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DIRECTORS' LIABILITY FOR ESG FACTORS UNDER *CAREMARK* CLAIMS[1]

A RESPONSABILIDADE CIVIL DOS CONSELHEIROS DE ADMINISTRAÇÃO DE SOCIEDADES ANÔNIMAS POR FALHAS NA GESTÃO DE FATORES ESG À LUZ DA TEORIA *CAREMARK*

Giovanna Rennó Duque*

Abstract: ESG investing has grown substantially during the past few years, and it is continuing to gain traction in markets today; correspondingly, lawyers, scholars, and regulators are debating the consequences of this trend on corporate and securities law. Although there is enough reason to believe that, in the coming years, Courts will be faced with the question of whether directors may be held liable for failing to oversee ESG factors, and if so, under which circumstances, very few authors have tried to answer this question. It is proposed in this Essay that, when dealing with ESG-related claims, Courts should resort to the same test and standards developed under *Caremark* and its progeny. Therefore, directors may be held liable for breaching their duty to oversee legal and business risks related to ESG (in the latter case, subject to a much higher burden on the plaintiffs), while remaining shielded from liability for failing to address ESG opportunities, in line with the business judgment rule.

Keywords: ESG. Board of Directors. Fiduciary Duties. Caremark Claims. Civil Liability.

Resumo: Os investimentos ESG cresceram exponencialmente nos últimos anos, e continuam a ganhar relevância no mercado de capitais; consequentemente, advogados, acadêmicos do Direito e reguladores começam a debater as implicações dessa tendência para o Direito Societário e do Mercado de Capitais. Apesar de haver mo-

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tivos suficientes para acreditar que, nos próximos anos, os Tribunais serão provocados a analisar se os conselheiros de administração de sociedades anônimas podem ser civilmente responsabilizados por eventuais falhas na gestão de fatores ESG e, em caso positivo, em quais circunstâncias tal responsabilização pode ser determinada, poucos autores se debruçaram sobre esse assunto até a presente data. Propõe-se, neste trabalho, que, ao lidar com demandas relacionadas a fatores ESG, os Tribunais devem recorrer aos mesmos testes e *standards* desenvolvidos no precedente *Caremark* e na jurisprudência que se consolidou após tal decisão. Portanto, conselheiros de administração podem ser responsabilizados por violarem o dever de fiscalizar riscos jurídicos e de negócios relacionados a fatores ESG (sendo que, no segundo caso, o ônus da prova do requerente é substancialmente superior); por outro lado, não podem responder por eventual falha em endereçar oportunidades de negócios relacionadas a fatores ESG, em linha com a teoria da *business judgment rule*.

Palavras-chave: ESG. Conselho de Administração. Deveres Fiduciários, Teoria Caremark. Responsabilidade Civil.

Introduction.

The acronym ESG stands for "environmental, social, and governance". These 3 words were first put together by the United Nations Secretary General Kofi Annan back in 2004, when he wrote to over 50 CEOs of major financial institutions urging them "to develop guidelines and recommendations on how to better integrate environmental, social and corporate governance issues in asset management, securities brokerage services and associated research functions".[2-3]

2 MACEY, Jonathan R. *ESG Investing: Why Here? Why Now?,* 15 nov. 2021. Disponível em:

But institutional investors have long resisted doing so, under the rationale that the fiduciary duties they owed to asset owners precluded them from adding "ethical considerations" to their investment decisions.[4]

Corporation directors faced the same dilemma, as illustrated by the longstanding scholarly debate on the purpose of corporations. Although the stakeholder theory advocated that corporations should seek not only profit but also the interests of their employees, consumers, and the community in which they are involved,[5] the shareholder-primacy approach is the one that has generally prevailed. Under this approach, corporate law is meant to serve the interests of stockholders, and thus the directors' job is purely to increase shareholder value.[6]

However, this debate seems to have become anachronic. In fact, in the past few years, various studies have suggested that there is a positive correlation between ESG and greater business and stock price performance, as well as lower cost of capital.[7] In other words, taking

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https://clsbluesky.law.columbia.edu/2021/11/15/esg-investing-why-here-why-now/#_ftn2. Aceso em: 4 fev. 2022.

3 UNITED NATIONS. *Who Cares Wins*, 2004. Disponível em: https://www.scribd.com/fullscreen/16876740?access_key=key-16pe23pd759qalbnx2pv. Acesso em: 4 fev. 2022.

4 CFA Society of the UK. *Certificate in ESG investing official training manual*, at 10 (1st ed. 2019).

5 For a summary of this corporate law debate, see STRINE, Leo E. *et al*., Caremark and ESG, Perfect Together*:* A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy. *Iowa Law Review*, Iowa City, v. 106, n. 1885, p. 1889-1905, 2021. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664021. Aceso em: 4 fev. 2022.

6 See FRIEDMAN, Milton. *The Social Responsibility Of Business Is to Increase Its Profits*. 1970. Disponível em: https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html. Acesso em: 4 fev. 2022.

7 See DB Climate Change Advisors, *Sustainable Investing:* Establishing Long-Term Value and Performance. 2012. Disponível em: https://churchinvestment.org/wp-content/uploads/2015/04/DB-Advisors-Sustainable_Investing_2012.pdf. Acesso em: 5 fev. 2022;

into consideration stakeholder interests effectively increases shareholder value. Accordingly, in 2019, the Business Roundtable issued a statement updating the purpose of a corporation to "promote an economy that serves all Americans", arguing that addressing stakeholder interests would help ensure long-term value for shareholders.[8-9]

A study conducted by McKinsey & Company has shown that ESG-value creation may happen in 5 different ways. First, ESG contributes to top-line growth by allowing companies to enter new markets or expand their shares in previous existing ones (for instance, by getting them to attract more customers that seek sustainable products). Second, it helps corporations reduce operational costs (by leading to a reduction in energy consumption, for example). Third, it reduces state intervention and fine application (such as for damages caused to the environment). Fourth, it increases productivity (e.g., increasing employee motivation and talent attraction). Fifth and lastly, it enhances investment and asset optimization (by allowing corporations to allocate capital to more sustainable and promising projects in the long term and preventing them from investing in stranded assets).[10-11]

CLARK, Gordon L.; FEINER, Andreas; VIEHS, Michael, *From the Stockholder to the Stakeholder:* How Sustainability Can Drive Financial Outperformance, 5 mar. 2015. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508281. Acesso em: 4 fev. 2022; FRIEDE, Gunnar; BUSCH, Timo; BASSEN, Alexander. ESG and financial performance: aggregated evidence from more than 2000 empirical studies. *Journal of sustainable Finance & Investment*, London, v. 5, n. 4, p. 210-233, nov. 2004. Disponível em: http://dx.doi.org/10.1080/20430795.2015.1118917. Acesso em: 5 fev. 2022.

8 BUSINESS ROUNDTABLE. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*. ago. 2019. Disponível em: https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans/. Disponível em: 4 fev. 2022.

9 Similarly, in the investing context, the Principles for Responsible Investment – PRI group stated that: "As institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios". Principles for Responsible Investment, *Signatories' Commitment*. Disponível em: https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment. Acesso em: 16 fev. 2022.

10 MCKINSEY & COMPANY. *Five ways that ESG creates value*, 2019. Disponível em:

As a result of these findings and the increasing demand on the part of consumers and individual investors that corporations contribute to a more sustainable and socially responsible society,[12] ESG investing has grown substantially. In fact, sustainable investing assets already correspond to 35.9% of the assets under management in the world, amounting to more than USD 35.3 trillion in dollars, as of 2020.[13] However, it seems like lawyers, regulators, and directors are still struggling to understand the exact impact of this ESG movement on their daily work.

In the regulatory sphere, some jurisdictions in the past years have been changing their rules to mandate that corporations publish information regarding ESG.[14] For example, the Brazilian Securities and Exchange Commission has recently enacted Resolution n. 59/2021, which mandates that publicly held corporations must clarify, among other ESG-related information, whether they publish any reports on their ESG approach and, in the affirmative, explain how they assess materiality. In the United States, although Regulation S-K does

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https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value. Acesso em: 8 jan. 2022.

11 Stranded assets are the ones that suffer premature devaluation or turn into liabilities. This may happen for a variety of reasons, but it is expected that ESG factors significantly increase the number of stranded assets, especially due to climate change in carbon-intensive industries. See LLOYD'S. *Stranded Assets:* the transition to a low carbon economy, 2017. Disponível em: https://assets.lloyds.com/assets/pdf-stranded-assets/1/pdf_stranded-assets.pdf. Acesso em: 4 fev. 2022.

12 Research shows that individual investors are increasingly interested in sustainable investing, especially among millennials. See MORGAN Stanley Institute for Sustainable Investing. *Sustainable Signals:* New Data from the Individual Investor, 2017. Disponível em: https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-signals/pdf/Sustainable_Signals_Whitepaper.pdf. Acesso em: 5 fev. 2022.

13 GLOBAL SUSTAINABLE INVESTMENT ALLIANCE. *Global Sustainable Investment Review 2020*, 2021. Disponível em: http://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf. Acesso em: 4 fev. 2022.

14 BRAZILIAN Securities and Exchange Commission, Resolution n. 59/2021, Annex A, item 1.9.

not specifically require corporations to disclose their ESG approach, item 105 does mandate that they disclose "material" risk factors, which include ESG material risk factors.[15-16]

For board members, in turn, it seems that there is still a large amount of hesitation and misunderstanding about what it means exactly to address ESG concerns and what is the best way to do so. Therefore, it is reasonable to conclude that, in the coming years, lawyers and Courts will be faced with the question of whether directors may be held liable for failing to oversee ESG factors, and if so, under which circumstances. This is especially the case in light of recent decisions by the Court of Chancery of Delaware which, for the first time, upheld *Caremark* claims (although so far only in the pleading stage).[17]

This Essay proceeds in 4 parts. Section II explains what the most common ESG factors are, how they can be classified into risks and opportunities, and how their materiality can be assessed by corporations and investors in their disclosures and decision-making processes. Section III provides an overview of caselaw on the duty of oversight. Section IV analyzes the circumstances in which directors may be held liable for failing to oversee ESG factors, building on the caselaw outlined in Section III and the concepts of risks and opportunities developed in Section II. Section V concludes.

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15 Regulation S-K, 17 CFR § 229.105.

16 As has been explained (and criticized) by Commissioner Allison Herren Lee: "[T]he Commission takes the position that it does not need to require or specify these types of disclosures [ESG disclosures] because our principles-based disclosure regime is on the job and will produce any disclosures on these topics that are material. Investors are asked to trust that each individual company has gauged materiality on these complex issues with flawless precision and objectivity". LEE, Allison Herren Lee. *Regulation S-K and ESG Disclosures*: An Unsustainable Silence, 2020. Disponível em: https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26. Acesso em: 8 jan. 2022.

17 See Section III *infra*.

1. ESG factors: risks, opportunities, and materiality.

What exactly are ESG factors? Several (truly, endless) elements may be regarded as such, so long as they have some impact on environmental, social, or governance matters. Environmental factors are the ones that pertain to the natural world, such as climate change, greenhouse gas emission, waste management, resource depletion, water scarcity, and the use of renewable energies. Social factors are issues that arise out of the corporation's relationship with its employees, consumers/clients, and society in general. They include occupational health and safety concerns, talent attraction and retention, human rights protection, product safety, customer privacy, and stakeholder opposition. Lastly, governance factors regard how corporations are run and what their officers, managers, and shareholders' rights and responsibilities are; typical governance matters are board structure and diversity, management compensation, succession planning, compliance with laws and regulations (including those about bribery and corruption), and corporate reporting and transparency.[18]

This is a rather "artificial" classification, for some situations may entail, at once, environmental, social, and governance concerns. For example, a hydroelectric corporation that engages in legal deforestation to build a new plant may face protests from the local community that eventually prevent it from continuing its operations. Shareholders might believe that the company is failing to properly address the matter and, in response, make sure to appoint a new board member experienced in crisis management to try to better navigate the problem. In this case, one single (and perfectly legal) corporate decision – to legally deforest an area in order to build a new plant – would have raised environmental (resource depletion), social (stakeholder opposition), and governance (board diversity) issues.

