[...] solemn obligation to protect and enhance the environment for the present and future generations”, simultaneously recognizing that “in the developing countries, most of the environmental issues arise out of the underdevelopment” and that, thus, “millions of people continue living below the minimum necessary levels for a dignified human existence [...]”. Therefore, stated that the developing countries must drive their efforts towards the development, having their priorities and the necessity to safeguard and improve the environment”.

With time, the comprehension of sustainability anchored solely in its environmental indicator was dislocated also to other more extensive axes. As pointed out by Maria Luiza Feitosa (2009, p. 33-34), the sustainability is no longer based solely in a restricted or ecological meaning, and that the “mark of such comprehension is the report of the United Nations Committee for Environment and Development (UNCED), of 1987, entitled ‘Our Common Future’⁵. In that very moment, the broadening of perspectives around the concept of development⁶ could be noticed through the bonding of the term to

fundamental needs of the majority of the population; and a diachronic solidarity, expressed in the economy of natural resources and in the ecological perspective to ensure the possibility of development to the future generations”.

4 The works and conclusions of The Club of Rome triggered the publication of the work *Limits to Growth*. MEADOWS, D. H. et al. *The limits to growth*. New York: Universe Books, 1972.

5 Also known as “Brundtland Report”, in tribute to the then Prime Minister of Norway, Gro Harlem Brundtland, responsible for preiding the Commission, created in 1983.

6 Even though there are not few authors that recognize the sustainability and sustainable development as synonyms, for Emanuela Cristina A. Lacerda, Alexandre Morais da Rosa e Gabriel Real Ferrer (201, p. 1204) sustainability and sustainable development are terms that no longer confused, although the sustainability has been gaining a ascending space in the speeches about development. According to the authors (p. 1213-1214), only through the assumption and substitution of the still prevailing paradigm, of the ascension, the adjective sustainable incorporates the goal of growth and may be treated as sustainable development.

the idea of satisfaction of current necessities without compromising the guarantee of the same possibilities to the future generations, indicating also the perspective of a intergenerational view, an aspect of the solidarity that comprehends an ethical dimension.

After the Brundtland report, the concept of sustainable development was put in the center of the international debates especially by occurrence of the “Earth Summit”, the United Nations Conference on Environment and Development. The meeting took place in Rio de Janeiro, in 1992, and gathered a total of 178 nations. In its final part, a global action plan, known as Agenda 21 was created, outlining a common program around a few foundations of the sustainable development, “in order to equally attend the necessities, in terms of development and of environment, of both present and future generations”.

Another marking worldwide event was the World Summit on Sustainable Development, occurred in Johannesburg, in 2002, in which the commitments made towards the sustainable development were again confirmed, including the creation of a global, humanitarian, equal and solidary society, through the ratification of the goals previously established for the protection of the environment and of the goals assumed in Agenda 21 (MARIANO, 2012, p. 29). All these historical marks were important to make the idea of sustainability become comprised of three indicators: economic activity, environment and social well-being⁷.

Through the abovementioned expanded conception, the sustainability starts to be pointed out as a “new century paradigm, in the gender of the ones that succeeded the genesis and the development of constitucionalism itself”, such as humanism, the social matter and the social democracy, respectively in the 18th, 19th and 20th centuries (CANOTILHO, 2010, p. 8). This new paradigm of Law – fomentor of axiological agendas in different levels⁸ – doted with multiple faces⁹,

7 There are authors that reference other dimensions, such as Ignacy Sachs (1993), who points out five: i) Social Sustainability; ii) Economic Sustainability; iii) Ecological Sustainability; iv) Spatial Sustainability; and v) Cultural Sustainability. Gabriel Real Ferrer, Maikon Cristiano Glasenapp and Paulo Márcio Cruz (2014, p. 1456), on the other hand, point out that sustainability may be understood in two meanings – restricted and broad -, and into this last would exist six dimensions: i) Ecological; ii) Economic; iii) Social; iv) Cultural; v) Political-legal; and vi) Technological. In this present work the tridimensional concept will be applied, due to the belief that each of the three elements may comprehend the others, without the necessity of increase of such configuration.

