



Legal high **C**ommittee for  
Financial markets of **P**aris

## ***CORPORATE SUSTAINABILITY REPORTING DIRECTIVE (CSRD)***

*Analysis of the risk of civil liability claims and  
stock market sanctions*

*Legal High Committee for Financial markets  
of Paris*

***26 October 2023***



## **CORPORATE SUSTAINABILITY REPORTING DIRECTIVE (CSRD)**

### **Analysis of the risk of civil liability claims and stock market sanctions**

*Directive (EU) 2022/2464 relating to corporate sustainability reporting (the “CSRD”)* plays a part in the European Union’s drive to steer capital towards a sustainable economy (the European Green Deal). Its contribution is that it principally aims to harmonise in-scope companies’ non-financial reporting and improve the availability and quality of the data which is published.

The CSRD will accordingly result in an increase in the scope and volume of the sustainability information to be disclosed. The information will also be more detailed, as illustrated by the European Sustainability Reporting Standards (the “ESRS”),<sup>1</sup> which are based on draft standards prepared by EFRAG and which, following a public consultation, were adopted as part of a delegated act totalling some 240 pages. Although the CSRD is primarily intended to introduce reporting and transparency obligations, it will also lead to in-scope companies adapting their governance, data collection and data construction tools, as well as their monitoring and risk analysis systems, in order to provide the additional information which must now be independently audited.

This increase in the constraints on the companies already subject to disclosure requirements, together with the increase in the number of companies falling within the scope of disclosure requirements (now including SMEs if they are listed, as well as non-listed companies if they qualify as “*large undertakings*”<sup>2</sup>), raises the question as to whether there could be an additional risk that such

---

<sup>1</sup> *European Sustainability Reporting Standards (the “ESRS”) set out in the annexes to Commission Delegated Regulation of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards. On 9 June 2023, the European Commission published a draft delegated act on the first European Sustainability Reporting Standards (ESRS) comprising a set of twelve cross-cutting standards (i.e., applicable to all sectors). In a press release dated 31 July 2023, the European Commission announced that on that same date it had adopted, pursuant to the terms of a delegated act, the European Sustainability Reporting Standards (ESRS). They are the first set of twelve standards (two cross-cutting standards and ten topical standards) covering Environmental, Social and Governance matters, applicable to companies subject to the EU Directive relating to corporate sustainability reporting (the CSRD). The delegated act has been submitted to the European Parliament and the Council for review.*

<sup>2</sup> *The CSRD will apply to around 50,000 companies, as opposed to 11,000 under the current rules set out in Directive 2014/95/EU on disclosure of non-financial information (NFRD) – European Parliament press release, Sustainable economy: Parliament adopts new reporting rules for multinationals, 10 November 2022. The CSRD therefore applies to all companies listed on an EU regulated market (except micro-undertakings) and all other “large” EU companies, i.e., if they exceed two of the three following criteria: 250 employees; net turnover of €40 million and balance sheet total of €20 million. Note that these thresholds have been amended by Delegated Directive (EU) of October 17, 2023 amending Directive 2013/34/EU of the European Parliament and of the Council as regards the criteria for determining micro, small, medium-sized and large undertakings or groups: the €40 million turnover threshold is increased to €50 million and the €20 million balance sheet total threshold is increased to €25 million.*



companies – and their directors (including board directors in a *société anonyme* – could have civil liability claims brought against them on the grounds of the sustainability information they disclose.

It can be noted that for companies that already have to publish a *Déclaration de Performance Extra-Financière* (DPEF) (a “*Non-Financial Statement*”),<sup>3</sup> the key changes introduced by the CSRD mean that the information already disclosed has to be provided in greater detail, whether such information was disclosed pursuant to the Non-Financial Reporting Directive (the “*NFRD*”)<sup>4</sup> or on a voluntary basis, in accordance with the European Commission’s various guidelines,<sup>5</sup> or in line with the recommendations of international organisations,<sup>6</sup> of ESMA<sup>7</sup>, and in France, of the French Financial Markets Authority, the *Autorité des marchés financiers* (AMF).<sup>8</sup> In this respect, “*the CSRD reinforces existing rules concerning the disclosure of non-financial ESG information introduced by the NFRD in order to improve the content*”.<sup>9</sup> However, for all non-listed “*large undertakings*” and for listed SMEs, this is a very considerable change in their disclosure obligations which explains why they have been given more time to adapt in order to comply.<sup>10</sup> In practice, “*the*

---

<sup>3</sup> Non-listed companies with total assets of more than €100 million or net turnover of more than €100 million and which employ more than 500 permanent employees during the financial year, and listed “*large undertakings*”.

<sup>4</sup> Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial information and diversity information by certain large undertakings and groups (the *Non-Financial Reporting Directive - NFRD*).

<sup>5</sup> European Commission Guidelines on Non-Financial Reporting, June 2017; European Commission Guidelines on Non-Financial Reporting: Supplement on reporting climate-related information, June 2019.

<sup>6</sup> For example, out of a panel of 100 large French companies (mainly from the list of companies making up the SBF 120, a French stock market index), 79 refer to the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and 72 refer to the framework established by the Global Reporting Initiative (GRI) (*Deloitte, EY, Medef, Reporting ESG des entreprises françaises : sont-elles prêtes pour CSRD ? (French Companies and ESG Reporting: are they ready for the CSRD?)*, 2022).

<sup>7</sup> See, in particular, *European Common Enforcement Priorities for 2022 Annual Financial Reports*, 28 October 2022.

<sup>8</sup> See, in particular, AMF Recommendation 2016-13; AMF Recommendation 2018-12; AMF CSR Report 2019; AMF Recommendation 2022-06. It can be noted that out of the panel of 100 companies mentioned in footnotes 6 above, 90 companies publish a materiality analysis and 84 describe their governance regarding ESG matters as recommended by the AMF and as will now become mandatory with the adoption of the CSRD.

<sup>9</sup> C. Cathiard, *La directive CSRD et le reporting “durabilité” (The CSRD and Sustainability Reporting)*, *Actes Pratiques et Ingénierie Sociétaire*, no. 2, March-April 2023, 2. See also, B. Lecourt, *La “Directive RSE 2” (“directive CSRD”) : le nouveau visage de l’information en matière environnementale et sociale, (The “CSR Directive 2” (“the CSRD”): the new face of information concerning social and environmental matters)*, *Rev. sociétés* 2022, 639; B. Parance, *La directive CSRD, nouveau modèle du reporting extra-financier au service de la durabilité des entreprises (The CSRD, new model for non-financial reporting in support of corporate sustainability)*, *JCP E*, no. 5, 2 February 2023, 1033; J.-M. Moulin, *L’irrésistible ascension de la RSE (premières vues sur la directive CSRD) (The unstoppable ascension of CSR – initial views on the CSRD)*, *Revue de Droit bancaire et financier*, no. 1, January-February 2023, Study 1.

<sup>10</sup> Article 5 of the CSRD. “*The CSRD represents significant progress by including more companies, from large companies on 1 January 2025 to listed SMEs on 1 January 2026, by providing for the possibility for the European Commission to issue delegated acts to define in detail the information to be disclosed by companies and by requiring that the disclosed information be subject to certification by a statutory auditor or third-party independent body*”, Report no. 179 (2022-2023) of Mr Hervé Maurey, presented on behalf of the French Senate’s Finance Committee, on the draft law introducing various provisions adapting French law to comply with EU law in the field of the economy, health, work, transport and agriculture, the French Senate, 6 December 2022, p. 9.



*new sustainability statement, which replaces the non-financial statement, will have a far broader scope of application and will contain more precise and more reliable information”<sup>11</sup>*

**While in-scope companies and their executives are automatically more exposed as a result of these new obligations, the CSRD does not specifically intend to alter the civil liability regime applicable to them.** The CSRD indeed restates the provision already set out in the NFRD (without adding further detail) requiring that members of the administrative, management and supervisory bodies of an undertaking should have “*collective responsibility*” for the preparation and disclosure of the sustainability information prescribed by the relevant provisions (and by the new ESRs).<sup>12</sup> As before, the absence of detail as to the scope of this responsibility and as to the practicalities for its implementation implies that no specific changes need to be made to Member States’ domestic regimes regarding civil liability proceedings. In addition, this allows Member States considerable discretion in deciding to define a specific new civil liability regime or on the contrary to rely on an existing regime provided for in ordinary law.