As mentioned in Section I above, there is significant evidence that ESG plays an important role in enterprise value creation. To bet-

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18 CFA SOCIETY OF THE UK, *Op. Cit.*

ter understand how this happens, it is useful to think about ESG factors as both risks and opportunities.

According to the Committee of Sponsoring Organizations of the Treadway Commission ("COSO"),[19] risks are events that might negatively impact a corporation, preventing value creation or eroding the existing one.[20] ESG risk factors thus create value if they are successfully managed in a way to avoid a negative outcome. For instance, an oil company is (or at least should be) aware that its operations may lead to environmental accidents, such as an oil spill into the ocean. If such an event occurs, the company may face huge fines, harming its profitability.[21] So, environmental factors impose a risk to this company, which it could mitigate by adopting a clear policy on how to conduct deep-water drilling,[22] thus avoiding fines and preserving enterprise value.

Opportunities are defined by the COSO as "the possibility that an event will occur and positively affect the achievement of objectives, supporting value creation or preservation".[23] Hence, ESG factors are opportunities if they have the potential to create value not by

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19 As stated in its website: THE COMMITTEE OF SPONSORING ORGANIZATIONS. *'The Committee of Sponsoring Organizations' (COSO) mission is to help organizations improve performance by developing thought leadership that enhances internal control, risk management, governance and fraud deterrence.* 2022. Disponível em: https://www.coso.org/pages/aboutus.aspx. Acesso em: 17 fev. 2022).

20 COSO. *Enterprise Risk Management — Integrated Framework*, 2004. Disponível em: https://www.coso.org/Publications/ERM/COSO_ERM_ExecutiveSummary.pdf . Acesso em: 14 jan. 2022, at 2.

21 The Gulf of Mexico oil spill caused in 2010 by the British company BP entailed a fine of almost $20 billion dollars, one of the largest corporate fines of all times. See Dominic Rushe, *BP set to pay largest environmental fine in US history for Gulf oil spill*, THE GUARDIAN, Jul. 2, 2015, theguardian.com/environment/2015/jul/02/bp-will-pay-largest-environmental-fine-in-us-history-for-gulf-oil-spill (visited on Jan. 8, 2022).

22 For an analysis of the BP accident and how management could have addressed the oil spill risk, see WATKINS, Michael D. *How BP Could Have Avoided Disaster*, jun. 2010. Disponível em: https://hbr.org/2010/06/global-strategy-local-policies. Acesso em: 13 jan. 2022.

23 COSO, *Op. Cit.*

avoiding negative outcomes, but by contributing to positive ones, thus allowing the company to capitalize on them. For example, an automobile company can lawfully produce only fuel cars; but, if it also starts producing electric ones, it will get to both benefit the environment and enter a new and (possibly) increasingly profitable market. From this perspective, environmental factors may entail opportunities to an automobile corporation.

One may apply the distinction between ESG risk and opportunity factors into the 5 categories of value creation identified in the McKinsey & Company's study (mentioned in Section I above).[24] Under this framework, the issues that must be managed for a corporation to avoid state intervention or fine application are risk factors – because they create value by preventing a negative outcome. Conversely, the elements that facilitate top-line growth, operational cost reduction, productivity increase, and investment and asset optimization are opportunity factors – because they create value by affecting the achievement of positive and profitable outcomes.[25]

Still, some types of ESG risks cannot be framed into these 5 categories of value creation. For example, as mentioned in Section I above, talent attraction and retention are considered as part of the "S" prong of ESG. Suppose that a corporation has not adopted training programs for people in leadership positions; the turnover ratio in its strategic positions remains very high, and there is evidence that the corporation is at a competitive disadvantage vis-à-vis its competitors as a result.

It seems clear that, in the example outlined above, talent attraction and retention fall within the concept of an ESG risk factor

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24 MCKINSEY & COMPANY, *Op. Cit.*

25 It was pointed out in the McKinsey & Company study that: "As with each of the five links to ESG value creation, the first step to realizing value [through costs reduction] begins with recognizing the opportunity". MCKINSEY & COMPANY, *Op. Cit.* It is proposed in this Essay, however, that not all categories of ESG factors involve identifying an opportunity, since some of them – namely, reduction of state intervention and fine application – entail risks, not opportunities.

because a social matter has a negative impact on enterprise value creation. But such impact is not related to either a state intervention or a fine; rather, it derives from a decision about how to conduct the corporation's business. It follows that one may classify ESG risk factors into legal or business risks depending on whether they are related, respectively, to obligations imposed by laws or regulations, on the one hand, or to business decisions, on the other hand.

In practice, however, it might not be all that simple to distinguish whether we are facing a business risk or an opportunity. For example, for a consumer goods company, it might be mission critical for sales to have a good reputation, including about sustainability issues. If a company fails to take any initiatives to appear to the market as an environmentally conscious corporation, is it missing an opportunity or poorly managing a risk?

As previously mentioned, there are endless issues that may be regarded as risk or opportunity ESG factors. Therefore, corporations must be able to determine which of these factors they should carefully address and disclose as part of their ESG reporting. To do so, corporations must carry out a "materiality" assessment,[26] i.e., they must identify the factors that impact enterprise value creation. In short, ESG materiality is a very important concept, and it is one similar to the materiality concept used for financial reporting purposes.[27-28]

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26 As previously mentioned, in the United States, although Regulation S-K does not specifically require corporations to disclosure their ESG approach, its item 105 does oblige them to disclosure "material" risk factors, which include ESG material risk factors (Regulation S-K, 17 CFR § 229.105). In fact, as has been explained (and criticized) by Commissioner Allison Herren Lee: "[T]he Commission takes the position that it does not need to require or specify these types of disclosures [ESG disclosures] because our principles-based disclosure regime is on the job and will produce any disclosures on these topics that are material. Investors are asked to trust that each individual company has gauged materiality on these complex issues with flawless precision and objectivity". LEE, Allison Herren. *Regulation S-K and ESG Disclosures:* An Unsustainable Silence. 2020. Disponível em: https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26. Acesso em: 8 jan. 2022. So, to comply with regulations, companies must be able to identify material ESG factors.

27 SASB *et al. Statement of Intent to Work Together Towards Comprehensive Corporate Report-*

Some institutions have created frameworks for identifying material ESG factors by sector,[29] helping corporations disclose comparable and reliable information. One of the most famous initiatives in this regard is the Sustainability Accounting Standards Board – SASB, which points out material environmental, social, and leadership and governance matters by industry "intended for use in communications to investors".[30] In line with the concept of materiality outlined above, SASB considers as material ESG issues the ones most likely to "impact the financial condition or operating performance" of the companies in a given sector.[31-32]

Similarly, in November 2021, the International Financial Reporting Standards – IFRS announced the creation of the International

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ing. 2020. Disponével em: https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf. Acesso em: 8 jan. 2022, at 4.

28 There are different types of ESG disclosure, which might serve (i) a broad range of users and objectives, or (ii) users whose primary objective is economic decision making. In the first case, the materiality assessment of the ESG factors will not be strictly related to their financial impact, but also to their importance to the corporation's stakeholders. *Id.*

29 As pointed out by the ESG research provider MSCI: "Environmental, social, and governance risks and opportunities are posed by large scale trends (e.g. climate change, resource scarcity, demographic shifts) as well as by the nature of the company's operations. Companies in the same industry generally face the same major risks and opportunities, though individual exposure can vary". MSCI. *Msci Esg Ratings Methodology*, 2020. Disponível em: https://www.msci.com/documents/1296102/21901542/MSCI+ESG+Ratings+Methodology+-+Exec+Summary+Nov+2020.pdf. Acesso em: 13 jan. 2022. at 3.

30 SASB. *Understanding SASB Standards*. Disponível em: https://www.sasb.org/implementation-primer/understanding-sasb-standards/. Acesso em: 8 jan. 2022.

31 *Idem.*

32 Other initiatives include the CDP, the Climate Disclosure Standards Board – CDSB, the Global Reporting Initiative – GRI, and the International Integrated Reporting Council IIRC. In 2020, these 5 organizations (including the SASB) issued a Statement of Intent to Work Together Towards Comprehensive Corporate Reporting, in which they have stressed that the combination of their frameworks "can provide the basis for progress towards a comprehensive corporate reporting system that would enable companies to provide more complete and comparable information to their different stakeholders". SASB *et al.*, *Op. Cit.*, note 26, at 305-318.

Sustainability Standards Board – ISSB, with the purpose of delivering "a comprehensive global baseline of sustainability-related disclosure standards".[33] As pointed out by commentators, this initiative "could help drastically simplify reporting for issuers and may even inform the SEC's likely rulemaking around ESG disclosure".[34]

It is also worth noting that ESG-oriented investors must also be able to establish how they will integrate ESG-related information into their investment analysis and decision-making processes. For that, they usually use the services of ESG research providers, such as MSCI and Sustainalytics, which have put in place their own approach for determining materiality.[35] Despite conceptual differences, these research providers also look to the financial impact of the ESG factors to determine their materiality.[36-37]

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33 IFRS. *About the International Sustainability Standards Board*. Disponível em: https://www.ifrs.org/groups/international-sustainability-standards-board/. Disponível em: 11 mar. 2022.

34 FLYNN, Dorothy; GUMBS, Keir. *Corporate Governance Trends in 2022 and Beyond*. 28 fev. 2022. Disponível em: https://corpgov.law.harvard.edu/2022/02/28/corporate-governance-trends-in-2022-and-beyond/?utm_content=buffer792e0&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer. Acesso em: 11 mar. 2022.

35 CFA Society Of The UK, *Op. Cit.*

36 MSCI assesses ESG materiality as follows: "A risk is material to an industry when it is likely that companies in a given industry will incur substantial costs in connection with it (for example: regulatory ban on a key chemical input requiring reformulation). An opportunity is material to an industry when it is likely that companies in a given industry could capitalize on it for profit (for example: opportunities in clean technology for the LED lighting industry)". MSCI, *Op. Cit.*

37 According to Sustainalytics, an ESG factor is considered material if: "An issue is considered to be material within the ESG Risk Ratings if its presence or absence in financial reporting is likely to influence the decisions made by a reasonable investor. To be considered relevant in the ESG Risk Ratings, an issue must have a potentially substantial impact on the economic value of a company and, hence, its financial risk- and return profile from an investment perspective". SUSTAINALYTICS. *ESG Risk Ratings* – Methodology Abstract. 2021. https://connect.sustainalytics.com/hubfs/INV/Methodology/Sustainalytics_ESG%20Ratings_Methodology%20Abstract.pdf. Acesso em: 13 jan. 2022.

2. The board's duty of oversight under *Caremark* and its progeny.

In *Graham*, members of the board of directors of a Delaware corporation had been accused of breaching their fiduciary duties by failing to prevent the company's employees from engaging in antitrust violations.[38] The Supreme Court of Delaware rejected the plaintiffs' claims, stating that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists".[39] In other words, in the absence of "red flags" pointing to these actions, the board had no liability for losses that the corporation had incurred because of law violations by its employees.

This understanding began to change in 1996 with *Caremark*. In this case, a corporation, Caremark, had been charged with a $250 million fine due to violations of laws and regulations applicable to the health care industry. The plaintiffs claimed that the members of Caremark's board of directors had breached their duty of care by failing to take measures to prevent these violations from occurring.[40]

In dictum, the Court of Chancery of Delaware recognized that a board of directors has the obligation to make sure that there are adequate reporting systems in place that allow it to receive sufficient information "to reach informed judgments concerning both the corporation's compliance with law and its business performance".[41] It distinguished *Graham*, arguing that directors could be held liable for ignoring the existence of wrongdoing within the corporation only

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38 DELAWARE. Supreme Court of Delaware. Graham v. Allis-Chalmers Mfg. Co. *188 A.2d 125* (Del. 1963), 24 jan. 1963.

39 *Idem*, at 130.