8 Gabriel Real Ferrer, Maikon Cristiano Glasenapp e Paulo Márcio Cruz (2014) correctly point out the sustainability as a new paradigm for the Law.

9 The sustainability, multifaceted phenomenon, was correctly approached, this way, in the work “A Sustentabilidade Ambiental e suas Múltiplas Faces” (FLORES, 2012). Some of the multiple faces of sustainability were discussed in innumerable chapters that affect the governance of public and private actors.

imposes complex challenges to the public and private governance, with direct reflexes in the necessity of redefinition of the roles for the social actors in face of a new broader set of perspectives and expectations.

3. THE SUSTAINABILITY AND THE COMPANY: THE INCORPORATION OF SOCIAL AND ENVIRONMENTAL ORDERS CONSIDERATIONS (BEYOND THE ECONOMIC AND FINANCIAL)

“Profit and respect for the law count, but are only part of the history”. Ricardo Abramovay

In face of this expanded conception around the notion of sustainability, the necessity of a new worldwide economy has been aired, once the the current manner of resources organization, although favorable for a growing material prosperity, does not attend to its greater goal of contributing to the enhancement of substantial liberties for humanity as a whole, thus, threatening – destroying or seriously challenging – nothing less than 16 of the 24 services performed by the ecosystems (ABRAMOVAY, 2012, p. 15). One of the biggest challenges in this reflection “is that formulate goals for the economic system that do not fundamentally depend of its expansion also means formulate goals for the firms that alter the direction of the corporate action and the measures of its efficiency” (ABRAMOVAY, 2012, p. 17). In other words, the emerging of this new economy brings with itself the equally necessary redefinition of the roles played by social agents, amongst which are the companies, in the meaning of adoption of the so called sustainable behaviors, oriented to the harmonization between economic, social and environmental aspects, and not only by the scope of short term profit. Therein, the inclusion of private actors in the search of the sustainable development is performed.

Actually, given the presence – mostly global – economic power, mobility and the inclusion of companies as promoting agents of the sustainable development constitute a natural and inexorable way (PINHEIRO, 2012, p. 25). In the specific case of the company, there is a broader view of the corporate relationships, in the meaning of incorporation of considerations of social and environmental orders in the business and operations carried out therein, with its ethical aspect centering the decisions and strategies. The referred foundations indicate that the mission of the company should ally ecological, economic and social engagements, that consider not only the meaning of their existence, their reasons to be and their legitimacy, but also their finality (LAVILLE, 2009, p. 160).

The company plays a central role in society, once its decisions impact the lives of people, families, ecosystems and entire countries (MACKEY; SISODIA, p. 283). It is natural, therefore, that a set of expectations is directed to it, considering its positive or negative contributive ability for the sustainable development. Although there is a current consolidation of the idea that such expectations cannot be ignored, the excessive focus on the maximization of short term economic results to the shareholders (partners/quota holders) generated a crisis context in the relationships between the companies and society. Such conception, as stated by Ana Bárbara Teixeira (2010, p. 226), chained the referred institute to the epistemological crisis of the development model used in the twentieth century, then marked by a solely quantitative and accumulative founded economic growth. According to the author, the model in question arised out of the dissociation between humanity (society), its organizations and the environment and caused reflexes in the misalignment between the interests of society and if its institutions, especially the State and the companies (those focused solely in short term economic results).

Given such scenario, the necessity of harmonization of the private interests with the social commitments became sustained, considering the consolidation of the idea that the companies do not carry out their activities in a social vacuum, but in face of fundamental matters such as expectations, values, social matrixes and broader communication processes with society. Thus, as described by Amartya Sen and Bernardo Kliksberg (2010, p. 362-264), the ideas around the role to be played by private companies in the contemporary society have been quickly modified in the past years, coming from a profit generator to owners point of view – to solely whom they should answer to – as their only responsibility, to a much broader perspective, promoting a paradigm rupture concerning the prior conceptions, in the meaning of consider them as a high social responsibility¹⁰. Therefore the necessity to increase the social responsibilities and redefine the role and mission of the companies in the society (ARNOLDI; MICHELAN, 2000, p. 159).

The creation of the concept of the stakeholders¹¹ has been fundamental for the arising of a new view for the roles of companies.