Consequently, the new directive does not require amendments to the French domestic law regime regarding corporate liability or directors’ liability set out in Article L. 225-251 of the French Commercial Code<sup>13</sup> which provides that the board directors (*administrateurs*) and the chief executive officer (*directeur général*) are liable either individually, or jointly and severally, for the breach of legal or regulatory provisions, for failure to comply with the articles of association, as well as for acts of mismanagement committed in carrying out their management duties, with the share in liability of each person being decided at the discretion of the courts (not forgetting that the board of directors remains a collegial body). Personal liability actions brought by third parties (non-shareholders) against directors would also remain subject to meeting the criteria prescribed by case law of a “*fault unconnected with the performance of the director’s corporate duties*”.<sup>14</sup>

---

<sup>11</sup> *Les dispositifs de prévention des risques extra-financiers des sociétés : 3 questions à France Drummond, Jean-Baptiste Barbière and Thiphaine Saupin (Mechanisms for the prevention of non-financial risks for companies: three questions for France Drummond, Jean-Baptiste Barbière and Thiphaine Saupin), Revue de Droit bancaire et financier, no. 1, January-February 2023-1. See also, Bref aperçu de la directive UE 2022/2464 du 14 décembre 2022 relative à la publication d’informations en matière de durabilité par les entreprises (CSRD) (Brief overview of Directive (EU) 2022/2464 of 14 December 2022 relating to corporate sustainability reporting (CSRD)), N. Lenoir, D. 2023, 184, in which it is mentioned that “there is a spectacular change in the presentation of the management report. It is becoming the tool for CSR just as much as it reflects the economic and financial situation of the company. It is not possible to set out the detail here; the mass of information to be disclosed is impressive. It will concern the value chain encompassing the group, its subsidiaries and the supply chain, whether as regards environmental or climate-related issues, social matters (including human rights) or governance.”*

<sup>12</sup> Article 33 of Directive 2013/34/EU as amended by the CSRD.

<sup>13</sup> For sociétés anonymes (form of French limited liability company).

<sup>14</sup> A director may only be ordered to remedy the loss or harm caused to third parties if it is proven that he or she personally committed a fault which is “séparable”, “detachable”, from (i.e., not connected to) his or her corporate duties. See, in particular, Court of Cassation, Commercial Division, 20 May 2003, no. 99-17.092; B. Dondero, Définition de la faute séparable des fonctions du dirigeant social (Definition of an act of misconduct which is “séparable” from the director’s corporate duties), D. 2003, p. 2623. It can be noted that a claimant can avoid having to comply with this requirement by acquiring shares in the company so as to no longer be considered a “third party”.



Similarly, the aim of the CSRD is not to introduce new specific stock market sanctions. Rules relating to the quality of information disclosed to the public and those relating to market abuse will therefore continue to apply to sustainability-related information. To this end, the CSRD consolidates the powers of the financial sector supervisory bodies<sup>15</sup> and requires that the “*persons responsible*” at the issuer confirm in the annual financial report that, to the best of their knowledge, the management report has been prepared in accordance with the reporting standards concerning sustainability-related information.<sup>16</sup> It can also be noted that in the course of the preparatory work which led to the CSRD, there was a question of possibly providing for a specific regime of administrative sanctions. This proposal was subsequently dropped and does not appear in the published version.<sup>17</sup>

The new directive does not therefore specifically set out to introduce sanctions or more generally to increase situations where actions could be brought against companies and their directors. Moreover, the ESRS – in view of their precise and exhaustive nature – provide a detailed framework for the entities within the scope of the directive by comprehensively identifying relevant sustainability matters. It can be noted in this respect that these standards are intended to guide companies right from when they draw up the materiality assessment which is then used to determine the non-financial information that they must disclose (see below).<sup>18</sup> Companies will be able to refer to this framework which is also intended to be supplemented by non-binding guidelines and sector-specific sustainability standards. It can also be noted that compliance with these standards will be subject to certification by a “*sustainability auditor*”.

---

<sup>15</sup> Reference to sustainability-related information added to Article 4(5) of Directive 2004/109/EC.

<sup>16</sup> Article 2 of the CSRD.

<sup>17</sup> See the initial proposal of the European Commission which provided for an amendment to Article 51 of Directive 2013/34/EU (Accounting Directive). Article 51 retains the following wording: “Member States shall provide for penalties applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that those penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive.” In view of the links between the duty of due diligence (*devoir de vigilance*) and the publication of sustainability-related information, it could have been contemplated, for example, that the prerogatives of the authority responsible for controlling application of the EU-prescribed due diligence (*devoir de vigilance*) be broadened so that it could sanction companies that fail to comply with the CSRD.

<sup>18</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 3.



## I. Increased scope, volume and granularity of sustainability-related information to be disclosed

### 1.1 - Obligations concerning the information to be disclosed

The new EU directive is based on several notions already established by the NFRD, but which are expanded upon in terms of detail, scope and depth. By also introducing certain new concepts, the CSRD aims to make the sustainability reporting obligations more stringent. While one could consider that the CSRD is just a question of “*fine-tuning*” for companies that already have to publish a *Déclaration de Performance Extra-Financière* (DPEF) (a Non-Financial Statement) in France, it will require considerable effort on the part of entities publishing this type of information for the first time.

#### 1.1.1 - Double materiality and materiality assessment<sup>19</sup>

The notion of “*double materiality*” already existed under the Non-Financial Reporting Directive even if the expression was not specifically mentioned. It is enshrined in the CSRD.

- The Non-Financial Reporting Directive contained a materiality criterion to determine what information needed to be provided<sup>20</sup> and the European Commission Guidelines, published in 2019 to clarify the provisions of the NFRD, expressly referred to the notion of “*double materiality*” (in the English version).

- In order to implement the measures provided for in the NFRD, issuers were therefore encouraged to identify, particularly through materiality assessments, the relevant information to be provided in order to take into account both the impact of non-financial matters on the issuer, as well as the impact of the issuer’s business on non-financial matters.<sup>21</sup>

#### **Changes introduced by the CSRD**

- The CSRD expressly formalises the requirement that a materiality assessment must be carried out based on “*double materiality*”: it requires that companies must provide a description of the process

---

<sup>19</sup> Articles 19 bis and 29 bis of Directive 2013/34/EU as amended by the CSRD; Delegated Regulation of 31 July 2023, ESRD 1, Section 3.

<sup>20</sup> It states that companies must publish “adequate information in relation to matters that stand out as being most likely to bring about the materialisation of principal risks of severe impacts, along with those that have already materialised. The severity of such impacts should be judged by their scale and gravity.” (Recital 8 to the NFRD) and “to the extent necessary for an understanding of the undertaking’s development, performance, position and impact of its activity” (Article 1 of the NFRD and Article L. 225-102-1 of the French Commercial Code).