40 DELAWARE. Court of Chancery of Delaware. In re Caremark Int'l. *698 A.2d 959* (Del. Ch. 1996), 25 set. 1996

41 *Ibidem*, at 970.

when (i) there was a systematic failure to oversee, (ii) the directors knew or should have known that violations of the law were occurring, (iii) they had failed to take good faith steps to prevent or remedy such violations, and (iv) this failure resulted in losses to the corporation.[42]

The Court noted, however, that "the level of detail that is appropriate for such an information system is a question of business judgment", and that "[t]he theory here advanced [directors' liability for a breach of the duty of oversight] is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment".[43] Accordingly, it found that in the case at hand there was no evidence that the defendants had systematically breached their duty of oversight, since the corporation had information systems that demonstrated the directors' good faith attempt to be sufficiently informed.[44]

In the *Gutmann* case, the Court of Chancery dismissed the claim against directors who had been accused of breaching their duty of oversight after the corporation had to restate its financial information for failing to comply with the applicable accounting standards[45]. In its reasoning, the Court remarked that, although the *Caremark* decision "is rightly seen as a prod towards the greater exercise of care by directors in monitoring their corporations' compliance with legal standards", the opinion required that plaintiffs showed that the directors had violated their duty of loyalty by failing to act in good faith.[46]

But it was only with the *Stone* decision that Delaware jurisprudence unequivocally established that the duty of oversight falls under

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42 *Ibidem*, at 971.

43 *Ibidem*, at 970, 967.

44 *Ibidem.*

45 DELAWARE. Court of Chancery of Delaware. Guttman v. Jen-Hsun Huang. *823 A.2d 492 (Del. Ch. 2003)*, 23 abr. 2003.

46 *Ibidem*, at 970, 506.

the duty of loyalty, the violation of which is not exculpated by Section 102(b)(7) of Delaware General Corporate Law.[47] Because of this development – and others explained below –, commentators usually refer to *Stone* as the precedent in which the Supreme Court of Delaware upheld and further clarified the duty of oversight doctrine first articulated in *Caremark* 10 years earlier.[48]

Stone was a derivative suit in which the directors of a bank were accused of breaching their duty of oversight after the company was fined $50 million to resolve investigations about its failure to report suspicious activities to the competent regulators. Similar to the ruling in *Caremark*, the Supreme Court dismissed the claim for failure to make demand, finding that the plaintiffs had not pled with particularity facts raising a reasonable doubt that the directors acted in good faith in exercising their oversight responsibilities.[49]

Despite having dismissed the claim, the Supreme Court in *Stone* developed 4 important concepts for analyzing alleged breaches of the duty of oversight: (i) in light of the Supreme Court's decision in *Disney*, it made clear that *Caremark* claims are about failing to act in good faith, understood here as a conscious disregard of the directors' duties to act;[50-51] (ii) it established that good faith is not an inde-

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47 DELAWARE. Supreme Court of Delaware. Stone v. Ritter. *911 A.2d 362 (Del. 2006)*, 6 nov. 2006. For a criticism of the "marriage" between good faith and oversight, see BAINBRIDGE, Stephen M. *et al.* The Convergence of Good Faith and Oversight. *UCLA L. Rev*, Los Angeles, n. 55, v. 559, p. 559-596, 2008. Disponível em: https://www.uclalawreview.org/pdf/55-3-1.pdf. Acesso em: 5 fev. 2022.

48 See HILL, Claire A.; McDonnell, Brett. Essay: Stone v. Ritter and the Expanding Duty of Loyalty. *Minnesota Legal Studies Research Paper*, n. 35, v. 7, p. [S. l.], 22 ago. 2007. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008930. Acesso em: 5 fev. 2022; POLLMAN, Elizabeth. Corporate Oversight and Disobedience. *U Of Penn, Inst For Law & Econ Research Paper*, Philadelphia, n. 20, v. 05, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3474337. Acesso em: 5 fev. 2022.

49 DELAWARE. Supreme Court of Delaware. Stone v. Ritter. *911 A.2d 362 (Del. 2006)*, 6 nov. 2006.

50 In *Disney*, the Supreme Court upheld that there are 3 categories of the concept of acting in

pendent fiduciary duty, but rather a subsidiary element of the duty of loyalty;[52] (iii) it held that, when the corporation already had reporting systems in place, there would only be a breach of the duty of oversight if the directors knowingly overlooked "red flags" indicating that those systems were inadequate to provide them with sufficient information;[53] and (iv) it clarified that liability for breaching the duty of oversight (regardless of whether the corporation already had reporting systems in place or not) depends on the scienter element, i.e., the directors must have been aware that they were failing to discharge their fiduciary obligations.[54-55]

Delaware Court decisions have indeed been granting a great degree of deference to boards that have put in place reporting systems, consistent with the holdings in *Caremark* and *Stone* (according

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bad faith, the third of which leads to unexculpated conduct under Delaware General Corporate Law Section 102(b)(7): "That leaves the third category of fiduciary conduct, which falls in between the first two categories of (1) conduct motivated by subjective bad intent and (2) conduct resulting from gross negligence. This third category is what the Chancellor's definition of bad faith – intentional dereliction of duty, a conscious disregard for one's responsibilities-is intended to capture." Supreme Court of Delaware. *Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.)*, 906 A.2d 27 (Del. 2006), at 99-100. For a scholarly study on the duty of good faith, see STRINE JR., Leo E.; HAMERMESH, Lawrence A.; BALOTTI, R. Franklin; GORRIS, Jeffrey M. Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law. *Geo. L. Rev*, v. 98, n. 629, p. [S. l.], 2010.

51 DELAWARE. Supreme Court of Delaware. Stone v. Ritter. *911 A.2d 362 (Del. 2006)*, 6 nov. 2006. At 369-370.

52 *Idem.*

53 *Idem.*

54 *Idem.*

55 Considering these elements, the Supreme Court so summarized the requisites for successfully stating a Caremark claim: "We hold that Caremark articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations". *Idem*, at 370.

to which, as mentioned, the level of detail of these existing systems is a matter of business judgment and, consequently, directors are allowed to trust their adequacy unless there are red flags pointing otherwise). The Courts have thus routinely dismissed claims that failed to establish "a sufficient connection between the corporate trauma and the board" and were based simply on conclusory allegations that the control systems must have been deficient because illegal behavior occurred.[56]

For example, in the *Gutmann* case mentioned above, the Court of Chancery pointed out that the corporation had an audit committee and that there had been no allegations that such committee "met only sporadically and devoted patently inadequate time to its work, or that the audit committee had clear notice of serious accounting irregularities and simply chose to ignore them".[57] Therefore, it concluded that the plaintiffs failed to plead with particularity that the corporation's financial compliance systems were inadequate.

Likewise, in *General Motors*, the background issue was that the corporation incurred losses as a result of liability for injuries and deaths caused by safety defects in some of its cars models. Plaintiffs argued that demand was futile because the directors faced a substantial likelihood of liability for breaching their duty of oversight.[58] The Court of Chancery, in a decision affirmed on its own basis and reasons by the Supreme Court,[59] dismissed the claim holding that General Motors had systems in place to report safety information to regu-

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56 DELAWARE. Court of Chancery of Delaware. Desimone v. Barrows. *924 A.2d 908* (Del. Ch. 2007); DELAWARE. Court of Chancery of Delaware. La. Mun. Police Emples. Ret. Sys. v. Pyott. *46 A.3d 313* (Del. Ch. 2012).

57 DELAWARE. Court of Chancery of Delaware. Guttman v. Jen-Hsun Huang. *823 A.2d 492 (Del. Ch. 2003)*. At 507.

58 DELAWARE. Court of Chancery of Delaware. In re GM Co. Derivative Litig. *2015 Del. Ch. LEXIS 179* (Ch. June 26, 2015).

59 DELAWARE. Supreme Court of Delaware. In re GM Co. Derivative Litig. *133 A.3d 971* (Del. 2016).

lators, the general counsel, and the board, and that plaintiffs had failed to plead with particularity that there were red flags concerning the adequacy of these systems and that the board had ignored them. In effect, the Court emphatically noted that "GM had a system for reporting risk to the Board, but in the Plaintiffs' view, it should have been a better system". Therefore, it ruled that this did not amount to pleading with particularity that the directors had failed to act in good faith.[60]

In 2019, the Supreme Court of Delaware upheld a *Caremark* claim for the very first time (although so far only in the pleading stage).[61] As in *General Motors*, the matter involved product safety defects: in *Marchand*, a listeria outbreak occurred in ice cream plants and led to the death of some of Blue Bell Creameries' clients. Although recognizing that caselaw does, and must, give deference to existing control systems, the Supreme Court explained that boards must at least "make a good faith effort—i.e., try—to put in place a reasonable board-level system of monitoring and reporting".[62] The Court further stressed that the fact that a corporation operates in a heavily regulated industry and so complies with some of the applicable regulations does not, *per se*, demonstrate any attempt at the board level to be sufficiently informed about a compliance issue "intrinsically critical to the company's business operation".[63]

Analyzing the case at hand, the Supreme Court noted that management had already received information concerning the listeria problem, but that such information never reached the board. It pointed out that, although Blue Bell was a monoline company – and so food safety was undisputedly a "central compliance issue" for the

60 DELAWARE. Court of Chancery of Delaware. *In re GM Co. Derivative Litig.*, 2015 Del. Ch. LEXIS 179 (Ch. June 26, 2015), at 46-51.

61 DELAWARE. Supreme Court of Delaware. *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

62 *Idem*, at 821.

63 *Idem*, at 823, 822.

corporation –, the "board had no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments".[64]

Since *Marchand*, the Court of Chancery has issued 4 important decisions holding that plaintiffs pled with particularity facts raising a reasonable doubt that the defendants acted in good faith (all in the pleading stage, as previously mentioned). For example, in *Clovis*, a pharmaceutical company had a promising drug under development, but clinical trial studies later indicated that it would not be approved by the FDA. The plaintiffs claimed that the directors had failed to oversee the clinical trial, thus allowing the corporation to mislead the market concerning the drug's efficacy. In denying defendants' motion to dismiss, the Court pointed out that red flags concerning the drug had been ignored by the board despite the drug in question being a "mission critical" product of the corporation.[65] In the same manner, in *Inter-Marketing Group*, the corporation owned various pipelines and one of them leaked, provoking an oil spill. The Court denied defendants' motion to dismiss, holding that plaintiffs pled with particularity that the board had not received any reports on pipeline integrity, despite the fact that the corporation was "one of North America's largest energy pipeline operators [and that] its primary operational emphasis [was] on pipeline integrity and maintenance".[66]

In *Hughes*, the company had persistently struggled with its financial reporting system; despite having declared in 2014 that it had remediated problems related to a lack of oversight of its audit committee and internal control for related-party transactions, it announced in 2017 that it had to restate its financial statements due to

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64 *Idem*, at 809.

65 DELAWARE. Court of Chancery of Delaware. *In re Clovis Oncology, Inc. Derivative Litig.*, 2019 Del. Ch. LEXIS 1293 (Ch. Oct. 1, 2019).

66 DELAWARE. Court of Chancery of Delaware. *Inter-Marketing Grp. United States v. Armstrong*, No. 2017-0030-TMR, 2020 Del. Ch. LEXIS 391 (Ch. Jan. 31, 2020), at 26.

these same problems.[68] The Court of Chancery highlighted that it had found in *Gutmann*, in dictum, that the existence of an audit committee does not provide an absolute protection against *Caremark* claims.[69] It further held that, in the case at hand, the audit committee had chronic deficiencies because its members (i) lacked expertise to oversee the corporation's financial reports, (ii) met only sporadically, (iii) did not devote enough time to its work, (iv) and entirely deferred to management even though there were clear signs that it was not capable of accurately reporting on related-party transactions. Therefore, the Court concluded that, contrary to the plaintiffs' allegations, the case in *Hughes* did not relate to the degree of efficiency of the existing control systems, as in *General Motors*, but rather to a lack of any good faith attempts to put in place a board-level control system, as in Marchand.[70]

Finally, in *Boeing*, losses were incurred due to the Lion Air and Ethiopian Airlines' airplane crashes, which revealed safety defects in Boeing's 737 MAX model. The record indicated that, as in *Marchand*, (i) the company operated in a heavily regulated industry; (ii) Boeing's employees were aware of issues with the 737 MAX and had reported them to senior management, but the board remained uninformed about the problem; and (iii) airplane safety was "mission critical" to the corporation's line of business. Regardless, (i) there was no committee in charge of handling airplane safety specifically, (ii) this issue was not a regular agenda item at board meetings, and (iii) the board had no protocols in place for receiving internal information about airplane safety. Therefore, the Court dismissed the directors-defendants' motion to dismiss for failure to make demand.[71]

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68 DELAWARE. Court of Chancery of Delaware. *Hughes v. Xiaoming Hu*, No. 2019-0112-JTL, 2020 Del. Ch. LEXIS 162 (Ch. Apr. 27, 2020).