10 It is important to point out that the matter of social responsibility is related to the idea of “voluntary integration of social and environmental concerns by the companies in their operations and in their interaction with the community” (TOMASEVICIUS FILHO, 2003, p. 46), distancing from the notion of social function.

11 The concept of stakeholder was approached in the Article Stockholders and Stakeholder: A New Perspective on Corporate Governance published in 1983 by the California Management Review. According to the authors, R. Edward Freeman itself, in co-authorship David L. Reed, the term was veiculatedbedore, in 1963, in an internal memo of Stanford Research Institute, as a reference to, “those groups without whose support the organization would not exist”.

In a non-literal translation, the term has been used to define a set of “interested parties” directly or indirectly affected by the economic activities performed by the company, such as: employees, consumers, community, environment, amongst others. Such view is based upon the understanding that the companies should create the highest possible value to each “interested party”. As taught by Freeman (2010, p. 24-26), the premise that the maximization of profit to partners and shareholders would be its sole finality is contested, passing on to the notion that the companies should create the highest possible value to such entire enhanced set.

The increase and development of studies regarding the stakeholders theory brought together the contesting of the doctrine of the creation of values solely to the shareholders or stockholders (partners/shareholders) – which sees the company as an instrument whose only purpose is the pursuit of economic results, moved exclusively by the interests of rational agents that maximize utilities – which comes to be considered as a myth (STOUT, 2012).

From there rises the notion of the creation of shared value (PORTER; KRAMER, 2011): the action of the companies cannot be turned solely for the economic and financial performances, especially the short term. The rights of all the other interested parties must also be contemplated, as a redefinition of its finalities that allows a higher contribution to the performance of the development and for the sustainability. The company, therefore, is conceived as “much more than an entity simply economic, transformed into an institution with high weight in social level” (ANDRÉS; PIMENTEL, 2005, p. 37).

4. THE SUSTAINABILITY AND THE COMPANY: TRANSPARENCY RELATED TO THE ENVIRONMENTAL AND SOCIAL PERFORMANCES (BEYOND THE ECONOMIC AND FINANCIAL)

From the context of changes related to the notions of accommodation of particular interests and social commitments, imperatives such as transparency emerge, thus, “the idea that the company not only commits, but also accepts to be accountable for the manner in which honor its commitments” (LAVILLE, 2009, p. 27-28).

Therefore, the demonstration of the behavior of the company before its set of public and all society comprehends the question of the public disclosure of reports that prove its economic, social and environmental performances, as well as the impact of its activities and eventual risk assessment measures. In other words, its non-financial informs or sustainability reports, documental proofs of a set of corporate practices, that publicly disclose the economic, environmental and social

performance of the reporter.

In worldwide level, the “Global Reporting Initiative” (GRI) is an international organization that promotes a series of guidelines and parameters for the elaboration of sustainability reports, establishing principles and indicators for the measurement and communication of the behavior and performance of organizations. Currently, the structure of GRI is used by organizations from all over the world as a reference for the elaboration of the sustainability informs. As for the content of such reports, besides the economic, environmental and social performances, matters such as labor practices and decent work, human rights, society (focusing on the impact that the organizations create on the communities in which are inserted and how the risks of their interaction with other institutions are managed and mediated) and responsibility for the product are also proved¹².

In the United Nations scope, there is also a concern about the incorporation of the idea of a sustainable action plan inside the performance of the companies, which comprehends the matter of presentation of informs about sustainability as well as the necessity of production of good practices models. Therefore, the final document of the United Nations Conference on Sustainable Development, in its Paragraph 47, points out the importance of the presentation of the informs about sustainability by the companies, especially the larger companies whose securities are traded in the market¹³.

In the same document (Paragraph 13), the institution also recognizes the main participation of the private sector and of the companies in the sustainable development, which would depend on an broad alliance that involves also the people, government and civil society, under the purpose of achieving the desired future for both the present and the future generations¹⁴. Accordingly to such conception, the company is understood as an indispensable social actor for the accomplishment of the development with sustainability.

