

From non-financial reporting to corporate sustainability reporting: formal or substantial evolution?¹

Manon DESBAT

PhD. candidate in law at the University of Paris 1 Panthéon-Sorbonne (Institut de Recherche Juridique de la Sorbonne, EA4150)

Abstract:

Far from delimiting or fencing off, as the etymology of the verb “to define” would have us do, the definition of sustainability as it emerges from the directive is destined to spread to an exponential number of neighbouring lands. Sustainability is spreading to affect governance factors, and is now pollinating a growing number of companies, particularly SMEs and non-EU companies. Moreover, while a hasty reading of Article 2 of the CSRD might lead to conclude that sustainability can be summed up in a list of five factors, sustainability above all questions the contribution of the company, and the law governing it, to the sustainable development of societies. Indeed, it penetrates the companies, through the channel of “corporate sustainability”, seeking to ensure that environmental, social, human rights and governance issues are levers in decision-making within the companies, thus inviting them to act, beyond communicating. This renewal of sustainability is reinforced by a redefinition of the obligations imposed on companies: the fields covered by the required information are multiplied, the “comply or explain” principle is largely abandoned, and assurance on sustainability information becomes compulsory.

Keywords: sustainability, corporate sustainability, sustainability reporting, reinforcing obligations, standardized sustainability information, first set of draft ESRS

Résumé :

La directive (UE) 2022/2464 en ce qui concerne la publication d'informations en matière de durabilité par les entreprises, ci-après dite « directive CSRD » (pour Corporate Sustainability Reporting Directive), réforme la directive 2014/95 (dite NFRD pour Non Financial Reporting Directive), laquelle avait instauré le premier cadre de reporting extra-financier de l'Union européenne. La directive CSRD opère un changement terminologique en renommant les informations précédemment désignées par la directive NFRD comme « non financières » en « informations en matière de durabilité ».

Or, un changement terminologique peut advenir sans pour autant observer un glissement sémantique qui opèrerait une évolution dans le sens et la signification des termes employés. A contrario, un changement sémantique peut aboutir sans qu'une substitution de terme n'accompagne l'évolution. Dès lors, le changement terminologique opéré par la directive CSRD s'accompagne-t-il d'un changement sémantique ? Par ailleurs, constitue-t-il un changement formel ou substantiel ? Autrement dit, le changement de mot permet-il une plus ample considération et une meilleure gestion des maux ?

La question se pose dans la mesure où cette terminologie n'est en réalité pas inédite. La directive NFRD évoquait effectivement déjà « les informations sur la durabilité ». Par la suite, les lignes directrices de la Commission européenne sur l'information non financière de 2017 fixant une

¹ This article is based on an article published in French in the *Revue trimestrielle de droit financier*. These articles are the result of a speech given at the conference “Directive CSRD: durabilité et régulation de l'entreprise sociétaire” organised at the University of Paris 1 by the Sorbonne-Affaires/Finance Department of the IRJS on 14 April 2023. I would like to thank the organisers of the event, Romain DUMONT (MCF) and Edmond SCHLUMBERGER (Prof.), and the co-directors of the department, Anne-Claire ROUAUD (Prof.) and Didier PORACCHIA (Prof.).

Furthermore, these two contributions were written before the European Commission published a draft delegated regulation relating to the “CSRD” directive on June 9, 2023. This draft delegated regulation could therefore not be fully integrated into the developments presented below. Finally, all references to domestic law in this article are to French law.

méthodologie pour la communication desdites informations ainsi que celles de 2019 sur les informations en rapport avec le climat² avaient repris la formule. L'expression n'apparaît qu'au stade des considérants de la directive NFRD, et qu'à une seule reprise dans les lignes directrices précitées. Le terme était néanmoins présent et, surtout, il était employé comme synonyme de « non financière ». Partant, deux présuppositions en découlent : l'adoption du terme par la directive CSRD ne revêtirait qu'une modification formelle et le changement terminologique ne serait pas soutenu par une évolution sémantique. La présente contribution met à l'épreuve ces deux présuppositions en concluant que l'évolution ne se réduit pas à un simple changement de terme.