69 *Idem*, at 40.

70 Idem, at 47.

71 DELAWARE. Court of Chancery of Delaware. *In re Boeing Co. Derivative Litig.*, No. 2019-0907-MTZ, 2021 Del. Ch. LEXIS 197 (Ch. Sep. 7, 2021).

It is worth noting that, even though the Court of Chancery briefly stated in *Caremark* that the corporations' reporting systems should allow the board to have sufficient information to reach conclusions about its "compliance with law and its business performance", the Court did stress that a breach of the duty of oversight depended on the directors' knowledge (either proved or presumed) about law violations.[72] Similarly, in *Gutmann*, the Court stressed that the decision in *Caremark* had the effect of enhancing "corporations' compliance with legal standards".[73-74] Accordingly, all the *Caremark* Claims mentioned above were based on damages incurred by the companies and their shareholders due to violations of laws or regulations (including accounting rules); in order words, they all involved the board's failure to monitor legal risks.

In *Citigroup*, plaintiffs alleged that the directors had breached their duty of oversight by failing to properly monitor the company's exposure to the subprime lending market, which led it to incur substantial losses (especially because of put options contained in the collateralized debt obligations that Citigroup issued)[75]. As pointed out by the Court of Chancery, those losses were directly related to the com-

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72 DELAWARE. Court of Chancery of Delaware. *In re Caremark Int'l*, 698 A.2d 959 (Del. Ch. 1996), at 970, 971.

73 DELAWARE. Court of Chancery of Delaware. *Guttman v. Jen-Hsun Huang*, 823 A.2d 492 (Del. Ch. 2003), at 505.

74 Commentators stress that one of the major impacts on the *Caremark* decision was to lead corporations to design and enforce compliance programs aiming at (i) assuring that information concerning the corporation's legal risks are drawn to the board's attention, and (ii) promoting organizational commitment to integrity at all the corporate levels. See BIRD, Robert C. Caremark Compliance for the Next Twenty-Five Years. *American Business Law Journal*, n. 58, v. 1, p. 86–102. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3566279. Acesso em: 4 fev. 2022; LANGEVOORT, Donald C. Commentary, Caremark and Compliance: A Twenty-Year Lookback. *Temple Law Review*, Philadelphia, v. 90, p. 727-742, 2018. Disponível em: https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3058&context=facpub. Acesso em: 4 fev. 2022.

75 DELAWARE. Court of Chancery of Delaware. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106 (Del. Ch. 2009).

pany's line of business, and so plaintiffs were seeking to hold the directors liable for supposedly failing to monitor not legal, but business risk.[76]

The Court highlighted that business decisions are protected by the business judgment rule, which presumption can be rebutted only by the difficult burden of showing the board's gross negligence.[77] It further stressed that directors' oversight duties had been designed to ensure that systems were put in place to allow the board to know about and prevent wrongdoings within the company, and that "[t]here are significant differences between failing to oversee employee fraudulent or criminal conduct and failing to recognize the extent of a [c]ompany's business risk".[78] Still, the Court recognized that, under some circumstances, a plaintiff can show that the directors "consciously disregarded an obligation to be reasonably informed about the business and its risks", in which case a *Caremark* claim could be successful, emphasizing that the burden in this case would be even higher than the one required for rebutting the business judgment rule.[79]

The Court of Chancery ruled that such high burden had not been met by plaintiffs in the case at hand because Citibank had procedures in place designed to monitor risk, and there had been no "red flags" indicating that those control systems were inadequate. But the understanding that the failure to oversee business risks may, at least in theory, give rise to liability under *Caremark* has been reaffirmed by the Court in later decisions, with the caveat that it is unclear under which circumstances this might occur in practice.[80]

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76 *Ibidem*, at 123-124.

77 *Ibidem*, at 125.

78 *Ibidem*, at 131.

79 *Ibidem*., at 125-126.

80 See DELAWARE. Court of Chancery of Delaware. *In re Facebook, Inc. Section 220 Litig*., 2019 Del. Ch. LEXIS 197 (Ch. May 30, 2019); Court of Chancery of Delaware. *In re Goldman Sachs*

What conclusions can we draw from the decisions outlined above? It is hard to say (at least for now) that in the past few years Delaware Courts have blatantly changed the law; rather, in the cases in which they have sustained *Caremark* claims in the pleading stage, they have repeatedly stated that those claims are very hard to prove. *Marchand*, *Boeing*, *Clovis*, *Inter-Marketing Group*, and *Hughes*, however, all involved extreme circumstances.[81] For example, in the first two cases, the corporations were monoline, and still the board failed to have any reporting system in place to monitor regulatory aspects directly related to their line of business. In *Hughes*, there was proof that the members of the audit committee lacked expertise in financial reporting, did not meet regularly and consistently ignored "red flags" that management could not properly report related-party transactions.

These cases provide insight into the elements that are likely to be taken into consideration by the Courts in refusing to grant deference to boards regarding the design and implementation of reporting systems. First, the fact that a company operating in a highly regulated industry complies with some rules applicable to its activities does not necessarily entail a board-level effort to monitor compliance. Second, failure to monitor risks that are "mission critical" to the corporation's business raises reasonable doubt that the directors acted in good faith.

Grp., Inc. S'holder Litig., Civil Action No. 5215-VCG, 2011 Del. Ch. LEXIS 151 (Ch. Oct. 12, 2011); Court of Chancery of Delaware. *Asbestos Workers Local 42 Pension Fund v. Bammann*, No. 9772-VCG, 2015 Del. Ch. LEXIS 142 (Ch. May 21, 2015).

81 KOTLER, Meredith; MARCOGLIESE, Pamela; TRACY, Marques. *Recent Delaware Court of Chancery Decision Sustains Another Caremark Claim at the Pleading Stage*. 25 mai. 2020. Disponível em: https://corpgov.law.harvard.edu/2020/05/25/recent-delaware-court-of-chancery-decision-sustains-another-caremark-claim-at-the-pleading-stage/. Acesso em: 21 jan. 2022; MARC LANE, *Representing Corporate Officers And Directors And Llc Managers*. 2022. At 1-36.5. Disponível em: https://books.google.com/books?id=5lOEDwAAQBAJ&pg=SA1-PA35-IA6&lpg=SA1-PA35-IA6&dq=has+delaware+changed+oversight+law+in+marchand&source=bl&ots=CBkaSkyB9b&sig=ACfU3U3nDFk-7UpA_NrE_5GIQQoUs2SOCQ&hl=pt-BR&sa=X&ved=2ahUKEwiN8tuZqr_2AhXwkYkEHaXICI0Q6AF6BAg1EAM#v=onepage&q=has%20delaware%20changed%20oversight%20law%20in%20marchand&f=false. Acesso em: 11 mar. 2022.

As in Courts holdings to date, in monoline corporations, issues directly related to the company's only line of business are mission critical. But this seems to be quite a vague concept, and it might be unclear in many situations whether the issue at hand is mission critical or not, especially in non-monoline companies. Under this perspective, it might be fair to conclude that directors now face a greater likelihood of liability under the *Caremark* doctrine than they did in the past.[82]

In any case, to this day, all decisions where Delaware Courts found that plaintiffs had alleged with particularity a breach of the duty of oversight concerned the monitoring of the corporations' legal risks. As pointed out by commentators, risk management and legal compliance are not different in "kind", but they are different in "degree", because the former is intertwined with risk taking, which falls within the protection of the business judgment rule.[83] Therefore, although the Court of Chancery admitted in the *Citigroup* decision that it is theoretically possible to file a successful *Caremark* claim related to the oversight of business risk,[84] in order to actually succeed in these claims, plaintiffs would probably have to prove that the board had no risk management program in place whatsoever, or that it blatantly failed to act in response to "red flags".

3. *Caremark* claims involving ESG factors.

After having analyzed how ESG factors play a role in enter-

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82 Arguing that, although there has not been a "black letter" change in the law, the risk of Caremark liability for directors are higher since 2019, see PACE, H. Justin; TRAUMAN, Lawrence J. Mission Critical: Caremark, Blue Bell, and Director Responsibility for Cybersecurity Governance. *Wisconsin Law Review*, Madison, v. 2022, n. 4, p. [S. l.], 2022. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3938128. 11 mar. 2022.

83 BAINBRIDGE, Stephen M. Caremark and Enterprise Risk Management. *UCLA School Of Law, Law-Econ Research Paper*, Los Angeles, n. 09-08, v. 31, p. [S. l.], 2009. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1364500. Acesso em: 4 fev. 2022.

84 Court of Chancery of Delaware. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106 (Del. Ch. 2009), at 125-126.

prise value creation and how their materiality can be assessed, as well as caselaw on directors' duty of oversight, we now turn to the main question of this Essay: can *Caremark* claims for failure to oversee ESG factors succeed under Delaware law?

Some commentators argue that *Caremark* claims involving ESG risks that are not the subject of legal regulation should not succeed because (i) "ESG oversight is difficult and beyond the skill set of typical corporate boards",[85] and (ii) "extending Caremark to the ESG context would effectively create a legal mandate that directors try to balance profit against environmental and social issues".[86] According to this line of thinking, ESG comprises such a variety of topics that it would be unreasonable to expect that any board would have the necessary expertise to deal with all of them; this circumstance, in addition to the fact that Delaware Courts have recently upheld some *Caremark* claims in the pleading stage, would lead to an increase in the directors' perceived risk, thus pushing many people away from boardrooms. These commentators further argue that many ESG concerns remain merely aspirational, and so corporate efforts to manage those concerns should be only voluntary.[87]

Other authors maintain that ESG "is best understood as an extension of the board's duty to implement and monitor a compliance program under *Caremark*", and so suggest that boards delegate compliance and ESG oversight to the same committee.[88] To this effect, they argue, for example, that compliance programs that address environmental risks better position the corporation to meet the environmental prong of ESG. In sum, ESG factors would allegedly overlap

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85 BAINBRIDGE Stephen M. Don't Compound the Caremark Mistake by Extending it to ESG Oversight; *UCLA School Of Law, Law-Econ Research Paper*, Los Angeles, n. 21-10, v. 24, p. [S. l.], 2021. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899528. Acesso em: 4 fev. 2022.

86 *Ibidem,* at 30.

87 *Idem,* at 36.

88 STRINE, Leo E. *et al.*, *Op. Cit.*

with compliance duties that have long been a focus of *Caremark* claims.[89]

A third line of reasoning differentiates compliance and ESG issues, arguing that the former is narrower than the latter: compliance programs are essentially backwards looking because they target legal risks based on statutory and regulatory concepts of appropriate conduct, whereas ESG information gathering efforts also focus on business risks from a variety of sources (whether or not they are legally punishable), as well as on potential social and environmental benefits.[90] These commentators further argue that, because addressing ESG concerns helps corporations create safeguards against downside risks, boards that act in bad faith and completely disregard these concerns should be subjected to liability, in line with Caremark.[91] *They claim, however, that prong 2 of the Caremark test, as clarified in Stone*, should not apply to ESG matters; in other words, directors would have no obligation to act upon ESG information when "considering whether to support a sustainability initiative, or whether to take ESG into account as one of the factors determining their ultimate choice on a business quandary before them".[92]

To better answer the question of whether *Caremark* claims regarding ESG oversight may succeed under Delaware law, one must bear in mind that ESG factors may entail either legal risks, business risks, or opportunities, as detailed in Section II. It seems that all 3 lines

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89 *Ibidem*., at 1905-1907.

90 GADINIS, Stavros; MIAZAD, Amelia. Corporate Law and Social Risk. *Vand. L. Rev.* n. 1401, v. 73, p. 1431-1432, 2020. Disponivel em: https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2020/10/19130846/Corporate-Law-and-Social-Risk.pdf. Acesso em: 4 fev. 2022).; POLLMAN Elizabeth. Corporate Social Responsibility, ESG, and Compliance. *Loyola Law School, Los Angeles Legal Studies Research Paper*, Chicago, No. 2019-35, v. 8, p. [S. l.], 2019. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479723. Acesso em: 4 fev. 2022.