5. THE CURRENT WAYS OF THE PUBLIC DISCLOSING OF NON-FINANCIAL INFORMS OR INFORMS (OR REPORTS) ABOUT SUSTAINABILITY

The coherence and the compatibility between corporate

12 Available in: <<http://www.globalreporting.org/resource/library/Brazil-Portuguese-G3-Reporting-Guidelines.pdf>>. Access in: Sep. 23rd, 2015.

13 Integral text of the final document of the Conference Available in: <<http://www.daccess-dds-y.un.org/doc/UNDOC/GEN/N11/476/13/PDF/N1147613.pdf?OpenElement>>. Access in: Sep. 23rd, 2015.

14 United Nations. United Nations Conference on Sustainable Development. Paragraph 13. Available in: <<http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/476/13/PDF/N1147613.pdf?OpenElement>>. Access in: Sep. 28th, 2015.

discourse and practice meets an affective instrument in the non-financial informs or reports about sustainability. It is an important mechanism to communicate the economic, social and environmental behavior of the companies, in attention to the ideals of responsibility and social function, as well as measure the impacts of the performed activity, permitting the evaluation of both the positive and negative effects of these behaviors, considering each reporting company and their respective adequacy to the imperatives related to the aspects and dimensions of sustainability.

Amongst other matters, the content of the reports may identify characteristics such as: i) personnel policies that respect the rights of the collaborators of the companies and that favor their development as human beings, through the offering of dignified conditions for the work and remuneration, possibility of progress in the career and capacitating programs for continuous training; ii) transparency and good governance, guaranteed in internal scope, to the shareholders, especially the minority, possibility of active participation in the business guidelines, with directive instances that seek to abolish/diminish the conflict of corporate interests; iii) fair play and transparency towards the consumers of products or services, with offering of products and services of good quality and reasonable prices; iv) environmental protection policies and engagement to the world agenda of the area, contributing locally, regionally, nationally or even internationally.

The observance, in the routine of the companies, of determined models of better practices, which incorporate matters as the ones abovementioned undoubtedly constitutes a relevant instrument for the consolidation of the notion of performance of the development with sustainability.

5.1. Informs about sustainability in the Brazilian law

Considering the necessity of consolidation of a system able to accommodate the economic activity, environment and social aspects, in a national scope there is no legal obligation towards the disclosure of informs or reports about sustainability¹⁵. On the other hand, there is a recommendation of BMF&BOVESPA – administrating institution of the Brazilian securities exchange – concerning that obligation.

The recommendation is restricted to the publicly traded companies listed in BMF&BOVESPA, thus, the companies whose securities are admitted for trading in the capital market¹⁶. The publicly traded company is considered one of the fundamental institutions of the

¹⁵ The legal obligation concerns solely the elaboration and disclosure of the consolidated financial balances.

¹⁶ It is not, therefore, destined to the other corporate types existent in the Brazilian Law, such as the private equity companies and limited liability companies, amongst others.

market economy, considering the quantity of interests – both general and particular – that require protection and composition (PEDREIRA, 2002, p. 7-8). Therefore, it must be based on the notion of transparency, focusing on the development together with its various publics, of a honest and transparent dialogue (LAVILLE, 2009, p. 28-29).

This primary formal initiative in the means of public disclosure of informs was carried out through the external communication 017 2011-DP, of December, 23rd, 2011, through which BMF&BOVESPA proposed to all the publicly traded companies listed therein the adoption of the report or explain model, to sustainability reports or similar. The document pointed out to a recommendation in the means that the publicly traded companies indicate, as of 2012, if they disclosed any kind of reports about sustainability or similar, and that disclosed where such information was available and, in the event of default of such responsibility, to explain the reason.

After the external communication 017 2011-DP. Through which BMF&BOVESPA proposed to the stock companies listed therein the adoption of the report or explain model, the administrating institution of the Brazilian capital market began to follow the adhesion of the companies to the policy of public disclosure of information. The data contained in the BMF&BOVESPA portal shows as evolution in the amount of companies that effectively disclosed informs about sustainability or similar. The current partials, measured as of the issuing of the external communication (December of 2011), indicate 96 (ninety-six) disclosures in June of 2012, 157 (One hundred and fifty-seven) in June of 2013 and 163 (One hundred and sixty-two) in June of 2014; there was also an evolution in the amount of companies that did not disclose, but presented explanations, being 107 (One hundred and seven) in June of 2012, 136 (One hundred and thirty-six) in June of 2013 and 149 (One hundred and forty-nine) in June of 2014.