Loin de borner ou clôturer, comme l'étymologie du verbe « définir » l'invite pourtant à le faire³, la définition de la durabilité telle qu'elle ressort de la directive a plutôt vocation à se répandre sur un nombre exponentiel de terres avoisinantes. La durabilité se déploie pour toucher les facteurs de gouvernance et pollinise désormais un nombre croissant d'entreprises, notamment les PME et les entreprises de pays tiers. Par ailleurs, si une lecture hâtive de l'article 2 de la directive CSRD pourrait conclure que la durabilité se résume à l'énumération de cinq facteurs, la durabilité interroge surtout la contribution de l'entreprise et du droit l'encadrant au développement durable des sociétés. Elle pénètre en effet les murs de l'entreprise par le canal de la « durabilité de l'entreprise », en cherchant à ce que les thématiques environnementales, sociales, de droits de l'homme et de gouvernance soient des leviers dans la prise de décision à l'intérieur de l'entreprise les invitant ainsi à agir, au-delà de communiquer. Ce renouvellement de la durabilité est renforcé par une redéfinition des obligations à l'égard des entreprises : les champs couverts par l'information exigée sont multipliés, le « comply or explain » majoritairement abandonné, et l'assurance sur les informations en matière de durabilité devient obligatoire.

Pour de plus amples informations, le présent article est disponible intégralement en français à la Revue trimestrielle de droit financier, sous la référence suivante : insérer ici la référence exacte quand elle sera disponible.

Mots-clés : durabilité, durabilité de l'entreprise, communication des informations en matière de durabilité, renforcement des obligations, normalisation de l'information, projets de normes de l'EFRAG

Introduction

1.- A lack of definition. - The Latin maxim “*Omnis definitio in iure civili periculosa est*”⁴ teaches that any definition is perilous in law and is thus intended to prevent the excessive rigidity of which definitions in law would be the source. Nevertheless, the total absence of a definition also raises difficulties. Without a consensus on a fixed definition, as many possible variations may take root as reflections of divergent models of society.⁵ Such variety can weaken the concept under study

2 Commission européenne, Communication, « Lignes directrices sur l'information non financière : Supplément relatif aux informations en rapport avec le climat », 2019/C 209/01, 20 juin 2019, p. 2 : « Si les entreprises susceptibles de recevoir des investissements ne communiquent pas suffisamment d'informations fiables et comparables sur leur durabilité (...). »

3 A. REY (dir.), *Dictionnaire historique de la langue française*, t. 1, éd. Le Robert, 2006, p. 1017 : le verbe « définir » est emprunté au terme latin *definire* signifiant « délimiter », « fixer ». Le nom « définition » quant à lui, est emprunté au dérivé latin *definitio* exprimant l'« action de fixer ».

4 Formulated by Javolenus, a Roman juriconsult of the first century, and reproduced in *Cinquante livres du Digeste ou des Pandectes de l'Empereur Justinien*, Rondonneau, 1805, trans. HULOT, 50.17.02 (cited by L.-M. SCHMITT in his doctoral thesis on definitions in private law). This maxim was used by the drafters of the 1804 Civil Code in their debate on the appropriateness of definitions in that Code (P.-A. FENET, *Recueil complet des travaux préparatoires du Code civil*, t. X, Paris, 1827).

5 The example of sustainable development is particularly revealing. The sustainable development has been able to promote different combinations of actions depending on how it was conceived. In economics, e.g., there are two opposing perceptions of sustainability. On the one hand, the

and make it more difficult, or even can paralyse the construction of a coherent regulatory framework that has a firm grasp of its subject matter.

And yet, disparate terms are flourishing to designate the orientation of companies towards virtuous conduct: first CSR,⁶ then ESG⁷ and now sustainability.^{8 and 9} A definition outlining a single, shared vision is lacking for each of these terms, which are sometimes (if not too often) used alternately as if they were synonymous.¹⁰

2.- The change in terminology introduced by the CSRD. - Directive (EU) 2022/2464 on the publication of sustainability information by companies,¹¹ hereaf-

proponents of weak sustainability (the environmental economics movement) see the different stocks of capital as substitutable (*i.e.* if growth reduces the stock of natural capital, it can be replaced by physical, human, social or institutional capital, so that the total stock of capital can grow even if the stock of natural capital falls). They therefore place their trust in technological innovation to provide new solutions to environmental problems and to ensure the sustainability of both consumption and economic growth. On the other hand, proponents of strong sustainability (ecological economics) believe that different types of capital are not substitutable. Therefore, to maintain the well-being of future generations at a level equivalent to that of the present generation, the stock of natural capital must be maintained. From the point of view of strong sustainability, lifestyles must therefore be considerably rethought.

6 Corporate Social Responsibility.

7 The acronym used by the financial community to designate environmental, social and governance criteria. It originated in the Global Compact report “Who cares wins. Connecting Financial Markets to a changing World”, published in 2004.

8 While sustainable development was defined long before the ESG triptych, and has already been the subject of abundant literature, the notion of “sustainability”, and in particular that of companies, has been revitalised by the recent work of the European Commission.

9 And, beyond the law, the vocabulary is being enriched by the imagination of market players, who are not just talking about “responsible” or “sustainable” enterprise. Walmart, for example, a transnational American company specialised in mass retailing, has set itself the goal of becoming a “regenerative company”.