91 GADINIS, Stavros; MIAZAD, Amelia. *Op. Cit.*, at 1466-1467.

92 *Ibidem.*, at 1468.

of thinking mentioned above have failed to properly apply these concepts to their analysis, and so do not offer the best understanding of how *Caremark* and ESG should intertwine. It is proposed in this Essay, instead, that directors may be held liable for breaching their duty to oversee ESG legal and business risks (in the latter case, subject to a much higher burden on the plaintiffs), but that they must be shielded from liability for failing to address ESG opportunities, in line with the business judgment rule.

The first conclusion – that *Caremark* claims may succeed due to a failure to oversee ESG legal risks – seems the least controversial. In these situations, ESG concerns have already been addressed by statutes or regulations, and so legal compliance and ESG directly overlap. It is not necessary to put one's imagination to work here; there are real-life examples of *Caremark* cases that involved ESG matters. For instance, *Inter-Marketing Grp.* concerned the board's failure to oversee a pipeline integrity reporting system, whereas *Marchand* and *Boeing* concerned the violation of product safety regulations. In the first case, the company's business was to operate pipelines, which are quite likely to provoke environmental accidents. In other words, this corporation faces a risk that falls within the "E" prong of ESG, and governmental authorities have responded to this risk by imposing certain regulations. Environmental compliance was thus an ESG legal risk for Inter-Marketing Group, and the directors' failure to oversee such risk might lead (as it did in this case) to their liability under *Caremark*. In *Marchand* and *Boeing*, the products sold by the companies in question – ice cream and airplanes, respectively – had the potential to create great harm to their consumers. Product safety was thus a risk to these corporations, one that falls within the "S" prong of ESG, and to which governmental authorities have responded by imposing certain regulations, turning product safety into an ESG legal risk factor. To the extent that corporate reporting and transparency is included in the "G" prong of ESG, the audit committee members' lack of expertise and violation of the applicable accounting rules in *Hughes* can also be viewed as a *Caremark* claim that involved ESG legal risks.

But, contrary to what some authors have implied,[93] this does not encompass the entire concept of ESG. Rather, ESG may also entail business risks, consistent with the definition proposed in Section II and the example given therein about the absence of talent attraction and retention policies.

As detailed above, the Court of Chancery in *Citigroup* has expressly stated that *Caremark* claims related to the oversight of business risks might succeed (although there is still no precedent upholding such a claim). The specificity of these cases is that the plaintiffs' burden will be much higher, given that the Courts cannot risk waiving the protection granted by the business judgment rule.[94]

Applied to our previous example in Section II, the directors could only be held liable for failing to oversee talent attraction and retention policies in highly unusual circumstances. For instance, this could be the case if the board had been presented with evidence that the corporation was struggling to find hires for very strategic positions and that the absence of attraction and retention policies was directly impacting its competitive advantage.[95]

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93 STRINE, Leo E. *et al.*, *Op. Cit.*

94 Court of Chancery of Delaware. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106 (Del. Ch. 2009), at 125-126.

95 In *Zucker v. Andreessen*, the plaintiffs presented, among others, a Caremark claim after the CEO of Hewlett–Packard Company was fired, and the company struggled to find a new CEO in the absence of a well-established succession plan. The court dismissed this claim on the grounds that the plaintiffs had failed to plea with particularity that demand was futile, stressing that: "In reaching this conclusion, the Court has no need to address whether the duty of care requires directors to adopt succession plans, and it expresses no view on that issue. Rather, the limited holding of the Court's analysis as to Count II of the Complaint is that there can be no substantial threat of personal liability predicated on bad faith disregard of a known duty to implement a succession plan because the Complaint fails to allege a basis from which the existence of such a known duty reasonably could be inferred". This seems to indicate that, under specific circumstances, the board might have the duty to put in place a succession plan. Court of Chancery of Delaware. *Zucker v. Andreessen*, No. 6014-VCP, 2012 Del. Ch. LEXIS 135 (Ch. June 21, 2012), at 40-41.

In short, there should be no difference between the duty to oversee (legal or business) risks related to ESG in particular and (legal or business) risks in general. When dealing with ESG-related claims, Courts should simply resort to the same test and standards developed under *Caremark* and its progeny, including the "mission-critical" assessment necessary to identify the issues that should be addressed, and the obligation to act upon "red-flags" under prong 2 of the test. Therefore, directors should not be held liable for failing to oversee any and all ESG-risk factors, but only those so intrinsically related to the success of the company's business that the directors could not have failed to oversee them had they been acting in good faith.

In this regard, it must be highlighted that the "mission-critical" standard used by the Courts to analyze a *Caremark* claim is not identical to the "materiality" assessment used for disclosure purposes. As mentioned in Section II above, the latter is similar to the concept of materiality applicable to financial reporting purposes, and so encompasses all ESG factors that might substantially impact shareholder value creation. The "mission critical" standard developed under *Marchand* and later cases seems to be much narrower, concerning risks directly related to the corporation's main (or only) line of business. It follows that some ESG factors might be material enough for the corporation to disclose them as part of its ESG efforts, but not enough for directors to be held liable for a failure to oversee them. But figuring out exactly how to determine which issues are "mission critical" in a non-monoline corporation seems to be a question to which the answer is unclear to date, as previously commented.

Having discussed directors' liability for ESG legal and business risks, one must also tackle the issue of ESG opportunities. This issue has a different history, and (at least in theory) a rather simpler one.

In fact, it seems to be crystal-clear that, under the board-centric model of Delaware law, directors cannot be told which businesses the corporation should invest in. For example, there cannot be any *Caremark* liability for the directors of an automobile company

that fails to invest in electric cars, even if all signs point to the conclusion that this environment-friendly move is also the best business strategy. Deciding whether or not to explore an ESG opportunity is a matter of pure business judgment, and the only available measures for discontented shareholders are voting the board out or divesting from the company.

In practice, however, and as mentioned in Section II, it might not be all that simple to distinguish whether we are facing a business risk or an opportunity, as "managing risks" and "taking risks" are intimately intertwined.[96] This fact, in addition to the vagueness of the "mission critical" concept, reinforces the significance of directors being held liable for failing to oversee business risks (either ESG related or not) only under highly unusual circumstances.

There is a final interesting issue regarding *Caremark* claims and ESG. As mentioned in Section I, ESG investing is already a major (and increasingly growing) market, and the decision in *Hughes* might be read as suggesting that putting in place adequate internal controls over financial reporting is mission critical to any publicly held corporation. It is thus possible that, under some circumstances, the board's failure to oversee the accuracy of the corporation's ESG reporting leads to its liability under *Caremark*.

Conclusion.

As mentioned in the introductory Section of this Essay, ESG is becoming increasingly important. In fact, ESG assets already correspond to a significant part of the assets under management in the world, and scholars, lawyers, and regulators are largely discussing the implications of this trend on corporate and securities law. Still, a lot remains unclear in relation to boards addressing ESG matters and the legal consequences of doing or failing to do so.

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96 BAINBRIDGE Stephen M., *Op. Cit*, at 31.

Although there is enough reason to believe that, in the coming years, lawyers and Courts will be faced with the question of whether, and if so, under which circumstances, directors may be held liable for failing to oversee ESG factors, very few authors have tried to answer this question. As argued in this Essay, all the approaches proposed so far fail to properly apply the concepts of legal risks, business risks, and opportunities detailed in Section II, and thus do not offer the best understanding of how *Caremark* and ESG should intertwine.

The first conclusion that might be drawn from this Essay is that it makes little sense to discuss whether *Caremark* claims apply to ESG factors in general. In fact, many *Caremark* cases, including the ones that have succeeded in the pleading stage (such as *Inter-Marketing Grp.*, *Marchand*, *Boeing*, and *Hughes*), are about the board's failure to comply with legal rules that are ESG-related. This is precisely what the second scholarly approach mentioned in Section IV advocates: ESG and compliance overlap.[97]

Although this conclusion is not inaccurate, it does not encompass the entire concept of ESG, and so it would be minimalistic to state that ESG and compliance are the exact same thing. Rather, as also mentioned, ESG may entail not only legal risks, but also business risks and opportunities. Thus, the real question seems to be whether *Caremark* claims also comprise ESG business risks and opportunities.

The first scholarly approach mentioned in Section IV, i.e., that Courts should not extend the *Caremark* doctrine to ESG risks that are not subject to legal regulation, draws on 2 presumptions: (i) that boards cannot have expertise in all ESG matters, and (ii) that addressing ESG would force the directors to choose between profit-seeking and stakeholder considerations, which would not be consistent with Delaware law.[98] These underlying presumptions, however, do not seem to be precise.

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97 STRINE, Leo E. *et al. Op. Cit.*

98 BAINBRIDGE, Stephen M. *Op. Cit.*

First, there is little doubt that ESG does comprise a lot of different issues, and so a big corporation may be exposed to some degree to so many of them that it would be unfeasible to have board members experienced in all such issues. But this is also true of any other aspect of the company's operation, whether it involves ESG concerns or not. In other words, no one expects boards to have members who are experts in any and all possible matters in which the corporation might be involved,[99] and the same reasoning should apply to ESG factors. Therefore, to comply with their duty of oversight, boards must have members experienced in and address those ESG risk factors that are "mission critical" to the corporation.

The argument that "extending" *Caremark* to ESG oversight would go against Delaware law by imposing on the board the obligation to balance profit against environmental and social issues is baseless if one establishes that liability in these cases can only follow when ESG factors should have been managed as safeguards against downside (legal or business) risk that is mission critical to the corporation. Analyzed under this perspective, failure to oversee ESG factors destroys shareholder value, as corroborated by various studies, and the legal framework applicable to these claims does not differ from that applicable to any other *Caremark* claim.

The third approach mentioned in Section IV is the one that gets closer to the one proposed in this Essay. According to this line of reasoning, addressing ESG matters helps corporations create safeguards against downside risks; therefore, if directors act in bad faith and completely disregard these matters, they should be subject to liability, consistent with *Caremark*. But prong 2 of the *Caremark* test should not apply to ESG matters, i.e., directors should have no obligation to consider ESG information as a factor influencing their decision.[100]

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99 See TILCSIK, András; ALMANDOZ, Juan. *When Having Too Many Experts on the Board Backfires*. 29 ago. 2016). Disponível em: https://hbr.org/2016/08/when-having-too-many-experts-on-the-board-backfires. Acesso em: 5 fev. 2022.

100 GADINIS, Stavros; MIAZAD, Amelia. *Op. Cit.*

This approach seems to place all types of ESG factors under the same rule, whether they consist in legal risks, business risks, or opportunities. In the latter case, there is no doubt that boards have no obligation to act upon ESG information, as they cannot be told how to run the corporations under Delaware law; in other words, both prongs 1 and 2 of the *Caremark* test do not apply in the opportunities sphere. There should be no difference, however, between the duty to oversee (legal or business) risks related to ESG in particular and (legal or business) risks in general, including in regard to prong 2 of *Caremark*.

In summary, it is proposed in this Essay that, when dealing with ESG-related claims, Courts should resort to the same test and standards developed under *Caremark* and its progeny, including the "mission critical" assessment necessary to identify the issues that should be addressed, and the obligation to act upon "red flags" under prong 2 of the test. Therefore, directors might be held liable for breaching their duty to oversee ESG legal and business risks, but they must be shielded from liability for failing to address ESG opportunities, in line with the business judgment rule. Because "managing risks" and "taking risks" are intimately intertwined, and it might be hard to establish what is "mission critical" in non-monoline corporations, directors may be held liable for failing to oversee ESG business risks only under extreme circumstances.

O DIREITO HUMANO DE ACESSO AOS MERCADOS[1]

THE HUMAN RIGHT TO THE MARKET ACESS

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Resumo: O artigo tem por objetivo lançar luz sobre a importância para os direitos humanos de os ordenamentos jurídico-sociais tutelarem direitos que ampliem, ou pelo menos não reduzam, o acesso das pessoas ao mercado, visto como ambiente em que trocas de bens e serviços, são realizadas orientadas pela lei da oferta e da procura. Utilizando o método da revisão bibliográfica e apoiando-se em doutrinas econômicas, jurídicas e sociais, o estudo evidencia que as políticas públicas devem idealmente ser guiadas pela tutela do direito humano ao mercado.