<sup>21</sup> In its reports on CSR-related matters, the AMF encouraged issuers to adopt an order of priority for the sustainability topics based on the strategic priorities and on stakeholder expectations, notably through “materiality assessments”, in order to identify the CSR issues clearly (AMF Recommendation 2016-13; AMF Recommendation 2018-12; AMF Report on Social and Environmental Responsibility 2019). Moreover, Mazars notes that in 2022, 85% of the companies in its panel (CAC 40, Next 25 and Last 15 of the SBF 120) mention a materiality assessment in their non-financial statements. Mazars, Baromètre RSE 2022.



carried out to identify the information to be included in their sustainability statement; in the context of this process, the companies thus take account of short-, medium- and long-term horizons. This materiality assessment must be conducted in accordance with the sustainability-related standards (which provide the content and scope thereof), notably involving engagement with stakeholders.<sup>22</sup> In this respect, the very broad definition of stakeholders could, as the case may, give rise to debate.<sup>23</sup>

- The results of the materiality assessment will have an impact on the information to be disclosed: with the exception of the general disclosures provided for in the standards (*i.e.*, ESRS 2) and certain information concerning processes,<sup>24</sup> companies will be able to decide to omit information that they consider to be “*non-material*” in view of the results of their materiality assessment<sup>25</sup> (see below, regarding the transition plan for climate change mitigation).<sup>26</sup> Furthermore, as regards policies, actions and targets in relation to a sustainability matter or information from the value chain, a company may state that, and explain why, it cannot disclose the prescribed information relating to these material issues. It shall indicate a timeframe within which it aims to be able to publish this information.<sup>27</sup>

### 1.1.2 - Forward-looking information<sup>28</sup>

The NFRD did not specify whether the information to be disclosed had to be forward-looking or about past performance. After transposition into French law, the corresponding provision referred, however, to the disclosure of “*targets*” concerning the reduction of greenhouse gas emissions<sup>29</sup> (in this respect, the French transposition is considered “*ambitious*”<sup>30</sup>). The CSRD refers to both forward-looking and retrospective information. This change comes with the possibility of referring to uncertainties and disclosing estimates or data based on certain assumptions.

#### Changes introduced by the CSRD

- The CSRD expressly provides that forward-looking information should be provided. The sustainability standards establish a general framework for providing the information and require

---

<sup>22</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 3.

<sup>23</sup> See definition in Annex 2 of the Delegated Regulation of 31 July 2023.

<sup>24</sup> ESRSs related to Disclosure Requirement IRO-1, Description of the process to identify and assess material impacts, risks and opportunities.

<sup>25</sup> Even if such information is mentioned in the sustainability-related standards.

<sup>26</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 31. It should be noted however that if the company concludes that all of the sustainability standards relating to climate change (ESRS E1) can be waived, the company must disclose the details of its materiality assessment. If disclosure requirements under other ESRS are deemed not to be applicable, the company may (and this is therefore not an obligation) disclose a brief explanation of the conclusions of its materiality assessment (Delegated Regulation of 31 July 2023, ESRS 1, Section 32).

<sup>27</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 33.

<sup>28</sup> Articles 19a(2) and 29a(2) of Directive 2013/34/EU as amended by the CSRD; Recital 33 to the CSRD.

<sup>29</sup> Article R. 225-105 of the French Commercial Code.

<sup>30</sup> G. Leray and A.-M. Ilcheva, *Finance durable, climat et responsabilité (Sustainable finance, climate and liability)*, *Revue Lamy droit des affaires*, no. 189, 1 February 2023.



companies to describe the underlying assumptions and methods they used in order to produce the disclosed forward-looking information, as well as other factors that provide evidence that it reflects “the actual plans or decisions made by the undertaking”.<sup>31</sup>

- Companies are also expressly authorised to indicate that the forward-looking information is “uncertain”<sup>32</sup> and they must indicate when significant “uncertainties” exist regarding the quantitative metrics<sup>33</sup> and monetary amounts.<sup>34</sup> More generally, the standards allow companies to use assumptions and estimates in the sustainability statement.<sup>35</sup> It should however be kept in mind that the Delegated Regulation requires that the information disclosed must be (i) complete, (ii) neutral and (iii) accurate.<sup>36</sup>

- This forward-looking information, like all sustainability-related information disclosed pursuant to the CSRD, is to be certified by “sustainability auditors” (independent third-party audit firm or statutory auditors) on the basis of an auditing standard to be defined.<sup>37</sup> In this respect, it is interesting to note that the French *Haut Conseil du Commissariat aux Comptes* (H3C) (regulatory authority for statutory auditors in France) has published guidelines which are intended to contribute to the development of a professional practice standard that will, later on, be replaced by the future European assurance standard.<sup>38</sup>

- The sustainability standards also require that material errors in prior disclosures must be corrected, and, in line with case law concerning the disclosure of financial targets pursuant to Regulation no. 596/2014 on market abuse, the estimates and targets relating to sustainability which constitute

---

<sup>31</sup> Delegated Regulation of 31 July 2023, ESRS 1, Appendix B, Section QC 15. The standards provide that these details are intended to enable users of the sustainability statement to decide “whether [or not] to use” this forward-looking information.

<sup>32</sup> Delegated Regulation of 31 July 2023, ESRS 2, Sections 11-12. More generally, the standards provide that companies must disclose information concerning the most significant uncertainties affecting the quantitative metrics and monetary amounts reported in their sustainability statements. Delegated Regulation of 31 July 2023, ESRS 1, Section 88.

<sup>33</sup> “Metrics” are defined in Appendix 2 of the Delegated Regulation of 31 July 2023 as “qualitative and quantitative indicators that the undertaking uses to measure and report on the effectiveness of the delivery of its sustainability-related policies and against its targets over time”. “Metrics and targets” are defined more broadly as “the undertaking’s performance, including targets it has set and progress towards meeting them” (Delegated Regulation of 31 July 2023, ESRS 1, Section 12(d)). There is therefore a certain ambiguity regarding the definition of the term “metrics”.

<sup>34</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 88; Delegated Regulation of 31 July 2023, ESRS 2, Sections 11-12.

<sup>35</sup> “The use of reasonable assumptions and estimates, including scenario or sensitivity analysis, is an essential part of preparing sustainability-related metrics, [...] provided that the assumptions and estimates are accurately described and explained.” Delegated Regulation of 31 July 2023, ESRS 1, Section 89; See also Delegated Regulation of 31 July 2023, ESRS 2, Sections 11 et seq.

<sup>36</sup> Delegated Regulation of 31 July 2023, ESRS 1, Appendix B, Section QC 5.

<sup>37</sup> Articles 26a of Directive 2013/34/EU as amended by the CSRD; Recital 60 to the CSRD.

<sup>38</sup> H3C, *Avis technique sur la mission d’assurance limitée sur l’information en matière de durabilité (Limited Assurance Engagement on Sustainability Information - Guidelines)*, July 2023.





insider information must be updated as soon as new information becomes available.<sup>39</sup> It is interesting to note that in the sustainability standards a distinction is made between corrections of errors and changes in estimates; estimates may indeed need to be revised as additional information becomes known.<sup>40</sup>

### 1.1.3 - “Climate-Related Plans” and reduction of greenhouse gas emissions<sup>41</sup>

While the NFRD only provided for an obligation to provide information which concerned environmental matters generally, once transposed into French domestic law, the corresponding provision expressly required information relating to measures adopted to adapt to the consequences of climate change, greenhouse gas emissions (GHG) reduction targets, as well as an action plan to reduce certain emissions.<sup>42</sup> The French Environmental Code also provides that certain companies must draw up a GHG emissions reduction plan.<sup>43</sup> In addition, French companies (included listed ones) were widely encouraged to publish their climate strategy.<sup>44</sup> The CSRD formalises this obligation (which echoes the development of so-called “say on climate” resolutions<sup>45</sup>). It should be noted nevertheless that the standards relating to climate-related plans may be waived in certain cases.

#### **Changes introduced by the CSRD**

- The CSRD introduces more specific and more stringent obligations as it requires disclosure of the plans defined by the company “to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement, and the objective of achieving climate neutrality by 2050” and GHG reduction targets at least for 2030 and 2050. The purpose of these disclosures is to show the efforts

---

<sup>39</sup> Delegated Regulation of 31 July 2023, ESRS 1, Sections 96-101; ESRS 2, Sections 11-14. See Section 3 concerning application of Regulation no. 596/2014 on market abuse.

<sup>40</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 101.

<sup>41</sup> Article 19a(2), a, iii and Article 29a(2), a, iii of Directive 2013/34/EU as amended by the CSRD; Delegated Regulation of 31 July 2023, ESRS 1, Sections 96-101; ESRS E1.