Considering its nature of mere recommendation issued by the administrating institute of the market, the listed companies, in Brazil, the disclosure of informs about sustainability is characterized eminently as a non-prescribing right, therefore, a recommendation arising out of the mechanisms of soft law, also known as soft norm or *droit doux*. It should be pointed out that such recommendations do not constitute a legal command, the referred texts do nor establish positive right obligations and provisions are not cogent. As emphasized by Jacques Chevalier (2009, p. 166-169), such instruments “indicate the goals” that are desirable to achieve, establish “guidelines” that are desired to be followed, formulate “recommendations” that are desirable to be respected, with its application depending not on the coercive element but on the voluntary adhesion of the recipients, consisting, therefore in a “brand right” – soft law - , that imposes in background the notion

of command and thus represent a more flexible conception of legal normativity

It is noticed that, although it does not constitute a legal obligation due to the lack of a coercive state dimension, the voluntary adhesion to the report or explain model, for sustainability reports or similar, has grown percentually in connection to the disclose and also to the presentation of explanations concerning the reasons for not previously disclosing. Amongst the 149 (One hundred and forty-nine) non-disclosing companies, but explained; 33 (Thirty-three) disclosed only papers in the same area; 27 (Twenty-seven) do not consider necessary the disclosure or do not have it as a priority; 23 (Twenty-three) are analyzing the possibility of disclosure; 17 (Seventeen) did not present an explanation; 19 (Seventeen) state that their reports are being elaborated; 12 (Twelve) explained that they do not disclose due to the nature of their operations or to the current moment; 10 (Ten) are developing a disclosing structure; 9 (Nine) alleged a misunderstanding of the report; 1 (One) stated that its report is comprehended into the report disclosed by its holding.

5.2. Sustainability reports in the scope of the institutional right of the European Union

The legal order of the European Union (EU) is considered as its own, in connection to its State-members, integrating and imposing such order to their respective legal systems (LOBO, 2005), through the establishment of a right constituted by a set of rules and principles intended to ensure the goals defined in the treaties (CEREXHE, 1985)¹⁷.

In the scope of the aforementioned own legal system, with autonomy in face of the systems of the State-members, which was referred to as European union right, the treatment of a series of matters understood as key-variables to the achievement of the finalities intended with the economic and politic integration of the current 28 (Twenty-eight) countries composing the UE has been given great relevance. To such set of rules that, in certain events, are elaborated towards the achievement of the goals of the integration, the name derived law is lent.

Amongst the innumerable themes that constitute concerns to the right of the European Union, the matter of the non-financial reports of the companies can be found, especially regarding those with securities traded in the market¹⁸. Actually, such idea surrounding the social

17 The main ones are: i) The Treaty that institutes the Coal and Steel European Community (CSEC); ii) The Treaties of Rome, CEE and EURATOM; iii) The Fusion Treaty – Treaty of Brussels; iv) The Single European Act; v) the European Union Treaty – Treaty of Maastricht; vi) Treaty of Amsterdam; vii) The Treaty of Nice; viii) The Treaty of Lisbon.

18 As examples of securities, the shares and debentures may be cited (respectively, participation

responsibility of the companies is largely consolidated in the level of the EU rights. Therefore, particularly in the last decade, a series of legislative and non-legislative actions have given treatment to the matter, for example, the European Parliament Resolution – a legislative body doted with law creation powers, as well as monitoring and budget powers – of March, 13th, 2007, entitled “Social Responsibility of Companies: a partnership”, in which was expressly showed the “conviction that the increase of the social and environmental responsibilities of the companies, in connection to the principle of the corporate responsibility, represents a key element to the European Social Model [...]” and, even, an “European strategy towards the sustainable development [...]”¹⁹.