Palavras-chave: Direitos Humanos. Liberdades económicas. Estado Social. Acesso ao mercado.

Abstract: The article aims to shed light on the importance for human rights of legal and social systems protecting rights that expand, or at least do not reduce, people's access to the market, seen as an environment in which exchanges of goods and services are carried out guided by the law of supply and demand. Using the bibliographic review method and relying on economic, legal and social doctrines, the study shows that public policies should ideally be guided by the protection of the human right to the market.

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Keywords: Human rights. Economic freedom. Social State. Market acess.

Introdução.

Este estudo visa a provocar reflexões sobre a importância, para os direitos humanos, de os ordenamentos jurídico-sociais tutelarem direitos que ampliem ou, pelo menos, não reduzam, o acesso das pessoas ao mercado, visto como ambiente em que trocas de bens e serviços são realizadas orientadas pela lei da oferta e da procura.

Conquanto existam enunciados normativos que disponham sobre direitos e deveres de ordem econômica, a temática não é comumente abordada no âmbito da teoria dos direitos humanos nem do direito econômico. Provavelmente, isso acontece porque esses enunciados por vezes se chocam tanto semanticamente quanto em termos pragmáticos, afinal não é fácil conciliar liberdade, igualdade e solidariedade.

De fato, a tutela do ambiente do mercado – o qual reúne uma miríade de interesses divergentes – é uma tarefa complexa. Ela envolve o choque entre vários princípios, como, de um lado, os da livre-iniciativa, da livre-concorrência, da autonomia da vontade e, do outro, a tutela do mercado com a supressão de suas falhas.

O trabalho foi estruturado em pesquisa jurídico-teórica de cunho bibliográfico e documental. Ele está dividido em sete seções. A

primeira trata da mudança dos paradigmas do feudalismo para o capitalismo; a segunda apresenta o argumento central deste estudo, que é o acesso aos mercados como direito humano, oferecendo uma ponte para a dignidade; a terceira versa sobre a concepção inicial de mercado; na quarta seção são enfrentadas as chamadas "falhas de mercado"; a quinta seção dispõe sobre a tutela do acesso ao mercado; a sexta trata da chamada economia mista; na sequência, apresentam-se algumas considerações sobre a obra *Inequality*, de Anthony B. Atkinson, que versa sobre aspectos fundamentais para a problemática. Conclui-se com reflexões finais sobre a temática central.

1. Viragem do feudalismo para o capitalismo.

Para se compreender a importância do tema abordado neste estudo, é necessário situá-lo na História. A concepção atual de pessoa humana, que alcança indivíduos de qualquer idade, sexo, etnia, credo e orientação política é recente e está relacionada com a formação de estruturas que permitem trocas orientadas pela lei da oferta e da procura.

Os últimos 200 anos trouxeram mudanças estruturantes muito significativas para a sociedade. Especialmente na Europa, o movimento migratório para as cidades, o renascimento do comércio e o florescimento da indústria resultaram no surgimento de relações sociais amparadas em novos conceitos, que romperam com costumes arraigados.

Antes disso, as estruturas sociais mais relevantes eram a família nuclear, a família estendida e a comunidade local.[2] Grande parte das necessidades individuais eram satisfeitas no bojo dessas estruturas. Nem sempre isso ocorria por meio de trocas orientadas pela lei

2 HARARI, Yuval Noah. *Sapiens:* Uma breve história da humanidade. São Paulo: Companhia das Letras, 2020. p. 376.

da oferta e da procura. Satisfaziam-se essas necessidades[3] pelo temor de sofrer represálias dos mais variados matizes ou mesmo pelo espírito de colaboração, o que levou alguns estudiosos a sustentaram ter havido nessa época um "comunismo agrário".[4]

Muitas dessas sociedades eram divididas em estamentos ou classes, que, por seu turno, possuíam prerrogativas e deveres, que buscavam atender suplementarmente os diversos interesses daquele grupo social. Eram sociedades orgânicas, nas quais os indivíduos eram tratados como parte integrante de um tecido social. A poucos eram reconhecidos direitos. Os deveres eram impostos às famílias e não aos indivíduos que as integravam.

O elemento fundamental de ligação dessas estruturas era a terra. Era dela que se extraía o sustento e era por ela que se lutava. Logo, as relações de domínio e poder eram fundadas essencialmente nesse elemento patrimonial. À medida que pessoas migraram para cidades, esses elos foram se enfraquecendo. Nas cidades, não era a propriedade de terra nem as relações de poder que distinguiam as pessoas. Na ausência desses elementos de força e domínio, a propriedade e a organização dos meios de produção, assim como a acumulação de bens tornaram-se as formas de as pessoas se distinguirem uma das outras. Surge, assim, uma classe nova, que não tinha terra nem era ungida, mas produzia bens e serviços que eram consumidos pelas outras classes: a burguesia.

A aliança entre reis e essa nova classe foi o que conduziu à formação dos Estados nacionais. Com isso, o poder dos senhores feudais esvaeceu. Como contraponto, avançaram as ideias liberais e, finalmente, a burguesia ascendeu como classe social e politicamente dominante. Na busca de mais espaço para comercializar, as fronteiras

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3 Cf. WEBER, Max. *História Geral da Economia*. São Paulo: Editora Mestre Jou, 1963. p. 29-120.

4 LAVELEYE, Émilie de. *De la propriété et de ses formes primitives*. Paris: Alpha Editions, 2020. passim.

dos Estados se expandiram dando ensejo ao imperialismo. Não foi esse movimento, entretanto, que trouxe o humanismo para o centro das relações sociais e jurídicas. Pelo contrário. Abusos inacreditáveis – como a escravidão - foram cometidos e considerados legítimos.

O caminho para que todo o indivíduo passasse a ser considerado como uma pessoa e, portanto, tivesse direitos e deveres iguais foi acidentado. O liberalismo, fulcrado nos institutos da propriedade privada e do contrato, lançou os alicerces para a formação dos mercados, tendo superado valores e ideias medievais que atravancavam a integração económica dos indivíduos[5]. Isso, entretanto, não foi suficiente para que os direitos humanos passassem para o palco principal. Somente após as Grandes Guerras, quando então o imperialismo se esmaeceu, que os Estados, norteados pelos princípios do *rule of law* e do *welfare state* trouxeram o indivíduo para o centro do sistema. A partir de então todo e qualquer indivíduo passou a ser visto como pessoa humana e, como tal, titular de direitos e deveres irrenunciáveis.

2. O acesso aos mercados como Direito Humano: uma ponte para a dignidade.

Nessa conjuntura, os direitos humanos passam a ser com-

5 Como registra Fábio Nusdeo, "[o]peracionalizar a liberdade como fundamento para a organização do Estado implicou superar e eliminar uma série de crenças e de peias que tolhiam o homem e suas iniciativas. Implicou, sobretudo, um voto de confiança no discernimento dele, homem, visto como senhor do seu destino e construtor de sua felicidade na terra, sem que o soberano, o Estado, a Igreja ou organizações diversas a que estivesse compulsoriamente atado viessem a lhe determinar o caminho a seguir. Daí o culto não apenas à liberdade, mas ao seu corolário lógico, o racionalismo, ou seja, a capacidade de realizar opções ditadas não pela religião, pela magia, ou pela tradição, mas por critérios decorrentes de uma visão científica do mundo ou pelo menos embasada numa observação metódica e objetiva dos fatos, quer da vida natural quer da vida social. Denso de simbolismo, nesse sentido, o ato dos revolucionários franceses de entronizar na catedral de *Notre Dame* o culto à deusa Razão (NUSDEO, Fábio. *Curso de Economia:* Introdução do Direito Econômico. São Paulo: Editora Revista dos Tribunais, 2008. p. 124).

preendidos como o "conjunto de direitos que pertencem a um indivíduo enquanto ser humano e se impõem (essencialmente) a todas as autoridades públicas, na medida em que estas são obrigadas a respeitá-los", constituindo "precioso meio de defesa direta do indivíduo contra o Estado".[6] Há uma correspondência imediata entre os direitos humanos e os direitos fundamentais, sendo os primeiros vinculados a ordens constitucionais nacionais[7] enquanto os segundos têm apelo universal e raízes no direito internacional", sendo a Declaração Universal dos Direitos Humanos a principal fonte jurídico-internacional dos direitos humanos.

Na esteira da Declaração Universal dos Direitos Humanos, proclamada, em 10 de dezembro de 1948, pela Assembleia-Geral das Nações Unidas, à pessoa humana, como indivíduo que nasce livre e igual em dignidade e direitos (artigo 1º), deve ser assegurado o direito à vida, à liberdade e à segurança pessoal (artigo 3º), o que deve ser dar conforme um

> padrão de vida capaz de assegurar a si e à sua família saúde, bem-estar, inclusive alimentação, vestuário, habitação, cuidados médicos e os serviços sociais indispensáveis e direito à segurança em caso de desemprego, doença invalidez, viuvez, velhice ou outros casos de perda dos meios de subsistência em circunstâncias fora de seu controle.

Os instrumentos que a sociedade pós-moderna utiliza para alcançar esses horizontes são o Estado democrático de direito e o mercado. Eles são tão importantes, que há quem sustente que sem eles, a noção de indivíduo não existiria.[8]

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6 FIGUEIREDO, Eduardo António da Silva. *O princípio anticorrupção e o seu papel na defesa e efetivação dos direitos humanos*. Jundiaí: Editora Brasílica, 2019. p. 23.

7 MACHADO, Jónatas E. M.; COSTA, Paulo Nogueira; HILÁRIO, Esteves Carlos. *Direito constitucional angolano*. 3a edição. Coimbra: Coimbra Editora, 2014. p. 164.

8 Para Harari, "[o] Estado e o mercado são a mãe e pai do indivíduo, que só pode sobreviver

É certo que uma pessoa não consegue viver sozinha. Ainda que ela tivesse atributos que permitissem isso, a sociedade tal como está estabelecida não deixaria espaço para que o um fato desse se prolongasse por muito tempo. Por outro lado, a sociedade moderna incentiva o individualismo. Seja livre, afinal todos somos iguais, mais seja também solidário. Essa dicotomia – necessidade de interação e individualismo – deságua em uma solução: o mercado. É nesse ambiente que os indivíduos interagem para obterem uns dos outros bens e serviços que permitam-lhes sobreviver com prazer e bem-estar, o que corresponde ao que J. J. Gomes Canotilho e Vital Moreira denominam "direitos de quarta geração".[9] Logo, para que a pessoa tenha dignidade, é preciso que ela tenha acesso ao mercado, caso contrário ela não conseguirá interagir economicamente, o que afetará não só a sua dignidade, mas a sua própria subsistência.

3. A percepção inicial sobre o mercado.

De acordo com a visão liberal, os indivíduos deveriam ser livres para tomar suas decisões quanto à administração dos bens escassos. Os pensadores que a acolheram defendiam que o homem, por sua natureza, sempre tomaria decisões de maneira racional. Os bens de produção e os insumos seriam aplicados no processo industrial e no comércio de forma eficiente, assim como o consumo seria orientado por critérios eminentemente racionais. A racionalidade que está por trás dessas decisões seria de cunho hedonista. Desse modo, todo indivíduo procuraria extrair o máximo das funcionalidades dos bens, com vistas à satisfação de seus desejos, o que provocaria o aumento da sensação de bem-estar[10]. Essa percepção foi bem caracterizada

graças e ele" (HARARI, Yuval Noah, *Op. Cit.,* p. 379)

9 CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. *Constituição da República Portuguesa anotada*. Vol I. 4ª ed., Coimbra: Coimbra Editora, 2007. p. 294.