<sup>42</sup> Articles R. 225-105 and L. 225-102-1 of the French Commercial Code which define the content of the Non-Financial Statement (*déclaration de performance extra-financière*).

<sup>43</sup> Article L. 229-25 of the French Environmental Code provides that private-law companies with more than five hundred employees must adopt a transition plan; Article R. 229-47 prescribes the details of its content.

<sup>44</sup> In particular, the AFEP-MEDEF Governance Code, in its version of December 2022, recommends that the board of directors adopt, further to a proposal from the management, a strategy regarding social and environmental responsibility, including “climate” aspects with specific targets. This strategy and its implementation must be presented to the general meeting of the shareholders at least every three years. See also the European Commission Guidelines on non-financial reporting: Supplement on reporting climate-related information, June 2019, and the AMF’s recommendations concerning shareholder dialogue on environmental and climate-related issues.

<sup>45</sup> HCJP, Rapport sur les résolutions climatiques “say on climate” (Report on “say on climate” resolutions), December 2022.



made by the company to mitigate its contribution to climate change and to adapt its strategy and its business model for the transition to a low-carbon economy. The sustainability standards also set out the details which must be included in the plan (notably the targets concerning GHG Scopes 1, 2 and 3 Emissions).

- However, as mentioned above, if the double materiality assessment carried out by the company shows that climate change is not material for the company, the company can waive the ESRSs relating to the transition plan.<sup>46</sup> Companies making use of this exemption must indicate if and when they will adopt such a plan.

## 1.2 - Obligations having an impact on company organisation

Certain provisions of the CSRD, although they impose primarily transparency obligations, will in practice also have an impact on the company's organisation and governance.

### 1.2.1 - Role of governance bodies and description of their respective expertise and remit<sup>47</sup>

The NFRD did not require companies to disclose details of the governance arrangements in place for monitoring non-financial reporting. However, the European Commission's (non-binding) guidelines stated that a company may "*explain the responsibilities and decisions of its management and board of directors, and the extent to which the allocation of resources is consistent with objectives, risk management and anticipated results*".<sup>48</sup> The AMF also recommended that issuers provide such information.<sup>49</sup> These recommendations were widely followed by French companies that had to publish a Déclaration de Performance Extra-Financière (DPEF) (Non-Financial Statement).<sup>50</sup>

#### **Changes introduced by the CSRD**

- The CSRD contains more stringent requirements since it expressly provides that companies must set out a description of the role of the administrative, management and supervisory bodies with regard to sustainability matters. They must also provide a description of their "*expertise and skills*" with respect to carrying out that role.<sup>51</sup>

---

<sup>46</sup> Delegated Regulation of 31 July 2023, ESRS 1, Sections 30-32.

<sup>47</sup> Article 19a(2)(c) and Article 29a(2)(c) of Directive 2013/34/EU as amended by the CSRD; Delegated Regulation of 31 July 2023, ESRS 2, Section 2. Delegated Regulation of 31 July 2023, ESRS 2, Appendix A, Section AR1 et seq.

<sup>48</sup> Section 4.2 of the European Commission's Guidelines on non-financial reporting, June 2017.

<sup>49</sup> See, in particular, the AMF Report on Corporate Social and Environmental Responsibility 2019; AMF Report on Corporate Governance 2022.

<sup>50</sup> Out of the panel of 100 large French companies mentioned above, 84 set out their governance practice regarding ESG, 55 in detail (Deloitte, EY, Medef, Reporting ESG des entreprises françaises : sont-elles prêtes pour CSRD ? (French Companies and ESG Reporting: are they ready for the CSRD?), 2022).

<sup>51</sup> Article 19a(2)(c) and Article 29a(2)(c) of Directive 2013/34/EU as amended by the CSRD; Delegated Regulation of 31 July 2023, ESRS 1, Section 2.



- In particular, the audit committee will have a more important role as it will be responsible for the quality of the sustainability information and it must explain how it contributed to ensuring the integrity of the sustainability reporting and specify the role it played in this process.<sup>52</sup>

- In addition, sustainability standards require disclosure of details of the actions taken to ensure due diligence is carried out. It is nonetheless stated that they “do not require any specific actions and do not extend the role of the administrative, management and supervisory bodies provided for by other legislation or regulations.”<sup>53</sup>

### **1.2.2 - Detailed information on the business model and the strategy<sup>54</sup>**

The NFRD required that companies provide only a brief description of their business model, without necessarily linking it to sustainability matters.

#### **Changes introduced by the CSRD**

The new directive now requires that information is provided on the level of resilience of the company’s business model and strategy as regards the risks related to sustainability matters, as well as the opportunities sustainability matters could offer the company. This could therefore encourage companies to adapt their strategies to address these issues. The sustainability standards provide some further detail as the companies must notably indicate how the interests and views of the stakeholders are taken into account in the strategy and business model.<sup>55</sup>

### **1.2.3 - Information concerning the value chain<sup>56</sup>**

In the Recitals to the NFRD there is mention of an obligation that the non-financial statement should include information “regarding, where relevant and proportionate, [the] supply and subcontracting chains [of the undertaking], in order to identify, prevent and mitigate existing and potential adverse impacts”. These items are specified in the CSRD which expressly refers to the “value chain”.

#### **Changes introduced by the CSRD**

- The CSRD requires that reported sustainability information should now include information on the impacts relating to the undertaking’s whole value chain (including its own operations,

---

<sup>52</sup> Article 34 and Article 39 of Directive 2013/34/EU as amended by the CSRD.

<sup>53</sup> Delegated Regulation of 31 July 2023, ESRS 2, Section 33.

<sup>54</sup> Article 19a(2)(a)(ii) and Article 29a(2)(a)(ii) of Directive 2013/34/EU as amended by the CSRD; Delegated Regulation of 31 July 2023, ESRS 2, Section 3.

<sup>55</sup> Delegated Regulation of 31 July 2023, ESRS 2, Section 37 et seq.

<sup>56</sup> Article 19a(3) and Article 29a(3) of Directive 2013/34/EU as amended by the CSRD; Recitals 33, 46 and 53 to the CSRD.



its products and services, its business relationships and its supply chain, where applicable). The information should therefore cover EU Member States as well as third countries if the value chain extends beyond the EU. These requirements are in line with those of the proposal for a directive on corporate sustainability due diligence (CS3D) and clarity will be needed as regards the concurrent application of both these texts.

- It is stated in the sustainability standards that the company must use “*reasonable efforts*” to collect information about its value chain.<sup>57</sup> The standards acknowledge however that the capacity of a company to collect this information may vary and notably depends on the relations it has with the parties in its value chain (level of control, contractual arrangements, *de facto* power exercised over the parties in question or the power exercised over it by such parties).<sup>58</sup> The standards therefore provide that in the event that it is not possible to collect the required information, the companies may use estimates or “*other proxies*” by using “*reasonable and supportable information*” that is available to the company, “*without undue cost or effort*”.<sup>59</sup>

- Besides, the European legislator, aware of the challenging task that companies have ahead of them, has provided for a three-year period during which, “*in the event that not all the necessary information regarding its upstream and downstream value chain is available, the undertaking shall explain the efforts made to obtain the necessary information about its upstream and downstream value chain, the reasons why not all of the necessary information could be obtained, and its plans to obtain the necessary information in the future*”.<sup>60</sup>

- Companies must provide information concerning any actions taken by them to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts and the result obtained in this respect concerning the value chain.<sup>61</sup>

## **1.2.4 - Business conduct and corporate culture:<sup>62</sup> new disclosures introduced by the CSRD**

### **Changes introduced by the CSRD**

The sustainability standards require that a company describe its policies regarding responsible business conduct and describe how it builds its corporate culture. Companies must therefore notably provide a description of (i) the mechanisms for identifying, reporting and investigating

---

<sup>57</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 69.

<sup>58</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 68.

<sup>59</sup> Delegated Regulation of 31 July 2023, ESRS 1, Section 69; ESRS 1, AR 17.