The point of view regarding the importance of the companies for the achievement of the goals of EU was affirmed in the Communication of the Commission entitled “Social Responsibility of companies: a new strategy of EU for the period of 2011-2014”, adopted in October 25th, 2011. Such perspective led the European Parliament (2013) to edit new resolutions, such as the “Social Responsibility of companies: responsible and transparent behavior and sustainable growth” and the “Social Responsibility of companies: the promotion of corporate interests and a way to a sustainable and inclusive recovery”, in which the necessity of improvement of the transparency of both social and environmental information, an element deemed essential for the social responsibility of companies, was recognized²⁰.

In the sequence of the abovementioned resolutions, the matter received a normative treatment and was object of directives from both the European Parliament and the European Union Counsel – a body that shares the legislative power with the Parliament and in which discussions, amendments and approvals of laws in Europe are carried out -, specially the Directives 2013/34/EU (first regarding the subject) and 2014/95/EU (which amended it). Therefore, opportune is the analysis: i) of the nature of the directive and its impacts in thee legal system of the State-members; ii) of the specific content of the normative treatment conferred to the non-financial reports.

The directive is one of the legislative acts subject to adoption in the EU. It concerns the most important instrument of action of EU, through which it seeks to harmonize the necessity to concede certain unity to the European Law, with the consideration and maintenance of the peculiarities of the national legal systems. It is not intended, with the directive, the full unification of laws, but to consolidate an approach

and debt titles).

19 Available in: <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0062&language=PT>>. Access in: Oct. 15th, 2015.

20 Available in: <[http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0207/CO_M_COM\(2013\)0207_PT.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0207/CO_M_COM(2013)0207_PT.pdf)>. Access in: Oct. 15th, 2015.

of the legislations of the State-members, in the meaning of elimination of normative contradictions (BORCHARDT, 2011).

This legislative act bounds the recipient State-member as to the results to achieve, but leaves to its own criteria the manner and the means (CEREXHE, 1985). It obliges the State-member to intervene in the internal legal (and administrative) structure in order to surpass, to its respective legal system, under a mandatory character and a established deadline, the general norms that consecrate certain common parameters, associated to the goals proposed in the content of each directive. It sets, as noted by CAMPOS (1983, p. 98), “a result that in the common interest should be reached”.

Currently, the most important legislative act regarding the subject of this present analysis is the Directive 2014/95/EU, which amended the Directive 2013/34/EU in its dispositions concerning the disclosure of non-financial information by certain large corporations and groups. The legislative act in question has as recipient all the 28 (Twenty-eight) State-members.

The Directive 2013/34/EU, recognized that the policy of disclosure of the non-financial information is of vital importance to the management of the shift to a sustainable global economy, based upon the notion of the necessity of harmonization of the long-term profitability with the ideal of social justice and with the protection of the environment. The disclosure of such information allows a better supervision of the corporate management and of the impacts of the actions of companies in society.

The Directive 2014/95/EU, which amended the aforementioned Directive, on the other hand, had as a foundation, amongst others, the Communication entitled “Act for the Unified Market – Twelve levers to stimulate the growth and reinforce the mutual trust – Together for a new growth”, adopted by the Commission in 2011, based on the necessity of improvement of the transparency of information related to companies, expanding it (to beyond the financial aspects) also to the social and environmental scopes and in order to reach a comparable level in all the State-members, regardless if they demand additional improvements in the transparency of information inside their legal systems.

The most relevant point of the Directive 2014 /95/EU may be found in its Article 19-A, which concerns the financial reports. It predicts that the large companies that are public interest entities and that, as of the closing balance sheet date, must include in their management reports a non-financial report that contains enough information to a comprehension of the evolution, development, position and impact of their activities. In the segment therein, the companies that exceed the average of 500 employees per financial year are included.

The information, that should concern, at least: i) the environmental

and social matters related to the employees; ii) the respect for the human rights; iii) the combat of corruption and the attempts of bribery; iv) the indication of the corporate model of the company; v) the description of the policies adopted in connection to such matters, as well as the obtained results; vi) the indication of the associated risks related to the company activities, their potential negative impact in products or services and their means of management; vii) the appointment of the key-indicators of development for the specific activity carried out therein; and viii) if adequate, a reference to the amounts contained in the annual financial reports and additional explanations regarding such amounts.