10 YAZBEC, Otávio. *Regulação do mercado financeiro e de capitais*. Rio de Janeiro: Elsevier, 2007. p. 10.

por Adam Smith, quando tratou, na sua obra mais famosa, do princípio que dá origem à divisão do trabalho, nos seguintes termos:

> A divisão do trabalho, da qual resultam tantas vantagens, não procede originalmente da sabedoria humana, que prevê e projeta essa riqueza geral a que dá origem. É antes a consequência necessária, embora muito lenta e gradual, de uma certa propensão na natureza humana que não almeja uma utilidade tão abrangente: a propensão a cambiar, permutar e trocar uma coisa pela outra.
> [...] o homem quase sempre precisa da ajuda de seus semelhantes, e seria vão esperar obtê-la somente da benevolência. Terá maiores chances de conseguir o que quer se puder interessar o amor-próprio deles a seu favor e convencê-los de que terão vantagem em fazer o que deles pretende. Todos os que oferecem a outro qualquer espécie de trato propõem-se fazer isso. Dê-me aquilo que eu desejo, e terás isto que desejas, é o significado de todas as propostas desse gênero e é dessa maneira que nós obtemos uns dos outros a grande maioria dos favores e serviços de que necessitamos. Não é da benevolência do açougueiro, do cervejeiro e do padeiro que esperamos o nosso jantar, mas da consideração que eles têm pelos próprios interesses. Apelamos não à humanidade, mas ao amor-próprio, e nunca falamos de nossas necessidades, mas das vantagens que eles podem obter.
> [...]
> Na medida em que é por acordo, por troca e por compra que obtermos uns dos outros a maior parte dos serviços mútuos dos quais necessitamos, é essa mesma propensão para a troca que originalmente leva à divisão do trabalho.[11]

11 SMITH, Adam. *A Riqueza das Nações*. São Paulo: Martins Fontes, 2020, v. 1. p. 18-20.

Como todo indivíduo buscaria o melhor para si, os negócios realizados no bojo do mercado provocariam aumento de bem-estar para todas as partes, já que ninguém sairia perdendo. Quando em situação de equilíbrio económico, nenhuma das partes aceitaria um negócio em que saísse [ou que acreditasse que estivesse] perdendo.

Esses pressupostos refletem as crenças típicas do século XIX sobre o ser humano, influenciadas por um momento de prosperidade econômica decorrente de desdobramentos da Revolução Industrial. Todavia, eles não se revelaram reais.

Não há dúvida que o liberalismo político e o liberalismo econômico caracterizaram um importante rompimento com um passado medieval. Eles propiciaram o aumento da riqueza e de sua circulação, além do controle do poder. Todavia, o choque entre capital e trabalho[12] deixou muito evidente que a lógica liberal clássica do mercado, calcada em uma liberdade meramente formal, não era suficiente para assegurar a tão entoada liberdade do indivíduo.[13]

Em reação ao exacerbado formalismo e individualismo do Estado liberal, surgiram várias correntes doutrinárias. O socialismo utópico de Robert Owen, Saint-Simon, Charles Fourier e Pierre-Joseph

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12 "A antinomia Estado-sociedade, proveniente da falsidade da ideologia burguesa, já não pode, assim, em suas vestes formais, dissimular o holocausto social da liberdade. Um holocausto que teve por vítima maior a classe obreira, o chamado quarto estado ou proletariado, segundo a linguagem da revolução das massas, linguagem hoje um tanto arcaizada, de inspiração no marxismo-leninismo" (BONAVIDES, Paulo. *Do Estado Liberal ao Estado Social*. 11. ed. São Paulo: Malheiros, 2013. p. 15).

13 "No Estado Liberal [...] a ordem jurídica é propriamente vaga ou indiferente a fins determinados, cuja eleição compete por completo aos particulares. O direito limita-se a fixas as regras do jogo, sem conceder privilégios a qualquer dos jogadores, considerados, dessa forma, iguais perante a lei. O bem comum, objetivo declarado do Estado, reduz-se à adequada formulação e ao escrupuloso respeito das regras do jogo. A grande transformação ocorreu quando se passou a considerar legítima a organização estatal e a ordem jurídica em função de fins ou objetivos determinados, cuja realização se impõe à coletividade. A fixação desses fins sociais costuma ser feita, primariamente, na Constituição e, secundariamente, em leis orgânicas, ou na lei do plano" (COMPARATO, Fábio Konder. *Direito empresarial:* estudos e pareceres. São Paulo: Saraiva, 1995. p. 6.)

Proundhon, que pregava a reforma social por meio da reestruturação da sociedade e de suas instituições. O socialismo científico de Karl Marx e Friedrich Engels, que cunhou a teoria do materialismo histórico – contrária ao idealismo de Friedrich Hegel – segundo o qual o homem é fruto da História e que esta é esculpida pela intervenção humana por meio do trabalho. Essa corrente filosófica defende o rompimento com as estruturas do sistema produtivo capitalista, o que deveria se dar mediante a luta de classes e pela abolição da propriedade privada. Destacam-se ainda o positivismo sociológico de Auguste Comte e a sua teoria da solidariedade social, a obra de Émile Durkheim, notadamente o seu *A Divisão do Trabalho*, e o social-liberalismo de John Stuart Mill.

A experiência socialista e, sobretudo, o Estado social transformaram aquele modelo liberal. Conquanto ele ainda esteja baseado nos aventados institutos do contrato e da propriedade privada, não se pode mais admitir esses direitos como absolutos e desvirtuados das suas respectivas funções sociais.

O constitucionalismo e o reconhecimento dos direitos humanos somaram-se, portanto, ao Estado e ao mercado como catalisadores das mudanças estruturais da sociedade. O fim do imperialismo, com o surgimento de mais Estados independentes, e a globalização contribuíram para o fortalecimento dessas estruturas, uma vez que se tornou necessário desenvolver novos mercados que fossem suportados por esses pilares. Surgiu, ademais, a escola da nova economia institucional, que admite ter o direito a missão de encontrar as soluções para as falhas de mercado.

4. As falhas de mercado.

A estrutura prevista ou imaginada para o funcionamento do mercado pode não corresponder àquela concretamente verificada na maioria dos mercados. Os tão propalados automatismo e adaptabilidade às condições mutantes dos agentes de mercado, que os leva-

riam a tomar decisões muito céleres, quase automáticas, e que sempre influenciariam a tomada de decisão, nem sempre observam a racionalidade esperada. Existem, de mais a mais, outras circunstâncias que afetam o regular funcionamento do mercado, pelo menos da forma como se imaginou que ele deveria funcionar. A existência dessas falhas de mercado seria, então, a principal justificativa para a intervenção estatal, destinada à sua correção ou à criação de sucedâneos para aquele mercado com falhas.[14]

A doutrina[15] costuma identificar 6 (seis) espécies de "falhas de mercado". Essas "falhas" nada mais são do que certos aspectos da realidade econômica, que simplesmente foram desconsiderados pelos precursores do aventado modelo liberal de mercado. Sucede que esses fatores são reais e, obviamente, produzem efeitos, que são sentidos pela sociedade. Sem embargo, esses efeitos não foram previstos no citado modelo de mercado, circunstância que, no mais das vezes, trouxe efeitos ruins. Seriam estas falhas: (i) de mobilidade; (ii) de transparência; (iii) de estrutura; (iv) de sinal; (v) de incentivo; (vi) os chamados "custos de transação" e (vii) o custo da corrupção.

Essas falhas de mercado, de um modo geral, indicam que a premissa adotada pelo liberalismo econômico de que o indivíduo reage racional e automaticamente aos impulsos económicos, para extrair, de forma eficiente, as melhores funcionalidades dos bens e serviços, provocando, assim, o aumento de seu bem-estar, não está totalmente correta. A racionalidade humana é limitada. Consequentemente, as decisões não são tomadas de forma plenamente esclarecida, sendo influenciadas por vários aspectos.[16]

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14 CORRÊA, Rodrigo de Oliveira Botelho. *O princípio da reparação integral do dano causado à atividade negocial*. Berlin: Novas Edições Acadêmicas, 2015. p. 76.

15 Para os fins deste estudo, será utilizada a classificação dada por Fábio Nusdeo nas suas obras *Fundamentos para uma codificação do direito econômico* e *Curso de Economia:* Introdução do direito econômico.

16 Sobre o ponto, cf. THALER, Richard H.; SUNSTEIN, Cass R. *Nudge:* Como tomar melhores decisões sobre saúde, dinheiro e felicidade. Rio de Janeiro: Objetiva, 2019. *passim*.

5. A tutela de acesso ao mercado.

Não só a Declaração Universal dos Direitos do Homem, de 1948, como muitas constituições reconhecem que os direitos humanos têm também uma feição econômica. Uma pessoa não consegue alcançar uma vida digna, se ela não consegue acessar o mercado para obter recursos que assegurem a sua subsistência.

Como mencionado, a Declaração Universal dos Direitos do Homem, de 1948, prevê, por exemplo, que "todo ser humano tem direito ao trabalho, à livre escolha de emprego, a condições justas e favoráveis de trabalho e à proteção contra o desemprego". O trabalho é exercido em um mercado, o chamado "mercado de trabalho". É nesse ambiente que se oferece trabalho a pessoas que o demandam. Esse trabalho, segue a Declaração Universal, deve ser remunerado da forma justa, não sendo cabível distinguir quando realizado igual trabalho. Deve ser assegurada, ainda, a liberdade de organização sindical, o que é justificado como forma de equilibrar as relações entre empregador e empregados.

Para se oferecer trabalho é preciso alguma qualificação. Em uma sociedade cada vez mais tecnológica, o conhecimento é imprescindível para se obter trabalho. Não por outro motivo, a Declaração Universal dispõe que "[t]odo ser humano tem direito à instrução". A educação é tratada como bem elementar de uma sociedade, tanto que ela deverá ser oferecida gratuitamente, ou seja, caberá ao Estado, pelo menos nos graus elementares e fundamentais, assegurar que todos tenham instrução, ainda que não tenham condições de pagar por isso. Isso engloba a formação profissional, que deverá ser acessível a todos, e a instrução superior, que deve ser baseada no mérito.

Além de oferecer instrução – que seria o elemento básico para o acesso ao mercado – o Estado também não deve colocar obstáculos ao exercício das liberdades individuais, o que inclui as de natureza econômica. Assim, estabelece o artigo 29 da Declaração Universal dos Direitos Humanos que "[t]odo ser humano tem deveres para com

a comunidade, na qual o livre e pleno desenvolvimento de sua personalidade é possível". Avança dispondo ainda que "[n]o exercício de seus direitos e liberdades, todo ser humano estará sujeito apenas às limitações determinadas pela lei, exclusivamente com o fim de assegurar o devido reconhecimento e respeito dos direitos e liberdades de outrem e de satisfazer as justas exigências da moral, da ordem pública e do bem-estar de uma sociedade democrática".

Percebe-se, assim, que a Declaração Universal dos Direitos Humanos entende como ilegítima a intervenção no domínio econômico, quando esta não tiver como fundamento a proteção e o respeito a direitos e liberdades ou a proteção de um interesse público.

6. Economia mista.

Como forma de alcançar esses objetivos, as constituições de Estados democráticos têm previsto a possibilidade de ser adotado um modelo de economia mista. Esse movimento é percebido com mais nitidez depois da II Guerra Mundial, como retratam Daniel Yergin e Joseph Stanislaw:

> Throughout Western Europe, several broad forces shaped the mixed-economy consensus. The first was before everybodys eyes – the appaling destruction, misery, and disruption created by the war. That devastation precipitated a crisis of unprecedented proportions; never had there been a cataclysm like it. The scene, U.S. secretary of war Henry Stimson wrote in his diary, was "worse than anything probably that ever happened in the world". Tems of millions of people were desperately short of food, many of them on the edge of starvation. The crisis could be measured by the human cost – the dead and the injured, the grim survivors, the flood of displaced persons, the

> shredding of families. It also evidente in the physical destruction – the homes and factories reduced to rubble, agriculture ant Transportation disrupted. But there was also a devastation that was less obvious to the eye: Machenery wal obsolete and worn-out; the labor force in Europe was exhausted, malnourished, and in disarray; technical skills had been dissipated. Extreme Weather, culminating in the Siberian winter of 1947, unleashed a grave crisis.[17]

Por esse modelo, nem todas as decisões ficam a cargo dos indivíduos reunidos no mercado. O Estado participa dessas decisões, não só pela adoção de políticas públicas de planejamento e regulação, como pela atuação direta na economia.