10 But they are not. M. TIREL recently published an article in which she very clearly justifies the distinctions between ESG, CSR and compliance. (M. TIREL, « RSE, ESG et compliance : éléments pour une distinction », *Revue Lamy droit des affaires*, n° 189, 1^{er} février 2023). See also J.-B. BARBIERI, « La Corporate sustainability », *Revue de droit d'Assas*, n° 22, November 2021, p. 97: “*The ubiquity of these expressions conceals the vagueness that surrounds them. The mere fact of questioning their true meaning is an admission that we doubt their definition*”.

11 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

This directive has been the subject of numerous legal articles. Without claiming to be exhaustive, for French doctrine, see, *e.g.*: B. LECOURT, « La “directive RSE 2” (“directive CSRD”) : le nouveau visage de l’information en matière environnementale et sociale », *Revue des sociétés* 2022, p. 639; T. SAUPIN, « La comptabilité environnementale et l’Union européenne : de la publication d’informations non financières à la publication d’informations sur la durabilité », *R.A.E.-L.E.A.*, 2022/2; N. CUZACQ, « La RSE, le masque et la plume », *Revue des sociétés*, février 2023, n° 2, p. 71-83 ; B. PARANCE, « La directive CSRD, nouveau modèle du reporting extra-financier au service de la durabilité des entreprises », *La semaine juridique entreprise et affaires*, n° 05, 2 février 2023, p. 22-27 ; C. NOUEL, « Directive CSRD : la durabilité au cœur de la stratégie et de la gouvernance des entreprises », *BJS*, n° 3, mars 2023, p. 53-64 ; J.-M. MOULIN, « L’irrésistible ascension de la “RSE” (premières vues sur la directive CSRD) », *Revue de droit bancaire et financier*, n° 1, 2023, p. 20-29 ; F.-G. TRÉBULLE, « Entreprise et durabilité: petit pas ou pas de géant ? », *Énergie. Environnement. Infrastructures*, n° 5, mai 2023, référence 5. Not exclusively linked to the directive but making strong reference to it: see *e.g.*, P.-H. CONAC, « La

ter referred to as the “CSRD” (*Corporate Sustainability Reporting Directive*), reforms Directive 2014/95¹² (referred to as the NFRD for *Non-Financial Reporting Directive*), which established the European Union’s first extra-financial reporting framework. The CSRD makes a terminological change by renaming as “sustainability” information, the information previously designated by the NFRD as “non-financial”.

However, a change in terminology may occur without a semantic shift taking place in the meaning and significance of the terms used. On the other hand, a semantic change can occur without a substitution of terms.

So, does the change in terminology introduced by the CSRD go hand in hand with a change in semantics? And does it constitute a formal or substantive change? In other words, does the change of word allow for greater consideration and better management of harm?

The question arises insofar as this terminology is not actually new. The NFRD already referred to “sustainability information”.¹³ Subsequently, both the European Commission’s 2017 guidelines on non-financial information¹⁴ and the 2019 guidelines on climate-related information¹⁵ had used the same formula. The term only appears in the recitals of the NFRD, and only once in the aforementioned guidelines, but it was used, and above all, it was used synonymously with “non-financial”. This gives rise to two presuppositions: that the adoption of the term by the CSRD is merely a formal change, and that the terminological change is not supported by a semantic evolution. This contribution will provide an opportunity to put these two presuppositions to the test.

One thing is certain, the directive introduces a change in terminology: from non-financial information (which is not financial, apart from the financial ques-

gouvernance durable des entreprises selon l’UE : un modèle européen avec des ambitions mondiales réalistes ? », *Revue Européenne du Droit. Repenser le capitalisme*, n° 4, été 2022, p. 130 ; M. TIREL, « Prendre le droit de la RSE au sérieux », *BJS*, novembre 2022.

12 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

13 Directive 2014/95/EU, recital 3: “*The European Parliament acknowledged the importance of businesses divulging information on sustainability such as social and environmental factors, with a view to identifying sustainability risks and increasing investor and consumer trust*”.

14 European Commission, communication, “Guidelines on non-financial reporting (methodology for reporting non-financial information)”, 2017/C 215/01, 5 July 2017, p. 7: “*Information can be made fairer and more accurate through, for example: appropriate corporate governance arrangements (for instance, certain independent board members or a board committee entrusted with responsibility over sustainability and/or transparency matters) (...)*”.

