

**From non-financial information to
corporate sustainability information:
formal or substantial evolution?**

***De l'information non financière à l'information
en matière de durabilité des entreprises :
évolution formelle ou substantielle ?***

Rémi DALMAU

*Professeur à l'Université de Lorraine (Nancy)
Institut François Gény*

I will not go back over what Manon Desbat has presented in full detail about the change in terminology.¹ The change in terminology from “extra-financial” (see NFRD regulation) to “sustainability” is not simply a change in vocabulary but represents a relatively substantial development. I would like to concentrate my remarks on the aims of CSRD. The purpose of this new directive is to broaden the scope of the reporting obligations and create a standardized framework for reporting. Thus, I will simply present two sets of comments.

Firstly, the “duty to report”² that we are accustomed to seeing in the existing non-financial reporting is considerably more thorough. This evolution brought about by the CSRD could have a significant impact on the business approach. It is hoped that the new reporting requirements will lead the companies concerned to “do” things differently. And secondly, the other main objective of CSRD is to standardize the communication of sustainability information to render it comparable and usable by the stakeholders and even the States.

In other words, the CSRD should encourage companies to “do” things differently (I), and the standardization of the information will have consequences (II).

I – Reporting on sustainability to encourage doing

As has already been pointed out, three elements have been added by the CSRD to the previous non-financial reporting obligations. The change in terminology is accompanied by a broadening of the information to be transmitted (A). This leads to observing that the information required by CSRD is also linked to corporate due diligence and other provisions, especially under French law (B).

¹ The oral form has been kept.

² Using this wording, I. PARACHKÉVOVA, « D'un reporting à l'autre : où va l'entreprise », *BJS*, 2017, p. 585.

A) The effect of broadening the information required

Firstly, CSRD requires companies to set objectives of sustainable development and climate change. Having to present these objectives and communicate on them may well mean that the company's strategy needs to be adjusted. Description and measurement should lead to a change in the way of conducting business only because the companies must declare objectives that will be under analysis by the recipients of the information.

Secondly, the directive requires a sustainability analysis to be carried out throughout the value chain. The analysis is designed to combine the financial aspect with the environmental and social/societal aspects. For companies, this implies establishing a link between the financial and non-financial dimensions of their activities and publishing the impact of sustainability issues on their earnings (financial or internal dimension). Thus, the sustainability report must describe the due diligence procedure implemented by the company concerning sustainability issues, the actual or potential impacts resulting from the company's activities, and its value chain, including the products and services of its business relationships and its supply chain. Finally, the company must highlight the steps taken to identify and monitor these impacts and the actions taken to mitigate them. The mere fact that a company must publish such information implies that a reflection is necessary to identify the relevant information, process it, and then inform the public. In addition, the analysis is broadened by the double materiality principle: the company must assess the positive and negative externalities of its activities in terms of sustainability, both for the company itself and for third parties. All this should have a side effect, and in the best-case scenario will lead to a change in behavior. Disclosure of the information in question puts the company under the scrutiny of the outside world and enables it to be compared with other companies.

Thirdly, and this is probably the most important, the directive requires disclosure on how Corporate Governance takes sustainability into account.³ It was not the case under previous legislation, mainly NFRD regulation and, for example, in France.⁴ What is noteworthy is that the directive demands that the degree of involvement of management teams be established, as well as describing the incentives for managers and their expertise over sustainability. The directive also requires outlining how corporate governance processes take sustainability into account. Describing all this would seem to be an obligation to organize the governance underlying the reporting obligation. Therefore, the new reporting obligation could influence the company's business model.⁵

3 CSRD 2022, Art. 29 bis. 2. c.

4 See L. 225-102-1 of the commercial Code.

5 V. M. TIREL, « Prendre le droit de la RSE au sérieux », *BJS*, nov. 2022, p. 41.

B) Using reporting to compel action

The obligation to report and reveal imposed by the CSRD will also be used directly to impose an obligation to act in the context of the coming Corporate Sustainability Due Diligence directive. We are familiar with this in French law where this duty already exists. The cross-references in the French provisions between texts governing extra financial reporting and duty of vigilance directly⁶ make the relationship obvious.

And, for sure, there are significant overlaps between CSRD information requirements and the enforcement of corporate sustainability due diligence. For example, due diligence on the value chain is at the core of the corporate due diligence plan. The same is true for governance and climate, which are included in the proposed directive on corporate sustainability due diligence (articles 25⁷ and 15 respectively).⁸

However, the scope of the contemplated corporate due diligence directive and the existing French provisions are less ambitious (whether in the future directive or currently in national law) than the obligation to report on sustainability. The CSRD thresholds are in fact lower, and the new directive has lowered them even further.

If we focus only on France, it could be added that the CSRD information could be useful. According to article 1833 of the Civil Code as amended by the 2019 PACTE Act,⁹ “social and environmental issues” must be considered in the management of companies. The information that the CSRD directive requires to be verified is necessarily linked to that provision applicable to all types of companies governed by French law. And companies that are subject to the CSRD directive will therefore be inclined to take these factors into account in their strategy and key decisions.

