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ESG AND THE LAW: THE SHIFTING SANDS OF ACCOUNTABILITY

ESG E O DIREITO: AS AREIAS MOVEDIÇAS DA RESPONSABILIZAÇÃO

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Over the last forty years, the ESG framework has undergone remarkable transformations in corporate and international law, evolving from voluntary corporate philanthropy into a system shaped by binding obligations. This shift was brought about by the adoption of the Corporate Sustainability Reporting Directive in 2022 and the Corporate Sustainability Due Diligence Directive (CSDDD) in 2024, alongside a notable proliferation of national business and human rights legislation in Australia, Canada, France, Germany, Norway and the United Kingdom, among other countries. Yet, despite growing social pressure, reflected in more than 250 strategic climate cases filed against companies since 2015 (Setzer, Higham, 2025: 19), turning ESG obligations from soft law into hard law has been a winding road. Initiatives such as the United Nations Global Compact (United Nations Information Service, 2000) and the United Nations Guiding Principles on Business and Human Rights (United Nations Human Rights Council, 2011) have long paved the way for enforceable duties. However, binding law is not developing in a linear or clear way, and this special issue emerges at a moment of intense and unstable dynamics for ESG obligations.

In March 2026, Directive (EU) 2026/470 – the so-called Omnibus I Directive – entered into force, introducing substantial amendments to the CSRD and the CSDDD, narrowing significantly the personal scope and obligations imposed by the Directives. For instance, Omnibus I pushed back the implementation deadlines, removed the obligation to adopt a Paris-aligned climate transition plan, lowered infringement penalties, among other changes (Council of the European Union, 2026). Less than ten weeks earlier, the Council and the European Parliament had already agreed to postpone the EU Deforestation Regulation's date of application for large operators to 30 December 2026 (Council of the European Union, 2025). A movement towards retrenchment in ESG law seems clear. This movement, however, is better understood in a broader timeframe: as Marta Paricio Montesinos argues in this issue's first article, 2026 is not a new oscillation period but a repetition of a pattern of attempts to constrain transnational corporations visible since the 1970s, while the contribution of the United Nations binding treaty negotiations to this oscillation remains unresolved twelve years into its drafting and adoption process.

Furthermore, Paricio Montesinos' paper argues that the recurring logic of this movement is structurally contested and reconfigured through the combined pressure of geopolitical shifts, the framing of corporations as indispensable engines of economic growth, and the influence of corporate actors in rule-making processes. This, she claims, creates the so-called "persistent paradox" in which corporations are simultaneously framed both as the source of harm and as actors expected to deliver solutions, while this dualism reinforces a broader tension related to corporate accountability debates.

The first article in this edition sets an essential backdrop for understanding other approaches to the current retrenchments in ESG regulations described by other contributors to this edition. For instance, the second article frames this retrenchment in the constitutional dimensions of ESG law itself. Inês Neves' article frames sustainable development as a constitutional EU metaprinciple and argues that ESG legislation is a core legal mechanism to fulfil primary law commitments. From this perspective, the Omnibus reforms raise constitutional questions and may be considered an unjustified regression from a previously attained level of protection. One of this issue's practitioner contributions provides practical substance to this reading. Applying the Centre for European Policy Studies' test, Tiago Antunes concludes that many Omnibus I changes cross the line from simplification into deregulation, pointing to markers such as indefinite delay of implementation, reduction of the regulated population beyond what proportionality requires, and replacement of binding obligations with voluntary guidance.

On the other hand, there also appear to have been signs of a movement towards expansion of ESG law: a Paris court convicted the cement manufacturer Lafarge and several of its former executives of financing terrorism in Syria, a verdict the Business and Human Rights Resource Centre described as “unprecedented” (2026; American Society of International Law [ASIL], 2026); the United Nations’ intergovernmental working group on a binding business-and-human-rights treaty scheduled its twelfth negotiating session for October 2026 (ESCR-Net, 2026); and India’s securities regulator extended mandatory third-party assurance of core ESG indicators to its 500 largest listed companies (Securities and Exchange Board of India [SEBI], 2023; SEBI, 2025).

From the fundamental issues on ESG regulation, the edition moves to one of the most crucial empirical problems – the gap between ESG frameworks’ requirements and their implementation. The contribution by Vaibhavi Rane and Swetang Naik brings empirical evidence from India’s Business Responsibility and Sustainability Reporting regime. Tracking 89 of India’s largest listed firms across three consecutive financial years, the article finds that mean disclosure quality rose 41.4 percent while measured substantive ESG outcomes rose at less than half that rate. The introduction of mandatory third-party assurance under BRSR Core was expected to narrow this gap. Strikingly, it was instead associated with the gap widening, showcasing, yet again, how difficult it is to translate ESG obligations into effective results in favour of environmental and social protection. This article demonstrates, therefore, that disclosure and accountability are not the same thing.

Also following an empirical approach, Tamara Hojaij’s work on the Brazilian cocoa value chain uses field research by the Business and Human Rights Centre of Fundação Getulio Vargas to document how dispersion in large territories, dependence on intermediaries who obscure beans’ origin, and a context of widespread labour informality in Brazil’s regions of Bahia and Pará limit the traceability on which human rights due diligence depends. Here, we find that the complex relation between ESG and the law is also a result of the elusive and complex nature of the social and economic problems it aims to address.

Finally, this volume also traces accountability’s shifting sands into two domains at the frontiers of human knowledge and technological development: outer space and artificial intelligence. In both cases, accountability problems persist: in space, we find a fragmented and largely voluntary legal regime; in AI, the absence of governance frameworks around a technology already in widespread use for ESG compliance practice itself.

Merve Erdem Burger's contribution argues that international space law's existing principles of cooperation and avoidance of harmful contamination, under Article IX of the Outer Space Treaty, should be read through the lens of established environmental law principles, such as precaution, prevention, polluter pays and intergenerational equity. This proposed legal reframing responds to the fact that the existing binding framework, principally Article IX itself, leaves environmental protection fragmented and only partially developed, with no dedicated regime for debris mitigation or environmental harm. Nuno Bettencourt's practitioner contribution identifies a similar gap in the governance of the tools now used to comply with the CSRD itself: artificial intelligence and automation are already indispensable to the collection, reconciliation and audit of sustainability data, but at risk of bias, hallucination and diluted accountability without human professional judgement.

Read together, these contributions lead to five crucial conclusions.

- First, disclosure and accountability are conceptually and empirically distinct, and regulatory design that improves the former does not reliably improve the latter.
- Second, the expansion and contraction of binding corporate obligation is not a one-way historical process but a recurring oscillation.
- Third, many constraints result from institutional fragmentation, poor enforcement design and asymmetries of power between regulators, companies and affected communities. Additional disclosure is unlikely to resolve these constraints.
- Fourth, and cutting across all of the above, the relationship between ESG and the law remains ambiguous along three axes. In terms of *level*, it is unsettled whether ESG commitments are constitutional in character and therefore resistant to ordinary legislative reversal, or freely revisable whenever competitiveness concerns prevail. In terms of *scope*, the boundary of who and what ESG obligations reach is continually renegotiated. In terms of *nature*, ESG

governance remains a patchwork of hard and soft law rather than a coherent body of binding obligation.

- Fifth, solving the challenges presented in this edition will require constitutional dialogue, a context-sensitive approach, cross-regime interpretation and new accountability paradigms.

Several of the developments this issue tracks will resolve in the upcoming months or years. This issue cannot predict how these processes will resolve. What the issue offers instead is a body of evidence, empirical, doctrinal and practitioner, that the law of ESG in 2026 is neither a settled achievement nor obsolete.

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