15 European Commission, Communication, “Guidelines on non-financial reporting: Supplement on climate-related information”, 2019/C 209/01, 20 June 2019, p. 2: “*Without sufficient, reliable and comparable sustainability-related information from investee companies, the financial sector cannot efficiently direct capital to investments that drive solutions to the sustainability crises we face (...)*”. The French version of these guidelines is even more revealing, using the expression “*durabilité de l’entreprise*” (corporate sustainability): « *Si les entreprises susceptibles de recevoir des investissements ne communiquent pas suffisamment d’informations fiables et comparables sur leur durabilité [...]*. »

tion)¹⁶ to sustainability information. But one uncertainty remains: what does sustainability mean?

3.- Environmental sustainability. - Over the last few years, the European Union has stepped up the pace of its legal initiatives to promote environmental sustainability, in line with regulation 2020/852¹⁷ establishing a taxonomy to promote sustainable investment. In the spirit of this text, sustainability is equivalent to environmental sustainability. The taxonomy resulting from this regulation in fact sets environmental sustainability criteria (the social aspect nevertheless comes into play, but only in that, for an activity to be considered sustainable, it must comply with basic social criteria).^{18 and 19} This standard also enriches the environmental reporting required of financial and non-financial companies, since article 8 requires companies covered by the NFRD (and now the CSRD) to publish certain indicators specifying the extent to which their activities are environmentally sustainable within the meaning of the taxonomy.^{20 and 21} In the same vein, that of sustainability from an environmental point of view, we can also mention the so-called “benchmark regulation”,²² defining the conditions for the creation of stock market indices linked to the climate and the energy transition, as well as the proposed regulation

16 It should be noted that prior to the CSRD, numerous studies, including those of the European Union, had established that this information was not in fact devoid of financial significance.

17 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

18 The criteria to be met are as follows: the activity makes an essential contribution to one or more of the six objectives set out in the regulation, *i.e.* mitigation of climate change, adaptation to climate change, sustainable use and protection of water resources, transition to a circular economy, protection and reduction of pollution, protection and restoration of biodiversity and ecosystems (recital 23, art. 3 and 9 of regulation 2020/852); the activity does not cause significant harm to any of the other environmental objectives (recital 20, art. 3 and 17), the activity complies with basic social criteria (recital 19, art. 3 and 18) and the activity meets the technical criteria defined in the delegated acts (art. 10, 11, 12, 13, 14, 19 and 23).

19 Although the creation of a social taxonomy, or even a taxonomy of sustainability in its global vision had been announced, we are still waiting for them at the time of writing.

20 To this end, non-financial companies must publish the proportion of turnover generated by products or services associated with economic activities that can be considered environmentally sustainable, as well as the proportion of capital expenditure and the proportion of operating expenditure relating to assets or processes associated with economic activities that can be considered environmentally sustainable.

21 The CSRD also aims to ensure that the disclosure requirements applicable to companies are consistent with the taxonomy. To this end, the draft standards published by EFRAG consider the indicators that companies must publish on the extent to which their activities are environmentally sustainable according to the taxonomy, as well as the technical review criteria and the taxonomy thresholds relating to the absence of significant harm.

22 Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

on green bonds²³ and the very recent Commission proposal for a directive last March on environmental claims.²⁴

4.- A global vision of sustainability at the heart of the sustainable finance action plan. - Recently, and with the support of the CSRD, a holistic view of sustainability is taking shape. It is in this dimension that this contribution approaches sustainability. Sustainability is the focus of the standards set out in the 2018 Sustainable Finance Action Plan,²⁵ which aims to concentrate savings on “sustainable” activities. In this action plan, the CSRD is presented as a major measure. Other measures in the plan depend on companies’ ability to publish adequate sustainability information: the taxonomy of sustainable investments mentioned above, the publication of information by asset managers (SFDR regulation),²⁶ and the regulation on sustainable benchmarks (benchmark regulation mentioned above). Finally, sustainability in its entirety is also at the heart of the proposal for a Directive on corporate sustainability due diligence (hereafter referred to as the CS3D proposal), often portrayed as the twin sister of the CSRD directive.²⁷

Above all, the SFDR regulation, concerning the publication of sustainability information in the financial services sector, anchors the term “sustainability” in its global sense in the hard law applicable to the private sector. This regulation imposes institutional disclosure obligations on investors (at entity level, concerning policies for integrating sustainability risks into their investment decision-making process and the main negative impacts of investment decisions on sustainability factors), as well as product disclosure obligations (the information required varies according to the product classification).²⁸

As these different standards serve the same idea of sustainability, it is natural that there should be many interdependencies between them. So, for example, an investment fund management company will rely on both the EU’s green taxonomy (taxonomy regulation) and the sustainability information and due diligence plan

23 Proposal for a regulation on European green bonds, COM (2021) 391 final, 6 July 2021.

24 Proposal for a directive on substantiation and communication of explicit environmental claims (Green Claims Directive), COM (2023) 166 final, 22 March 2023.