II - Reporting becomes standardized

As I said, the other aim of the CSRD directive is to create a standardized sustainability information. The idea is to create a common European standard framework based on an accounting logic to compete with the one envisioned in the United States, which (A), the consequences of which need to be estimated (B).

6 Except in the case of listed companies, as highlighted by the HCJP report, see RA51, July 2022, <https://hcjp.fr/societes>

7 V. A. STEVIGNON, « l'article 15 de la proposition de directive sur le devoir de vigilance : signe d'un renforcement normatif de la RSE ? », *RLDA*, n° 189, 1^{er} fev. 2023.

8 V. B. PARENCE, préc., spéc. n° 14 et s.

9 G. LERAY, « Quelques réflexions civilistes sur la notion d'« enjeux environnementaux » dans l'article 1833 du Code civil », *RTD com.*, 2021, p. 513 ; H. LE NABASQUE, « À propos de la réforme de l'article 1833 du Code civil », *BJS*, sept. 2019, p. 1.

A) *An accounting approach to sustainability information*

The CSRD entrusted EFRAG organization with the task of standardizing sustainability information to overcome the difficulties of the previous reporting system under the NFRD regulations. In France, for example, article R. 225-105 of the Commercial Code only gives a list of areas in which extra-financial information is relevant. And there was no provision for any control or standardization of the information. As could be expected, the information published was partial, unsound, and led to greenwashing.¹⁰ The unreliability of the information was then transmitted to the SRI ratings given to companies, whose reputability was also questionable.

The EFRAG's mission is designed as a response to these criticisms. The standardization body is responsible for creating a common, standardized reporting matrix, which will be adopted by the Commission by means of delegated acts. It will help to determine what information should be sought and how it should be produced and presented to the public¹¹ even if the whole process is largely based on a “comply or explain” analysis as regards the relevance of the information. The objective is to standardize accounting-type information to ensure confidence in and use of the information. In fact, the directive states that the information must be “comparable and reliable”¹² with a status comparable to that of financial information.¹³ Moreover, CSRD has links with the regulation on the publication of information in financial matters (of 2019 amended in 2020).

Thus, in the CSRD, “accounting logics” goes beyond its usual boundaries (balance sheet, profit and loss account, and annexes) to reach the other information that third parties need. The directive accordingly imposes an accounting and analysis logic based on indicators,¹⁴ but also monetized indicators for accounting for natural resources or natural capital.¹⁵ In addition, the information published must receive an assurance of compliance from a qualified third party, as is the case with independent auditors. Although this review is initially limited, after an initial assessment in 2028, there will no doubt be an increase in the level of requirement.

B) *Consequences*

As we have seen, the directive tends to introduce an accounting-like standardization of information on sustainability with the creation of indicators.¹⁶ The introduction of this standardized information may have several consequences that today we can only try to guess.

¹⁰ See cons. 13 of the CSRD.

¹¹ E.g., use of m³, water, gas, days of downtime, etc.

¹² Art. 29b 2.

¹³ Recital 37.

¹⁴ Art. 19 and 29. a. 2, h; recital 33: e.g., greenhouse gas emissions/revenue.

¹⁵ See recital 44.

¹⁶ Art. 19 bis. 2, h.

Some scholars, such as our colleague Jennyfer Bardy,¹⁷ are calling for a change in the way corporate profits are calculated. Their idea is to take social and environmental issues into accounting. And it is plausible that the standardization of information imposed by the CSRD could make this change possible. If this idea is adopted, it could lead to a more far-reaching change in business behavior. Nevertheless, it is not sure that this could happen in the foreseeable future. A parallel can be drawn with GDP. We know that it is a partial and poor indicator that does not consider the social and environmental aspects of the activities. Alternatives have been proposed, but it nonetheless remains “The” benchmark.

Without radically changing the calculation of the profit generated by companies, actions can be carried out through other channels. Direct taxation (essentially the corporate income tax) for example. Direct taxation for companies is based on accounting. Schematically, tax law applies its rules to the result established in accordance with accounting rules to produce the taxable profit. Is it possible to use this transition from accounting profit to taxable profit by introducing CSRD indicators in tax law to vary the tax burden? This could be done in two ways: either by directly reinternalizing negative externalities (considering the costs to society of activities) through the calculation of taxable profit, or more simply by varying the tax rate in the light of CSRD indicators.

Finally, another consequence could be considered, especially in France. Standardized and controlled information on sustainability could be used by shareholders or third parties, even outside the scope of accounting, tax law, or due diligence. Based on the information provided by the company on sustainability, it may be possible to seek the liability of the directors (*présidents, gérants, administrateurs*) based on article 1833 of the Civil Code already mentioned. This article states that “*a company is managed in its social interest, taking into account the social and environmental challenges of its business*”.¹⁸ If, after one or more management decisions, it becomes clear that the consolidated sustainability indicators are deteriorating, it will be a serious indication or even proof that social and environmental challenges have not been well considered. Obviously, to achieve this, all the other conditions of civil liability must be met. However, when there is evidence that sustainability has been set aside by the management, litigators will try and some of them will succeed.

17 J. BARDY, « Approche comptable de la RSE », *RLDA*, n° 189, 1st feb. 2023.

18 My translation.