Concerning the methodology of the reports, developed to furnish such non-financial information, the directive indicates that the companies covered by it may resort to a series of platforms, all considered apt to the exercise of communication to the public, such as: i) national systems; ii) Union systems, such as the Communal System of Ecomanagement and Audit (CSEA); iii) international systems, such as the United Nations Global Pact, the guiding principles concerning companies and human rights applicable to the United Nations “Protect, Respect and Repair” framework, the guidelines of the Organization for the Economic Co-operation and Development (OECD) for the multinational companies, the ISO 26000 norm of the International Organization for the Normalization, the Tripartite Declaration of Principles of the International Labor Organization about the multinational companies and the social policy, and the Global Initiative about the elaboration of reports or other re-known international frameworks.

Until December 6th, 2016, the Commission should elaborate a set of guidelines (non-mandatory) regarding the methodology for the reporting of non-financial information by the companies, referencing certain key-indicators of non-financial, general and sectorial performances, in order to facilitate the policy of disclosure of non-financial information and contribute to make such information pertinent, useful and comparable by the companies. Interesting is that, in this point, the content of the directive prescribes that the Commission has to consult the interested parties.

Regarding the transposition of the content of the directive into the national legal systems, the Article 4 prescribes that: i) the State-members shall make effective the necessary legislative, regulatory and administrative dispositions in order to fulfill the provisions therein until December 6th, 2016; ii) the State-members establish that the dispositions referred to in the first paragraph are applicable to all the companies comprehended by Article 1 as of the financial year beginning in January 1st, 2017 or during the civil year of 2017, considering that, once they adopt such dispositions, the State-members have to include a reference to the directive or make the official disclosure be

accompanied by such reference.

Although the established deadlines have not expired yet, the eventual non-compliance to the policies related to one or various of these questions shall imply in the presentation of an clear and reasoned explanation of the reasons for not applying such policies.

6. THE NORMATIVE POLICY RELATED TO THE NON-FINANCIAL REPORTS IN A COMPARING PERSPECTIVE

The method of analysis and interpretation applied in this present investigation is limited to the comparison of the regulation of a specific institute – the non-financial report/inform or sustainability report – in different legal systems, i.e.: the Brazilian Law and the Institutional Law of the European Union²¹.

It regards, hereunder, not an activity of comparison between legal systems globally considered, even less between the characteristics of the big families of law²², but solely a “microcomparison” (OVIDIO, 1984, p. 166) concerning the normativeness surrounding the specific institute, through the identification and analysis of the differences between the normative treatment attributed to the object of study by each of the pre-determined legal systems.

In Brazil, disregard the increase of the voluntary adhesions to the model in question, it may be noted that the absence of state coercitivity maintain a flexibility to the normative content of the recommendations, making more uncertain the achievement of an effective dialogue between the companies and the society, and the consequent consolidation of the transparency around their non-financial performances, once its application depends on the voluntary adhesion of the recipients of the brand right, disregarding its submission to the model.

The normativity sorrounds a soft law instrument, not cogent, that simply recommends the disclosure (important to note) by the companies listed in BM&FBOVESPA, of the sustainability reports or informs, for the general public, concerning the environmental, social and economic-financial performances. Such “weak” regulation, excludes from its incidence the other corporate types prescribed in the Brazilian legal system, such as, the private equity companies and limited liability companies. Many of these are big companies, even though they do not trade securities in the Brazilian capital market (therefore, not recipient

21 As noted by Francisco Ovidio (1984), the nature of the compared law is very contentious, being possible to find in the doctrine those who defend that it concerns science (as the own author emphasizes) and, on the other hand, those who advocate the thesis that it concerns, in fact, a method. For the purpose of the present work, the notion of method will be adopted.

22Regarding the studies of the big families of Law, it is opportune to remit the reader to the works of René David (2002) and Mario G. Losano (2007).

of the weak normativity of the “report or explain” model), in accordance to their size and activity, equally impact society as a whole.