25 European Commission, Communication, “Action Plan: Financing Sustainable Growth”, COM (2018) 97 final, 8 March 2018.

26 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

27 Commenting on this directive, French Professor François Guy Trébulle emphasised that “*far beyond mere vigilance, (...) through this directive, sustainability, including climatic sustainability, is placed at the very top of the agenda of the largest companies (...)*” (F.-G. TRÉBULLE, « Vigilance et durabilité : une nécessité ! », *Energy. Environment. Infrastructures*, n° 4, April 2022, reference 4).

28 For all financial products subject to the regulation, financial market participants must provide, in the pre-contractual documentation, information on the consideration of sustainability risks and their possible impact on the profitability of the product (art. 6). In addition, the standard distinguishes two types of products with extra-financial characteristics to which specific disclosure requirements apply: products promoting environmental or social characteristics (art. 8) and products pursuing a sustainable investment objective (art. 9).

published by the companies in which it invests (CSRD and CS₃D directives) to fulfil its own obligation to provide sustainability information to end investors (SFDR regulation).

5.- The definition of sustainability factors: a global understanding of sustainability. - Without defining it directly, Article 2 of the SFDR Regulation sets out a definition of “sustainability factors” in relation to the issues they concern: environmental, social and employee matters, respect for human rights and anti-corruption and bribery matters.²⁹ In short, these are the four issues already listed in the NFRD,³⁰ but brought together under a single term: sustainability.

As for the CSRD, it refers successively to the “*dimensions of sustainability*”,³¹ the “*sustainability factors*”,³² and the “*sustainability matters*”,³³ which it then specifies in its first article. This article adds governance issues to the list set out in the SFDR regulation,³⁴ and it has thus been interpreted as renewing the ESG triptych, which is debatable.³⁵

6.- The CSRD’s addition of governance issues to the list: a half-hearted development. - Aspects relating to corporate governance were in fact not absent before. To begin with, it should be noted that the fight against corruption is included in the definition of governance commonly given.³⁶ Secondly, the SFDR regulation, to which the CSRD refers, already mentioned governance, not only in the recitals³⁷ but

²⁹ SFDR Regulation, art. 2, 24.

³⁰ Article 19a. 1. of Directive 2013/34 as it stood between the adoption of the NFRD and the CSRD provided: “1. *Large undertakings (...) shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking’s development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including: (...)*”.

³¹ CSRD directive, recital 6.

³² *Ibid.*, recital 28 and art. 1, 2), b) (to refer to the sustainability factors set out in Regulation (EU) 2019/2088).

³³ *Ibid.*, p. 4, 5, 6, 7, 9, 10, 11, 13, 16, 17, 18, 19, 20, 28, 29, 30, 31, 33, 34, 37, 38, 47, 49 and 51.

³⁴ *Ibid.*, recital 28 and art. 1, 2), b), 17): “*‘sustainability matters’ means environmental, social and human rights, and governance factors, including sustainability factors defined in point (24) of Article 2 of Regulation (EU) 2019/2088*”. There is, moreover, a repetition in this definition since the sustainability factors in the SFDR Regulation to which the definition refers already cover environmental, social and human rights factors.

³⁵ The recitals of the Directive, like those of the SFDR Regulation, relate sustainability sometimes to the three dimensions of sustainable development: economic, social and environmental (recital 5 of the CSRD; recital 1 of the SFDR Regulation), and sometimes by summarising the three main sustainability issues in the terms “environmental”, “social” and “governance”, which is reminiscent of the acronym ESG (recital 28 of the CSRD, recital 14 of the SFDR Regulation). For a distinction between ESG and sustainability, see A. WINSTON, “What’s Lost When We Talk ‘ESG’ and Not ‘Sustainability’”, *MIT Sloan Management Review*, 5 May 2022; E. POLLMAN, “The Making and Meaning of ESG”, *European Corporate Governance Institute - Law Working paper* No. 659/2022. For a distinction between ESG and CSR, see M. TIREL, *supra*.

³⁶ Haut Comité Juridique de la Place Financière de Paris, *Rapport sur les dispositifs de transparence extra financière des sociétés*, juillet 2022, p. 47.