O Estado passou então a assumir, direta ou indiretamente, postos-chave da economia. Foi exatamente na viragem do Estado Liberal para o Estado Social que a associação de capitais privados e públicos se fez mais sensível. A doutrina defendida pelos fisiocratas, segundo a qual o Estado deveria se limitar a assegurar os direitos individuais, de maneira que os indivíduos fossem livres para tomar as decisões quanto à administração dos bens escassos, perdeu força em decorrência, sobretudo, do conflito entre capital e trabalho, das crises financeiras e das Grandes Guerras ocorridas na primeira metade do século XX. O Estado abandonou a posição passiva quanto à economia e passou, ele próprio, muita vez em associação com capitais privados, a atuar diretamente no mercado.

Essa nova postura não esteve livre de críticas e de desacertos. O agigantamento do Estado trouxe consequências ruins, em especial no tocante às finanças públicas e à concorrência. Isso despertou, principalmente após a crise mundial do petróleo, desencadeada em

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17 YERGIN, Daniel; Stanislaw, Joseph. *The Commanding Heights*: the battle for the world economy. New York: Touchstone, 2002. p. 3.

1973 – e ressurgida, posteriormente, em 1979 -, quando os países-membros da OPEP (Organização dos Países Exportadores de Petróleo) decidiram reduzir o fornecimento do óleo e aumentar fortemente o seu preço, uma reação para a redução da intervenção estadual na economia. O chamado Consenso de Washington foi o gatilho que disparou o processo de profunda mudança macroeconómica. Ele se deu, mormente, por meio da privatização ou desestatização de empresas públicas, da alienação de participações em sociedades comerciais, do rompimento de monopólios legais, da delegação a particulares da execução de serviços públicos e atividades económicas de interesse público, da desregulamentação de atividades económicas.

Nada obstante, na conjuntura atual, ainda se observa a atuação do Estado na economia. Por mais que essa tenha sido em alguma medida reduzida, ela ainda se faz presente e é fortemente sentida, principalmente quando age como regulador.

É sob essa perspectiva que o direito o humano de acesso ao mercado deve ser observado. A atuação do Estado na economia deve ser orientada por essa norma. As políticas públicas devem fomentar a formação intelectual e qualificação profissional, reduzindo as desigualdades e promovendo oportunidades para que os indivíduos acessem o mercado e satisfaçam dignamente suas necessidades.

7. O pensamento de Anthony B. Atkinson.

A experiência não tão bem-sucedida com sistemas econômicos que tinham, em princípio, compromisso com a redução ou eliminação da desigualdade alimentaram uma reação liberal. O resultado, todavia, não foi promissor. O fato de a concentração de renda e de poder econômico ter aumentado, fez com que a questão da desigualdade, notadamente no plano econômico, especialmente no que respeita à possibilidade de os indivíduos poderem aceder ao mercado em condições de realizarem trocas equilibradas, voltou a estar à frente dos debates públicos. A redução da desigualdade econômica foi

colocada como prioridade por muitos governos, inclusive pelo Fundo Monetário Internacional.

Em vista disso, políticas públicas vêm sendo pensadas e estruturadas para permitir que indivíduos em situação de maior vulnerabilidade possam participar do mercado em condições de tomar decisões que efetivamente lhes beneficiem e que tenham condição de trocar trabalho por recursos que os possibilitem viver com dignidade.

No livro *Inequality,* uma das suas últimas obras, o saudoso economista e cientista político Anthony B. Atkinson apresentou um sério diagnóstico para esse problema. Em pesquisa conspícua, amparada em dados empíricos densos e consistentes, Atkinson apontou problemas graves relacionados à desigualdade de oportunidades e de renda.

Ele inicia seu estudo alertando que não buscava eliminar todas as diferenças relacionadas ao auferimento de renda. Em outras palavras, ele não tinha o objetivo de obter uma igualdade total. Certas diferenças de renda, segundo o economista, são justificáveis. Todavia, o excesso de desigualdade não o é.

Como o estudo destaca, a literatura econômica recente, seguindo o trabalho de John Roemer e de Richard Tawney, ressalta a importância da igualdade de oportunidades. Tawney chega a afirmar que "all the people should be equally enabled to make the best of such powers as they possess"[18]. Ao enfrentarem o problema da desigualdade de oportunidades, essa corrente separa as situações de desigualdade em razão das circunstâncias que estão além do controle pessoal, como o fato de uma pessoa ter nascido em uma família abastada e com relações sociais relevantes, do esforço feito pelo indivíduo para se distinguir da multidão e colher os louros pela sua conduta pessoal. O objetivo dos estudiosos desse problema é o de neutralizar as circunstâncias que favorecem determinados indivíduos – seja por

18 TAWNEY, Richard *apud* ATKINSON, Anthony B., *Op. Cit.*, p. 9.

meio de medidas de compensação, como é o caso das cotas sociais e raciais, seja pela adoção de políticas de fomento e de assistência social, e até pela aplicação de normas de hermenêutica e jurisprudência voltadas para a correção de desequilíbrios nas relações jurídicas -, buscando, assim, implementar condições iniciais de igualdade de oportunidades.

Atkinson, entretanto, chama atenção para o fato de que a resolução do problema da desigualdade de oportunidades não é suficiente. Fatos supervenientes podem desequilibrar as relações sociais, trazendo novamente desigualdade excessiva e danosa. Os próprios "prêmios" que a sociedade eventualmente concede àqueles que mais se esforçam podem acarretar a quebra do equilíbrio inicial das oportunidades. Isso porque, à medida que o indivíduo acumula esses prêmios, as oportunidades que aparecem para ele tendem a aumentar, o que se dá em sentido diametralmente oposto àqueles que deixaram de ser premiados.

Consequentemente, afirma Atkinson, a redução da desigualdade deve observar dois planos. O da igualdade de oportunidades e o da proporcionalidade das rendas auferidas. A promoção da igualdade de oportunidades não é suficiente para solucionar esse problema, como defendem alguns. Isso porque, mesmo quando os indivíduos partem em condições semelhantes, circunstâncias posteriores podem desequilibrar profundamente as relações.[19]

A preocupação, portanto, deve ser tanto com as circunstâncias *ex ante* como com os aspectos *ex post,* até porque "[t]*odays ex-post outcomes shape tomorrows ex ante playing field: the beneficiaries of inequality of outcome today can transmit an unfair Advantage to their children tomorrow".*[20]

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19 "Inequality of opportunity is essentially na ex ante concept – everyone should have an equal starting point – whereas much redistributional activity is concerned with the ex post outcomes" (ATKINSON, Anthony B. *Inequality*. Cambridge: Havard University Press, 2015. p. 10).

20 Ibidem, p. 11.

Após identificar e deliminar o problema, Atkinson apresenta proposta de ações nos campos da propriedade intelectual - sobretudo da tecnologia disruptiva -, do trabalho e empregabilidade – como aspectos relacionados ao pleno emprego, garantia de trabalho, equidade de salários, com a adoção de políticas éticas de remuneração, que considere o combate à discriminação de gênero, raça e orientação sexual -, da acumulação de capital - em especial quando essas decorrem de expropriação de acionistas minoritários, pagamento de juros a pequenos investidores e, também, da perpetuação de poder econômico em decorrência da sucessão por morte (herança) -, tributação progressiva e ampliação do acesso e das políticas propriamente ditas de assistência social.

Não há espaço – nem esse é o objetivo – para se descrever todas as ações defendidas por Atkinson na referida obra. Pode-se, entretanto, reproduzir as quinze propostas que ele apresenta após descrever as referidas práticas. Essas são as propostas do economista para reduzir a extensão da desigualdade:

> Proposal 1: The Direction of technological change should be na explicit concern of policy-makers, encouraging Innovation in a form that increases the employbility of Workers and emphasises the human dimension of service provision.
> Proposal 2: Public policy should aim at propor balance of power among stakeholders, and to this end should (a) introduce na explicitly distributional dimension into competition policy; (b) ensure a legal framework that allows trade unions to represent Workers on level terms; and (c) establish, where it does not already exist, a Social and Economic Council involving the social partners and Other nongovernmental bodies.
> Proposal 3: The government should adopt an explicit target for preventing and reducing unemployment and underpin this ambition by offering guaranteed public employment at the minimum

wage to those who seek it.

Proposal 4: There should be a national pay policy, consisting of two elements: a statutory minimum wage set at a living wage, and a code of practice for pay above the minimum, agreed as parto f a "national conversation" involving the Social and Economic Council.

Proposal 5: The government should offer via national savings bonds a guaranteed positive real rate of interest on savings, with a maximum holding per person.

Proposal 6: There should be a capital endowment (minimum inheritance) paid to all at adulthood.

Proposal 7: A public Investment Authority should be created, operating a Sovereign wealth fund with the aim of building up the net worth of the state by holdings investments in companies and in property.

Proposal 8: We should return to a more progressive rate structure for the personal income tax, with marginal rates of tax increasing by ranges of taxable income, up to top rate of 65 per cent, accompanied by a broadening of the tax base.

Proposal 9: The government should introduce into the personal income tax an Earned Income Discount, limited to the first band of earnings.

Proposal 10: Receipts of inheritance and gifts inter vivos should be taxed under a progressive lifetime capital receipts tax.

Proposal 11: There should be proportional, or progressive, property tax based on up-to-date property assessments.

Proposal 12: Child Benefit should be paid for all children at a substantial rate and should be taxed as income.

Proposal 13: A participation income should be introduced at a national level, complementing ex-

> isting social protection, with the prospect of an EU-wide child basic income.
> Proposal 14 (alternative to 13): There should be a renewal of social insurance, raising the level of benefits and extending their covertage.
> Proposal 15: Rich countries should raise their target for Official Development Assistance to 1 per cento f Gross Nartional Income[21].

O estudo de Atkinson revela que a preocupação com a igualdade voltou com força. As consequências de medidas de cunho estritamente liberal aumentaram de forma preocupante a desigualdade social.

É importante notar que não só os governos e a academia estão buscando lidar com esse problema; as corporações também o fazem por meio do que se tem compreendido como responsabilidade social das empresas.[22] A temática, portanto, está renovada e é considerada muito relevante.

Conclusão.

Como visto, o acesso ao mercado é uma ação fundamental para que os indivíduos possam satisfazer com dignidade suas necessidades e interesses. A atuação de mercado no plano da educação, da formação profissional e atuação na economia deve ser orientada por esse princípio, de maneira que as políticas públicas possam atender e tutelar esse direito humano.

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21 *Ibidem,* p. 237-238.

22 Cf. WILLIAMS, Cynthia A. Corporate Social Responsability and Governance Governance. *In*: GORDON, Jeffrey N.; RINGE, Wolf-Ge org (Coord.). *The Oxford Handbook of Corporate Law and Governance*. Oxford: Oxford University Press, 2018, p. 634-678; PARKINSON, J. E. *Coporate Power and Responsability*: Issues in the Theory of Company Law. Oxford: Clarendon Press, 1993. p. 262-303.

Não basta assegurar oportunidades iguais. É preciso também adotar medidas que amenizem os fatos supervenientes que eventualmente atingem as trajetórias pessoais e tornem as oportunidades desiguais novamente. Consequentemente, nenhuma ação do Estado deve ser dirigida ao recrudescimento do poder econômico de alguns grupos, quando em detrimento de outros que podem, inclusive, serem alijados do mercado. Nessa perspectiva, as políticas de assistência social, que visam ao combate à pobreza, estão fundamentadas no direito humano de acesso ao mercado, tanto quanto as políticas públicas que visam à simplificação de procedimentos fiscais, a redução da burocracia, a defesa da livre-concorrência com o combate às práticas consideradas nocivas a esse bem jurídico.[23]

Em resumo, qualquer ação que procure equilibrar as forças no mercado e que permitam que as pessoas possam acessar esse ambiente para realizar trocas justas atende ao direito humano de acesso ao mercado.

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23 COUTINHO DE ABREU, Jorge M. Aspectos do Direito Económico da União Europeia (Apontamentos Proposito do Diálogo U.E. Mercosul). *Boletim da Faculdade de Direito da Universidade de Coimbra*, Coimbra, n. 74, p.705-728, 1998.