<sup>60</sup> Delegated Regulation of 31 July 2023, ESRS 1, Sections 132-133.

<sup>61</sup> Article 19a(f)(iii) and Article 29a(f)(iii) of Directive 2013/34/EU as amended by the CSRD.

<sup>62</sup> Delegated Regulation of 31 July 2023, ESRS G1.



concerns about unlawful behaviour or behaviour in contradiction with its code of conduct (indicating whether such mechanisms enable reporting by stakeholders), (ii) mechanisms to protect whistleblowers, (iii) its relations with its suppliers, (iv) its anti-corruption procedures.

It can also be noted that an employee information and consultation procedure has been introduced so that employee representatives are informed of, and have the opportunity to discuss, “*relevant information and the means of obtaining and verifying sustainability information*”.

## II. Current French liability regime concerning CSR information is not affected

The CSRD does not seek to create a new civil liability regime for companies and their directors based on the new sustainability reporting requirements.

In the public consultation launched by the European Commission concerning the revision of the NFRD, only a few participants (out of a total of 588) highlighted the necessity for provisions concerning civil liability. This point was not, moreover, mentioned in the summary report of the public consultation prepared by the Commission.<sup>63</sup> Similarly, in the recitals to the directive no reference is made to the necessity to provide for a specific regime for civil liability.<sup>64</sup>

Furthermore, the wording of Article 33 of Directive 2013/34/EU, as amended by the NFRD, is not altered but is simply extended to provide for the ESRs (as shown in the following bold and underlined text):<sup>65</sup>

*“Member States shall ensure that the members of the administrative, management and supervisory bodies of an undertaking, acting within the competences assigned to them by national law, **have collective responsibility for ensuring that the following documents are drawn up and published in accordance with the requirements of this Directive [Directive 2013/34 providing for sustainability information] and, where applicable, with [...] the sustainability reporting standards referred to in Article 29b or Article 29c of this Directive, and with the requirements of Article 29d of this Directive:***

*a) the annual financial statements, the management report and the corporate governance statement when provided separately;*

---

<sup>63</sup> Contributions to the public consultation on reporting by companies of sustainability-related information; European Commission, Summary Report of the Public Consultation on the Review of the Non-Financial Reporting Directive.

<sup>64</sup> Only Recital 59 refers to senior executives’ responsibility, but this is merely to introduce the few adjustments to be made to Article 33 of Directive 2013/34/EU.

<sup>65</sup> A similar provision is set out in Article 40c for third-country undertakings.



*b) the consolidated financial statements, the consolidated management reports and the consolidated corporate governance statement when provided separately.”*

In addition, on the basis of the English version of the text it seems that these provisions are more to set out the role of the executives rather than the conditions governing their civil liability (the English version uses the term “*responsibility*” and do not make reference to any potential “*liability*”). On the other hand, the directive clearly refers to the notion of *responsabilité civile* (*civil liability*) when it mentions the sanctions applicable to the statutory auditors and the sustainability auditors.<sup>66</sup>

It is interesting to note, moreover, that the civil liability of the company is not mentioned in the directive.

The requirements of French law relating to the relevant qualifying elements, *i.e.*, a loss or damage (*préjudice*) and a causal link (*lien de causalité*), in order to establish civil liability before the courts remain intact.<sup>67</sup> Therefore, despite the increase in the volume and detail of the information disclosed increasing the companies’ exposure, and which could, in theory, result in potential litigants being tempted to bring claims against them on the grounds of the sustainability information disclosed under the CSRD, such legal actions will remain strictly governed by the regime of civil liability as provided under ordinary law. This regime requires proof that the following three criteria have been cumulatively met: (i) there is a triggering factor (*fait générateur*) (fault/misconduct), (ii) there is a loss or damage (*préjudice*) and (iii) there is a causal link (*lien de causalité*) between the two.<sup>68</sup>

It should also be remembered that shareholders can bring an action on behalf of the company seeking to obtain that the senior executives, including board directors, be held liable and ordered to pay damages to the company (*action sociale ut singuli*, *i.e.*, a derivative action).<sup>69</sup> Claims for damages brought personally by shareholders require a personal loss (which is separate from the loss that may be suffered by the company), which is rare in practice except in matters regarding false or misleading information. Lastly, third parties (non-shareholders) must prove the existence of a fault which was (i) intentional, (ii) particularly serious, and (iii) incompatible with the normal performance of corporate duties (*i.e.*, a fault unrelated to the performance of an executive’s duties (“*séparable des fonctions*” de dirigeant)).

---

<sup>66</sup> Article 28a of Directive 2006/43/EU as amended by the CSRD.

<sup>67</sup> HCJP, *Rapport sur l’introduction de règles spécifiques aux personnes morales dans le droit de la responsabilité extracontractuelle* (Report on the introduction into French tort law of rules specifically governing legal entities), October 2018.

<sup>68</sup> See HCJP *Rapport sur la responsabilité des sociétés et de leurs dirigeants en matière sociale et environnementale* (Report on corporate liability and directors’ liability in social and environmental matters), June 2020; F. Danos and L. Yemal, *La nouvelle directive CSRD en matière d’information de durabilité* (The new CSRD and sustainability-related information), BRDA, 2023, no. 4, p. 25 et seq.

<sup>69</sup> A claim brought on behalf of the company by the senior executives (*action ut universi*) is only really conceivable if it were to be brought against former executives.



Therefore, while it is acknowledged that for a fault to be deemed to exist it must be proven “*that a duty or an obligation provided for by the legal order has not been complied with*”,<sup>70</sup> Articles 1240 and 1241 of the French Civil Code (formerly Articles 1382 and 1383) have already enabled the courts to order damages for faults of carelessness or negligence without it being necessary for a legal or regulatory provision describing a precise duty or conduct to have been breached. In this respect, publication of inaccurate sustainability information and the failure to meet commitments given on a voluntary basis could already constitute misconduct (*fautes*) which could result in companies and their executives incurring liability.<sup>71</sup>

With the adoption of the Directive, companies and their directors will consequently have to demonstrate that they acted diligently in order to comply with these new requirements regarding the information to be disclosed and the commitments that will be adopted. Compliance with the sustainability standards – which lay down a detailed common framework for the disclosure by companies of their commitments – will therefore be taken into consideration in the analysis of their actions. In addition, the discussions and exchanges with the sustainability auditors as part of the certification process will help companies<sup>72</sup> in determining how to implement the CSRD. The sustainability standards are also expected to be supplemented by non-binding guidelines prepared by EFRAG,<sup>73</sup> including a guide on materiality assessment methods.

The precautions taken in preparing the sustainability statement, including the forward-looking information and the assumptions and estimates and, if any, uncertainties on which it is based, would be details that should be taken into account in the event of legal action. The ESRs indeed acknowledge that the sustainability statements could contain errors. When these errors are “*material*”, they must be corrected.<sup>74</sup> Similarly, the standards state that estimates may be revised in the event additional information becomes known.<sup>75</sup>

---

<sup>70</sup> G. Viney, P. Jourdain, S. Carval, *Traité de droit civil - Les conditions de la responsabilité (Treaty on civil law - Conditions for liability)*, 4th edition, LGDJ 2013, para. 445.

<sup>71</sup> HCJP, *Rapport sur la responsabilité des sociétés et de leurs dirigeants en matière sociale et environnementale (Report on corporate liability and directors' liability in social and environmental matters)*, June 2020.

<sup>72</sup> Including those that must disclose non-financial information for the first time.

<sup>73</sup> European Commission, *Questions and Answers on the Adoption of European Sustainability Reporting Standards*, 31 July 2023.

<sup>74</sup> The “*material*” nature of an error is not however defined in the ESRs. *Delegated Regulation of 31 July 2023, ESR 1, Section 96*; See also *Delegated Regulation of 31 July 2023, ESR 2, Section 14*.