³⁷ SFDR Regulation, recital 14: “*A sustainability risk means an environmental, social or governance*

also in its definition of sustainable investment and in its definition of sustainability risks. Article 2 of this regulation defines sustainable investment as “*an investment in an economic activity that contributes to an environmental objective (...), or to a social objective, (...), or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices (...)*”.³⁸ Good governance practices are therefore seen as a prerequisite for meeting environmental and societal challenges. Governance is also present in the definition given in the regulation for “sustainability risk”: “*an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment*”.³⁹ Finally, and without claiming to be exhaustive, governance aspects were already contained in the corporate governance statement (required by Article 20 of Directive 2013/34).⁴⁰

Nevertheless, the addition of governance to the definition of sustainability factors strengthens the overall view of sustainability. The new disclosure requirements introduced by the CSRD therefore include “*a description of the role of the administrative, management and supervisory bodies in relation to sustainability issues, as well as a description of their expertise and competences in performing that role or the opportunities available to them to acquire that expertise or those competences*”.⁴¹

The CSRD therefore sets out five sustainability issues (environmental, social and personnel issues, respect for human rights, the fight against corruption and bribery, and governance), reviving French Professor Gérard Cornu’s observation that “*terminological definition often follows a model that brings it closer to enumeration or assimilation. There is a temptation to use a single word or formula – a convenient tool – to designate the elements of an enumeration*”.⁴²

7.- A renewal of sustainability accompanied by a redefinition of the obligations of companies. - Far from being a creation *ex nihilo*, the change in

event or condition that, if it occurs, could cause a negative material impact on the value of the investment, as specified in sectoral legislation (...)”.

38 Emphasis added.

39 SFDR Regulation, art. 2, 22).

40 This naturally raises the question of the relationship between the obligation set out in Article 20 of Directive 2013/34 for companies to include a corporate governance statement in their annual report and the obligation to provide information on sustainability set out in Article 19a of the same directive. Article 1. 5) of the CSRD clarifies this point. The second paragraph of this article provides for the link with the sustainability statement: companies subject to the sustainability information statement will be deemed to have complied with the diversity statement when they include this information in their sustainability information and a reference to this information appears in the corporate governance statement.

41 Directive 2013/34 in its consolidated version, art. 19a, 2, c).

42 G. CORNU, “Les définitions dans la loi”, in *Mélanges Jean Vincent*, Dalloz, 1981, p. 77 ff. The exact quote in its original version is as follows: « *La définition terminologique est souvent opérée suivant un modèle qui la rapproche de l'énumération ou de l'assimilation. La tentation existe de désigner sous un seul mot ou sous une même formule – outil commode – les éléments d'une énumération* ».

terminology brought about by the CSRD is consistent with the body of legislation to which it belongs. In this way, the directive contributes to the renewal of sustainability, and of corporate sustainability in particular (I). In addition to providing market players and society with reliable information, the CSRD aims to “*steer companies towards more sustainable and longer-term development*”.⁴³ Thus, the renewal of sustainability is accompanied by a redefinition of the obligations of companies (II).

I. A renewal of sustainability

8.- Plan. - The concept of “sustainability”, and in particular that of companies, is renewed by the CSRD directive.

Far from delimiting or fencing off, as the etymology of the verb “to define” would have us do,⁴⁴ the definition of sustainability as it emerges from the directive is intended to spread over an exponential number of neighbouring lands. Sustainability is spreading to affect governance factors, as our introduction has shown. Sustainability is now pollinating a growing number of companies, particularly SMEs and non-EU companies.⁴⁵ It is also penetrating the companies, seeking to ensure that environmental, social, human rights and governance issues are levers in decision-making within the companies.

This holistic conception of sustainability culminates in the directive’s reference to “corporate sustainability” (B). This model is supported by the double materiality approach that is the lifeblood of the CSRD system (A).⁴⁶

43 Communication from the Commission, “Action Plan: Financing Sustainable Growth”, *supra*, p. 4.

44 A. REY (dir.), *Dictionnaire historique de la langue française*, t. 1, éd. Le Robert, 2006, p. 1017: the verb “to define” is borrowed from the Latin term *definire* meaning “to delimit”, “to fix”. As for the noun “definition”, it is borrowed from the Latin derivative *definitio* expressing the “action of fixing”.

45 While the NFRD applied to only around 12,000 companies across Europe, the thresholds for application of the CSRD have been lowered to around 50,000. The CSRD will naturally apply to companies already subject to the NFRD from 1 January 2024. From 1 January 2025, the directive will also apply to companies that exceed two of the three thresholds (250 employees; €40m turnover; €20m balance sheet total). Then, from 2026, small credit institutions and listed SMEs will join the scheme. Finally, from 2028, non-EU companies with a net turnover of more than €150 million in the EU for each of the last two consecutive financial years and which have a subsidiary or branch in the EU will also be subject to the CSRD. According to estimates by the financial data company Refinitiv, published by the *Wall Street Journal* in an article dated 5 April 2023, more than 10,000 foreign companies will be affected.