In the other hand, in the EU, the next resolution in the timeline is the one entitled “Social Responsibility of Companies: responsible and transparent behavior and sustainable growth” and “Social Responsibility of Companies: promotion of the interests of society and a way to a including and sustainable recovery”, the directives of the Parliament and of the Counsel, specially the Directive 2014/95/EU, which amended the Directive 2013/34/EU, regarding the subject of the disclosure of non-financial information by certain big corporate societies and groups, constitute legislative acts that have all the 28 (Twenty-eight) State-members as recipients.

The directives, as legislative acts in the scope of the institutional law of the European Union, turn to the idea of conceding a larger unification of the normative treatment of certain sensitive questions. In such context, the content of such legislative acts shall be transposed, by the State-members, to their respective internal legal systems, increasing the transparency of the information related to the companies, amplifying it (to beyond the financial aspects) also to the social and environmental scopes, and in order to achieve an equitable level in all of them, in the different identified dimensions.

The countries, therefore, are obliged to intervene in their respective internal legal structures in order to transpose, in a mandatory character and under a specific deadline, the general rules that consecrate certain common parameters regarding the matter of the necessity of disclosure, by certain companies, of the non-financial information in connection with the achievement of the goals proposed in the content of each directive. And, as the transposition of such contents is internalized to the national legal systems, the relevant subject of the non-financial information disclosure, strictly connected to the notion of sustainable development, is incorporated under the condition of prescribing content, of cogent. In other words, hard law, a “strong” right.

7. CONCLUSION

Through the present research, the recognition of the sustainability as a structuring element of the Constitutional State was possible, framing it as a new paradigm which inducts axiological guidelines in different levels. Such phenomenon, multi-faced, leads to the necessity of continuous enhancement and adjustment in the roles of the different social actors, both public and private. Also, it should impact the role of the companies, understood as a social actor directly connected to the responsibility of accommodation of private interests with social agendas, and not as a mere expression of an economic activity.

In such context, the transparency adopts an imperative condition and demands from the companies the commitment to the public disclosure of their economic, social and environmental performances, by the means of the sustainability reports. Through such documents it is possible to evaluate the coherence and compatibility between corporate speech and practice, incorporating to the companies the idea of creation and preservation of values shared amongst all their stakeholders, under the prism of sustainability.

As for the research problem referred to in the introduction, which involves the question regarding the necessity, or not, of a public disclosure of the reports that prove the social and environmental performances of the companies (beyond the financial), as well as the impact of their activities and eventual prevention measures, it is concluded that, even though the transparency and necessity of disclosure have been representing a larger concern in the scope of international institutions such as UN, and also in a doctrinal level, the normative treatment of the subject constitutes a political option, varying in the different legal systems.

In the specific case of Brazil, as aforementioned, there is no legal obligation to disclose such reports, although there is a recommendation from BM&FBOVESPA addressed to all publicly traded companies listed therein, the document known as report or explain. On the other hand, in the scope of the European Union, a larger culture related to the transparency and disclosure of non-financial reports has been developed, with the edition, by the European Parliament and Council of directives regarding the subject, which implicates to the State-members the obligation of transposition of such commands to their internal legal systems.

In such context, it is believed that disregard the relative efficiency of the Brazilian soft law instrument (indicated by the analysis of the results in the periods since the implementation of the initiative, with an evolution in the voluntary adhesion), the European experience may be considered a parameter for the construction of a new model of normative treatment of the subject, with the transformation of the recommendation (with no cogent force) into a legal obligation arising out of state formal law, representing a mandatory prescription addressed to the companies, which must also ensure a larger certainty as to the normative framing of such relevant matter for the means of the sustainable development. Therefore, it is not a defense of the legal transplants – mere legal transplant of an already existent institute from a certain legal system into another.

Particularly, it is believed that the new perspectives and demands surrounding the adequacy of the corporate role to the sustainability imposes the participation of the law – of a prescribing law and not a mild, flexible law – in the means of creation and integration, to the legal

system, of the prescriptive legal contents aligned to the drafting of a better future, in which the companies are part not only of the way, but also of the final result.

Such conception of right, more prescribing, less flexible or mild, wagers on the premise that certain matters, such as the public disclosure of the economic, social and environmental performances of the companies, by its importance, should be observed more from the point of view of what is correct – and, consequently, of what is coercible demandable – and less under the scope of the costs to its implementation.

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