<sup>75</sup> These provisions apply therefore to both listed and non-listed companies. However, they will have different time limits for disclosing these revised estimates. Listed companies must disclose these revised estimates “*as soon as possible*” in accordance with the Regulation on market abuse when these revised estimates constitute insider information (see below). As the sustainability information is included in the management report presented to the shareholders at general meetings, it is unclear what the timeframe will be for non-listed companies to disclose such revised estimates when they become apparent during the intervening period between two general meetings. The Commission seems to have taken note of this difficulty for non-listed companies as in the final version of the *Delegated Regulation on the ESRs*, it no longer requires that the estimates be revised “*as soon as*” additional information becomes available. *Delegated Regulation of 31 July 2023, ESR 1, Section 101*.



Lastly, as previously, any interested party may apply to the courts for an injunction ordering the directors, subject to a periodic fine in the event of non-compliance, to publish the information that must be included in the sustainability statement.<sup>76</sup>

With regard to these factors and potential application of the CSRD to non-EU companies,<sup>77</sup> it cannot be ruled out that certain foreign companies will take the constraints of the CSRD into consideration when contemplating setting up in the European Union. Particular attention should be paid to how the CSRD should be applied in conjunction with foreign requirements,<sup>78</sup> particularly those of the U.S. Securities and Exchange Commission (SEC).<sup>79</sup>

### **Points to note concerning the climate-related transition plan**

As mentioned, the CSRD requires that in-scope companies disclose a climate-related transition plan,<sup>80</sup> although the Delegated Regulation of 31 July 2023 provides that the ESRs may be waived if the materiality assessment concludes that climate change is not a material sustainability matter for the company.<sup>81</sup>

Even if meeting the emissions reduction targets included in the transition plan is indeed subject to annual monitoring, companies cannot be bound by an “*absolute obligation*” (*obligation de résultat*) in this respect on the grounds of the CSRD,<sup>82</sup> as the CSRD is solely intended to organise the disclosure of specific information on the efforts actually made by the relevant companies as regards sustainability.<sup>83</sup> However, these companies must document the resources employed to implement

---

<sup>76</sup> This option is available as the sustainability statement forms part of the management report.

<sup>77</sup> Non-EU companies with at least one branch (having generated net turnover of more than €40 million) or a subsidiary in the EU and generating net turnover of at least €150 million in the EU shall fall within the scope of the CSRD (see Article 40a of Directive 2013/34/EU as amended by the CSRD). The extraterritorial effects of the CSRD also result from the fact that in-scope companies have to include their operations and business relations carried on outside of the EU in their sustainability statement.

<sup>78</sup> In March 2022 the SEC proposed standards with the aim of providing a framework for the disclosures to be made by issuers on their management of climate-related risks as well as their GHG emissions (Press Release, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors [2022-46], 21 March 2022). This proposal has not yet been formally adopted.

<sup>79</sup> R. Fox, S. Toms, and J. Gim, *The EU’s New ESG Disclosure Rules Could Spark Securities Litigation in the US*, Harvard Law School Forum on Corporate Governance, September 2023.

<sup>80</sup> See Section 1.

<sup>81</sup> Delegated Regulation of 31 July 2023, ESRs 1, Sections 30-32.

<sup>82</sup> The ESRs state that companies should include estimates of future emissions likely to be caused by their key assets and products in the Transition Plan (ESRS E1 Climate Change, Disclosure Requirement E1-1 – Transition Plan for Climate Change Mitigation, Section 16).

<sup>83</sup> The CSRD indeed relies on the principle of “*due diligence*” (Recitals 7, 30 and 31), implying only a “*best endeavours obligation*” (*obligation de moyens*). Concerning the reduction of GHG emissions, the Directive provides that the information to be disclosed concerns only the “*efforts made by companies*” (Recital 47). The ESRs confirm that there is no “*absolute obligation*” (*obligation de résultat*) relating to the reduction of GHG emissions (ESRS E1 Climate Change, Disclosure Requirement E1-1 – Transition Plan for Climate Change Mitigation, Section 16).





their plan and publish a “*description of the outcome of the actions for climate change mitigation*”,<sup>84</sup> and the emissions reduction targets must be reassessed every five years.<sup>85</sup>

In addition, despite international initiatives to encourage precise benchmarking or to validate companies’ commitments,<sup>86</sup> in the absence of a scientific consensus and without sector-specific criteria, it could be difficult for claimants to argue that the plan announced by the company is not compatible with achieving the overall goals of the Paris Agreement as provided for by the CSRD,<sup>87</sup> save in the event that the reduction targets announced and/or the means to be put in place to achieve them are clearly unrealistic. The ESRs indeed lay down a precise framework for drawing up a transition plan.

As mentioned above, companies will describe the assumptions on which their plan is based and the uncertainties surrounding their projections.

Lastly, aware that implementing measures for compliance with these obligations is likely to pose certain difficulties, the European Commission has set out transitional provisions; notably, in the first year:<sup>88</sup>

- no company is under an obligation to disclose information on the anticipated financial effects from environmental issues (ESRS E1 to E5); and
- companies with less than 750 employees can postpone disclosure of information relating to their Scope 3 indirect GHG emissions.

It should be noted that French companies listed in the United States will also be subject to the rules of the U.S. Securities and Exchange Commission (SEC) on disclosures relating to climate change. As proposed, these rules would require that a French company listed in the United States provide additional information on the transition plan, if the company has adopted one. A French company listed in the United States which has drawn up a transition plan in accordance with the provisions

---

<sup>84</sup> Delegated Regulation of 31 July 2023, ESRS E1-3.

<sup>85</sup> Delegated Regulation of 31 July 2023, ESRS E1-4.

<sup>86</sup> Benchmarking and harmonisation initiatives: United Nations Information Note on Climate Change and the Guiding Principles on Business and Human Rights; Report from the United Nations’ High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities - Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions; ADEME, Assessing Low Carbon Transition (ACT); United Nations - Race to Zero. World Benchmarking Alliance (WBA); SBTi; Climate Action 100+; CCNUCC.

<sup>87</sup> The obligations provided for by the ESRs with respect to the transition plan are extensive, notably as regards the information to be disclosed by the company on its mitigation efforts in order to “ensure that its strategy and business model are compatible with the transition to a sustainable economy, and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and with the objective of achieving climate neutrality by 2050”, Delegated Regulation of 31 July 2023, ESRS E1-1.

<sup>88</sup> Delegated Regulation of 31 July 2023, ESRS 1, Appendix C.



of the CSRD (and the future CS3D) would therefore be obliged to provide additional information that US companies do not have to provide,<sup>89</sup> as no such obligations exist as far as they are concerned, and this could expose these French companies to legal actions in the United States on the basis of the commitments set out in their publicly disclosed information on the transition plan.<sup>90</sup>

### III. Penalties for offences and breaches of stock market regulations in the light of the disclosure requirements imposed by the CSRD

The CSRD increases the disclosure and transparency obligations incumbent upon in-scope companies, and the number of companies falling within its scope has increased considerably.<sup>91</sup> As a result of this heightened ambition there is automatically an increase in the number of standards, which if not complied with could give rise to penalties under stock market regulations and securities law more generally.<sup>92</sup>

Indeed, “*this directive is an essential element for achieving the European Union’s objective of transitioning to a sustainable economy. It significantly increases the sustainability reporting requirements for companies and will ensure harmonisation of this process across the range of in-scope companies*”.<sup>93</sup> As it imposes additional non-financial transparency obligations, the CSRD is

---

<sup>89</sup> SEC Release no. 33-11042 (21 March 2022), Proposed Item 1501(c)(1) to Regulation S-K under the U.S. Securities Exchange Act of 1934, as amended.

<sup>90</sup> R. Fox, S. Toms, and J. Gim, *The EU’s New ESG Disclosure Rules Could Spark Securities Litigation in the US*, Harvard Law School Forum on Corporate Governance, September 2023.