For the application of the directive to non-European companies, see: insérer ici la référence de l'article de J. DIDRY BARCA publié dans cette revue, lorsqu'elle sera disponible.

46 The “CSRD system” in this contribution refers to the combination of the CSRD Directive and the EFRAG draft standards.

A. The double materiality approach

9.- Scope of the study. - This section does not describe all of the information that must be published, but rather focuses on the double materiality approach and its implications for the information to be communicated. The double materiality approach expands the scope of information that is considered “material” or important, and thus, the information to be published. The scope of this study is limited to cross-sector disclosures (the first set of Draft European Sustainability Reporting Standards (hereafter referred to as “Draft ESRS”)⁴⁷ and we will disregard the simplified version containing minimum requirements for SMEs.⁴⁸

10.- Standardisation of information: the mandatory common sustainability reporting standards. - The introduction of mandatory common sustainability reporting standards is a major development in the CSRD⁴⁹ compared to the framework provided by the NFRD.⁵⁰ Under the NFRD, companies could draw up their own “non-financial statement”,⁵¹ or might rely on national, Union-based or international frameworks (such as the ISSB, TCFD or TNFD). The Commission had drawn up guidelines (first in 2017 on the methodology applicable to the communication of non-financial information, then in 2019 dealing specifically with the climate-related information) but these were non-binding. Companies were therefore free to apply them or ignore them. In contrast, and in order to ensure the comparability of information and the publication of all relevant information,⁵² the CSRD requires companies to publish sustainability information in accordance with a framework of mandatory disclosure standards: the one that will be set by the forthcoming delegated acts adopted by the Commission based on the Efrag’s draft standards. Concerning information common to all business sectors, a draft delegated act was adopted by the European Commission on June 9, 2023. A consultation period to comment on this draft is open until July 7, after which the Commission should adopt the act during the second quarter of 2023. Finally, there will be a scrutiny period, during which the European Parliament and the Council may reject the text.⁵³ The

47 EFRAG (European Financial Reporting Advisory Group) is a not-for-profit association incorporated under Belgian law which provides advice to the European Commission on the adoption of International Financial Reporting Standards. Its mandate has been extended to include sustainability issues. For sustainability reporting, EFRAG’s work is delimited by article 29b of directive 2013/34 (added by art. 1, 8) of the CSRD directive) which lists the subjects and information on which EFRAG’s standards are expected to be more precise. The group proposed a first version of the standards which was put out to public consultation until August 2022 before the final publication of 12 draft horizontal standards in November 2022, called ESRS (*European Sustainability Reporting Standard*). Following public consultation, the number of disclosures has been reduced to 82 (from the initial 136 disclosures covering 620 disclosures) covering a thousand datapoints (indicators).

48 Specific standards for listed SMEs will be the subject of a delegated act scheduled for adoption in 2024.

49 Directive 2013/34 in its consolidated version, art. 19a, 4.

50 Art. 19a, 1. of Directive 2013/34 as it stood between the adoption of the NFRD and the CSRD.

51 *Ibid.* The expression “non-financial statement” disappeared after the CSRD was adopted.

52 CSRD Directive, recital 37.

53 TFEU, art. 290, § 2: to express an objection, the European Parliament acts by a majority of its

standardization framework is therefore still subject to change. This contribution was written before the publication of the draft delegated act, and therefore focuses on EFRAG's draft standards.⁵⁴

11.- The CSRD's endorsement of double materiality⁵⁵. - Understanding what double materiality means is essential for determining the scope of the information to be disclosed. According to the EFRAG, materiality is the criterion for inclusion of specific information in corporate reports. It reflects "(i) the significance of the information in relation to the phenomenon it purports to depict or explain, as well as (ii) its capacity to meet the needs and expectations of the stakeholders of an undertaking and of the undertaking itself, allowing for proper decision-making, and more generally (iii) the needs for transparency corresponding to the public interest".^{56 and 57}

Initially, the approach was that of simple materiality, consisting of reporting on the major impact that environmental and social issues can have on a company. Then, from a perspective focused exclusively on the company, the focus shifted to the impact that the company has on the environment and society. This is an essential aspect of the "strategic war"⁵⁸ being waged by Europeans and Americans on the subject of sustainability reporting. The Americans defending an analysis with the sole focus on the impacts of external sustainability events on the company (known as "simple materiality"), while the European Commission made a commitment on 6 July 2021, when renewing its strategy on sustainable finance, to defend the concept of double materiality at international level.^{59 and 60}

component members, while the Council acts by a qualified majority.

54 The appendix to this contribution puts into perspective the EFRAG drafts and the Commission's draft delegated act, only for the standards used in this contribution.