<sup>91</sup> See, in particular, A. Bernardi, *Entrée en vigueur de la directive CSRD - Des exigences de reporting ESG renforcées pour près de cinquante mille entreprises européennes (Entry into force of the CSRD - ESG reporting requirements reinforced for nearly fifty thousand European companies)*, Cahiers de droit de l’entreprise, no. 1, January-February 2023, editorial 1.

<sup>92</sup> T. Doré and L. Thébault, *Le double enjeu de la CSRD pour les acteurs financiers, producteurs et utilisateurs d’informations en matière de durabilité (The two-fold challenge for financial players, producers and users of sustainability-related information)*, Revue de Droit bancaire et financier, no. 2, March-April 2023, Study 6. The authors point out that the content of the transparency obligations introduced by the CSRD “requires that in-scope companies disclose information relating to the negative impacts of their business, as well as the sustainability-related risks and opportunities for their business (double materiality principle) and is based on the three pillars of ‘ESG’. One of the major innovations introduced by the CSRD is the obligation to disclose ‘the plans of the undertaking, including implementing actions and related financial and investment plans, to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement [...], the objective of achieving climate neutrality by 2050 [...] and, where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities’. Companies must also disclose information relating to their due diligence processes with reference to EU texts and therefore to the future directive on due diligence. Lastly, the European Commission is to publish, with the assistance of EFRAG, sustainability reporting standards. In this respect, EFRAG has adopted an approach involving publication of sector-agnostic standards (cross-cutting standards), sector-specific standards (which should include financial institutions), standards specific to certain entities (such as SMEs).”

<sup>93</sup> Explanatory Memorandum, Draft law introducing various provisions to adapt French law to comply with EU law in the fields of the economy, healthcare, work, transport and agriculture, Text no. 140 (2022-2023) of Mr Bruno Le Maire, French Minister for the Economy, Finance and Industrial and Digital Sovereignty, filed in the French Senate on 23 November 2022. See also, Impact Study, Draft law introducing various provisions to adapt French law to comply with EU law in the fields of the economy, healthcare, work, transport and agriculture, 22 November 2022, p. 92.



likely to enable the regulator to issue penalties not only for the failure to disclose the required non-financial information but also for the disclosure of information which does not comply with the obligations provided for in the Commission Delegated Regulation of 31 July 2023.<sup>94</sup>

The French Financial Markets Authority (*Autorité des Marchés Financiers - AMF*) has moreover announced that it will play an important role in the implementation of the non-financial reporting mechanism. The AMF has indeed set itself the objective of “*integrating the challenges of sustainable finance and the response to climate change into all of its missions of regulation, supervision and support*”.<sup>95</sup> It has notably integrated the review of non-financial disclosures into its Strategic Orientations 2023-2027 and expressly stated that it would “*carry out reviews and topic-based investigations and [would] use, if necessary, punitive measures, particularly when investors are adversely affected*”.<sup>96</sup> Lastly, it regularly mentions the fight against greenwashing as being one of its priorities.<sup>97</sup>

In this respect, it should be noted that the issuers shall remain subject to the provisions of Regulation 596/2014 on market abuse (MAR):

**Disclosure to the public as soon as possible of inside information:** Article 17(1) of MAR provides that issuers must inform the public as soon as possible of inside information<sup>98</sup> which directly concerns them.<sup>99</sup> This obligation remains applicable for sustainability-related information which constitutes inside information. In this sense, it is fully acknowledged that sustainability-related information can have an influence on the share price.<sup>100</sup> Thus, in the event that an issuer were to become aware that it is not going to be able to meet certain projections published concerning sustainability-related information, it will have to issue a press release to inform the market of this

---

<sup>94</sup> Commission Delegated Regulation of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards.

<sup>95</sup> J.J. Ansidej, *L'AMF face aux enjeux de la finance durable*, in “*La finance au service du climat*” (*The AMF and the challenges of sustainable finance*, in “*The role of finance in support of climate*”) (Dossier), *Bulletin Joly Bourse*, no. 2, 2021, p. 49.

<sup>96</sup> AMF, *Strategic Orientations 2023-2027*. It can also be noted that in its response to the European Commission’s public consultation on the revision of the NFRD, the AMF indicated that the changes should be accompanied by an effective system for enforcement.

<sup>97</sup> AMF *Action Priorities for 2022 and AMF Action Priorities for 2023*.

<sup>98</sup> i.e., “*information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments*”.

<sup>99</sup> Subject to being able to justify the conditions for postponing public disclosure of inside information. Article 17(4) of the Market Abuse Regulation.

<sup>100</sup> It has thus been noted, “*more than a downwards revision of a profit forecast, matters relating to sustainable investment provoke spectacular stock market movements. The world has changed. (F. Monnier, Quand l’extrafinancier prend le pouvoir (When non-financial factors take over), Les Echos Investir, 12 November 2022, p. 2). The article provides various recent examples.*”



(*ESG warning* or *sustainability warning*)<sup>101</sup> when such information qualifies as inside information, as is frequently the case in financial matters (*profit warning*). As they are (very) long-term commitments, it can be noted that it may be difficult to identify the exact moment when the information relating to the impossibility of reaching the projections becomes precise enough for it to constitute inside information.

**False or misleading information:** pursuant to Article 12(1)(c) and Article 15 of MAR, it is an offence to disseminate information which gives or which is likely to give false or misleading signals.<sup>102</sup> This point therefore requires that the issuers put stringent verification processes in place to ensure the quality of the sustainability information they disclose, and all the more so when disclosing forward-looking information required by the CSRD.<sup>103</sup> They will involve the audit committee, in accordance with the new provisions of the CSRD<sup>104</sup> (as is moreover the case regarding financial information<sup>105</sup>). In addition, the AMF General Regulations state that information disclosed to the public must be accurate, precise and fairly presented.<sup>106</sup> Case law concerning the disclosure to the public of forward-looking financial information provides several examples of where issuers have been ordered to pay fines for having failed to comply with these provisions.<sup>107</sup> It should also be noted that the deliberate dissemination of false or misleading information can, as provided for in Article L. 465-3-2 of the French Monetary and Financial Code, give rise to criminal sanctions for the offence consisting of providing false information to the market.

Issuers will be able to use the mitigation possibilities introduced by the ESRs:<sup>108</sup> possibility of mentioning that the information is subject, as the case may be, to uncertainties, includes estimates and/or is based on certain assumptions, and the possibility of correcting errors contained in earlier disclosures. In one of its decisions, the AMF Enforcement Committee indeed acknowledged that issuers may argue that they used a certain wording to moderate their statements. In that particular case,

---

<sup>101</sup> See, in this sense, A. Gaillard, *Les enjeux de responsabilité à l'égard des régulateurs en matière d'information et de reporting ESG (Liability vis-à-vis the regulators regarding disclosures and reporting)*, *Revue banque et droit*, no. 210, July 2023. For a recent example outside France, see *Rio Tinto, 2023 interim results*, 26 July 2023.

<sup>102</sup> See also Article L. 621-15 of the French Monetary and Financial Code.

<sup>103</sup> See Section 1.

<sup>104</sup> See Section 1.

<sup>105</sup> Article L. 823-19 of the French Commercial Code.

<sup>106</sup> Article 223-1 of the AMF General Regulations.

<sup>107</sup> See, in particular, AMF Enforcement Committee decisions: SAN-2006-17 (artificial reduction of a loss); SAN-2007-01 (use of different concepts or references so that the actual evolution of the company's business performance could not be assessed with sufficient accuracy); SAN-2007-s07 (vague information and optimistic forecast without justification); Paris Court of Appeal, decision no. 19-21808 and SAN-2022-01 (detail as to the nature of provisional information). It is also interesting to note that Article 223-1 of the AMF General Regulations has remained in force despite adoption of Article 12(1)(c) and Article 15 of MAR when these provisions relate to very similar matters. AMF Public Consultation on amendments to the AMF General Regulations and "Issuer" official guidance with a view to the entry into force of the Market Abuse Directive, 20 April 2016; see, in this sense, SAN-2017-09.

<sup>108</sup> See Section 1.



an issuer had indicated that there was “*inherent uncertainty in achieving the operating budget and the financing plan*” and that “*in the event of not attaining the assumptions, the valuation of the assets and liabilities may prove to be inappropriate*”.<sup>109</sup> The Enforcement Committee took these factors into account in order to refuse to sanction the issuer. In this way, as already mentioned, issuers may implement certain precautions to be more specific in their sustainability disclosures, within the limit of information which may be subject to “*uncertainties*”. More than mere “*standard*” wording, details should be given, in accordance with sustainability-related standards,<sup>110</sup> details of the uncertain or estimated data, notably stating the sources of these uncertainties as necessary and the underlying assumptions.

More generally, besides MAR, the information disclosed by issuers may result in sanctions on the grounds of Article L. 621-15, by reference to Article L. 621-14, II, of the French Monetary and Financial Code. The AMF may indeed issue sanctions against the authors of “*breaches of the obligations resulting from European regulations, legislative or regulatory provisions or professional rules aimed notably at protecting investors from insider dealing, market manipulation [...] or any other breach likely to undermine investor protection or the orderly functioning of the market [...]*”,<sup>111</sup> to the extent that these breaches relate to a financial instrument.

In other words, the regulator may sanction breaches of the French Commercial Code,<sup>112</sup> or EU regulations, if these breaches concern a financial instrument and are of a nature which could undermine investor protection or the orderly functioning of the market.

In addition, breach of the obligations contained in EU regulations, and therefore the Delegated Regulation containing the ESRs, could also be sanctioned by the AMF Enforcement Committee on the grounds of Article L. 621-15, II, g) of the French Monetary and Financial Code. This article provides that the AMF Enforcement Committee may issue a sanction against “*any other person for breach of the obligations resulting from European regulations falling within the scope of the AMF’s remit*”.

---

<sup>109</sup> SAN-2017-15.

<sup>110</sup> Delegated Regulation of 31 July 2023, ESRs 1, Section 87 et seq.

<sup>111</sup> With reference to issuers’ commitments or declarations on social and environmental matters, the HCJP points out in one of its reports that “*an issuer that disseminates information giving false or misleading signals about its situation or prospects in the declarations that it makes or in the context of the adoption of (or references to) its raison d’être set out in its articles of association, may be ordered by the AMF Enforcement Committee to pay a fine, and may even be subject to a criminal sanction for the offence of providing false information to the market. However, it is unlikely that this information could be deemed to constitute market manipulation. It would be necessary to prove that such information gives misleading signals regarding the offer or the demand, or sets the price of the relevant financial instrument at an abnormal level. On the other hand, it could constitute a breach of the disclosure obligation which may be sanctioned on the grounds of Article L. 621-15, by reference to Article L. 621-14, II, of the French Monetary and Financial Code which refers to ‘any other breach which could undermine investor protection’*” (HCJP, *Rapport sur la responsabilité des sociétés et de leurs dirigeants en matière sociale et environnementale (Report on corporate liability and directors’ liability in social and environmental matters)*, 19 June 2020, p. 19).

<sup>112</sup> For example, the decision issued by the AMF Enforcement Committee on 5 July 2018 regarding the companies Cibox Interactive and AI Investment, and Mr A and Mr B.



These prerogatives are not new.

The changes that are going to result from the CSRD – sustainability reporting standards will notably have to ensure “*the quality of reported information, by requiring that it is understandable, relevant, verifiable, comparable and represented in a faithful manner*”<sup>113</sup> – should allow the AMF to sanction breaches of these obligations.

Moreover, Recital 9 to the CSRD states that the main users of sustainability-related information published in companies’ annual reports are “*investors, including asset managers, who want to better understand the risks and opportunities that sustainability issues pose for their investments and the impacts of those investments on people and the environment*”. Recital 11 also mentions that “*there has been a very significant increase in demand for corporate sustainability information in recent years, especially on the part of the investment community. That increase in demand is driven by the changing nature of risks to undertakings and growing investor awareness of the financial implications of those risks*”. In view of the growing relevance of sustainability-related matters, Recital 21 considers that sustainability information is important for “*investor protection*”.<sup>114</sup>

Lastly, besides claims based on breaches of securities law rules, it cannot be excluded that actions could be brought on the grounds of special regimes, including against non-listed companies, for false or misleading information (*e.g.*, advertising, misleading commercial practices, unfair competition).<sup>115</sup> In this respect, it may be worth examining the impact of Article L. 121-2 of the French Consumer Code which provides, since the French Law on Climate and Resilience of 22 August 2021, that misleading commercial practices concern all essential characteristics of the “*product or service*” and “*the scope of the commitments of the company, notably regarding environmental matters*”. Although the information disclosed under the CSRD is intended to inform shareholders and stakeholders (defined broadly) and not to constitute communications on the basis of which relations between a company and consumers are established with a view to proposing products or services to them, companies should be particularly attentive when disclosing this information in order to avoid any ambiguity.

---

<sup>113</sup> Article 29b of the CSRD.

<sup>114</sup> “*Considering the growing relevance of sustainability-related risks and taking into account that small and medium-sized undertakings whose securities are admitted to trading on a regulated market in the Union comprise a significant proportion of all undertakings whose securities are admitted to trading on a regulated market in the Union, in order to ensure investor protection, it is appropriate to require that also small and medium-sized undertakings, except micro undertakings, whose securities are admitted to trading on a regulated market in the Union disclose information on sustainability matters.*”

<sup>115</sup> See, in particular, HCJP, *Rapport sur la responsabilité des sociétés et de leurs dirigeants en matière sociale et environnementale (Report on corporate liability and directors’ liability in social and environmental matters)*, June 2020.



## ***ANNEX 1***

### *Composition of the working group*



## COMPOSITION OF THE WORKING GROUP

### Corporate Sustainability Reporting Directive (CSRD)

#### CHAIRMAN

- **Didier Martin**, *Avocat*, Bredin Prat

#### RAPPORTEUR\*

- **Guillaume Agbodjan**, *Avocat*, Bredin Prat

#### PARTICIPANTS

- **Charlotte Ast**, Deputy to the Head of the Department for Sustainable Finance, Company Law, Accounting and Governance - The French Treasury
- **Odile de Brosses**, Head of Legal, AFEP
- **Pierre-Henri Conac**, Professor at Luxembourg University
- **Benjamin Dartevelle**, Head of the Department for Sustainable Finance, Company Law, Accounting and Governance - The French Treasury
- **Sylvie Delacourt**, Magistrate chargée de mission assigned as legal expert to the Department for Legal Affairs at the Banque de France
- **Olivier Douvreur**, French Ministry of Justice
- **France Drummond**, Professor at Paris University-Panthéon-Assas
- **Sophie Duclos**, French Ministry of Justice
- **Clémence Fallet**, *Avocate*, Bredin Prat
- **Robin Fournier**, Deputy to the Head of the Department for Sustainable Finance, Company Law, Accounting and Governance - The French Treasury
- **Gérard Gardella**, General Secretary, HCJP
- **Aurélien Hamelle**, General Counsel & Head of M&A, TotalEnergies
- **Françoise Labrousse**, *Avocate*, Jones Day
- **Brice Laniyan**, Notre Affaire à Tous
- **Jules Lechêne**, HCJP

\* with the help of Karen Clark-Reitenbach for the translation of this report.





- **Geoffroy Lelasseux**, In-house legal counsel, AMF
- **Pauline Joly**, *Avocate*, Bredin Prat
- **Paul Mougeolle**, In-house legal counsel, Notre Affaire à Tous
- **Océane Margaron**, In-house legal counsel, AMF
- **Rémi Noualhac**, Head of Legal - Sustainability, TotalEnergies
- **Eole Rapone**, *Avocat*, Emeriane Avocats
- **Pierre Rohfritsch**, Head of the Department for Company Law and Auditing - French Ministry of Justice
- **Vincent Salafa**, French Ministry of Justice
- **Tom Vauthier**, *Avocat*, Bredin Prat