55 The French term "*double matérialité*" is commonly used, but the French version of the CSRD translates "double materiality" as "*double importance relative*". It could also have been translated as "*double significativité*", in line with the choice made by the Spanish translation of the directive, which prefers the expression "*doble significatividad*". It should also be noted that the concept of materiality is a common one in accounting law. The regularity and fairness of the financial statements are assessed by reference to the knowledge that the directors have of the reality and materiality of the events recorded (French PCG, art. 121-3).

56 EFRAG, working paper, "double materiality conceptual guidelines for standard-setting", January 2022, p. 4.

57 According to Art. 2, 16 of the Directive 2013/34, "material" means "*the status of information where its omission or misstatement could reasonably be expected to influence decisions that users make on the basis of the financial statements of the undertaking. The materiality of individual items shall be assessed in the context of other similar items*".

58 See in particular. P.-H. CONAC, *supra*; B. PARANCE, *supra*.

59 European Commission, Communication "Financing the transition to a sustainable economy", COM (2021) 390 final, 6 July 2021, p. 21.

60 The frameworks developed at international level are for the most part limited to financial materiality (this is notably the case with the ISSB standards).

The NFRD already referred to the impacts of the undertaking's activity,⁶¹ thus adopting a “dual materiality” perspective without expressly naming it. In addition, the above-mentioned 2019 guidelines defined “the concept of materiality” as covering “both financial materiality and materiality in environmental and social terms”,⁶² but the latter referred only to climate. In addition, the SFDR regulation, without directly mentioning double materiality, makes a clear distinction between the integration of “sustainability risks”⁶³ and “principal adverse impacts on sustainability factors”.⁶⁴ The former concern significant actual or potential negative impacts on the value of the investment (which is similar to financial materiality), while the latter concern information on how the company affects society and the environment (which is similar to impact materiality).

The CSRD confirms and supports this pre-existing trend in hard law: from now on, double materiality (combining financial materiality and impact materiality) permeates the reporting process across all sustainability themes.

12.- A core of mandatory information, the rest depending on the outcome of the company's assessment of double materiality. - Of the twelve EFRAG draft standards,⁶⁵ the first, ESRS 1 (setting out the general requirements),⁶⁶ specifies that companies do not have to cover all sustainability issues. Instead, a core set of information must be published by all companies (draft ESRS 1, § 32). This includes general information applying to all sustainability issues (required by the draft ESRS 2),⁶⁷ climate-related requirements (draft ESRS E1),⁶⁸ cross-referenced indicators between the CSRD and other EU legislation⁶⁹ (indicators based on

61 Art. 19a, 1 of Directive 2013/34 as it stood following the NFRD, and before the CSRD, was worded as follows: “1. Large undertakings (...) shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position, and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters (...)”.

62 European Commission, Communication “Guidelines on non-financial reporting: Supplement on climate-related information”, *op. cit.* p. 4.

63 Defined by art. 2, 22 of the SFDR regulation.

64 SFDR regulation, recitals 18 and 20; art. 4, 5. a); art. 7, 1.; art. 19, 1. b).

65 There are two cross-cutting standards, and ten topical standards.

66 The draft horizontal standards are available online at <https://www.efrag.org/lab6>.

67 This standard sets out the company's disclosure requirements, which are cross-cutting in nature. It is structured according to the four pillars of the TCFD. It contains, in particular, the scope covered by sustainability reporting, disclosure requirements relating to governance (including the role and composition of governing bodies, and remuneration elements linked to sustainability), strategy, and the management of impacts, risks and opportunities (information on the materiality analysis process and its results, as well as policies, objectives and the monitoring of results).

68 This standard concerns climate change. It contains a number of disclosures, including remuneration elements linked to the reduction of GHG emissions, transition plans, policies implemented in relation to climate change mitigation and adaptation, and policies linked to energy efficiency. Indicators and targets are also included, such as targets related to the above-mentioned policies, the company's energy consumption and mix, and its gross Scope 1, 2 and 3 emissions.

69 These requirements are set out in appendix C of the ESRS 2 project, which provides a table listing the cross-referenced indicators. These must be declared, regardless of the result of the

regulations applying to financial institutions, such as the SFDR regulation, which themselves require a certain amount of information to meet their own obligations) as well as, for companies with 250 or more employees only, information concerning their own employees⁷⁰. Nevertheless, the draft delegated regulation adopted by the European Commission on June 9 2023 seriously reduces the scope of information that must still be disclosed (independently of the materiality analysis). Indeed, the ESRS 1 standard, as set out in Annex 1 to this draft, reduces the amount of such information by limiting it to the general information set out in the ESRS 2 standard⁷¹. As a result, this proposed version excludes from the scope of mandatory reporting the standards relating to climate and those relating to the company's employees.

For all other sustainability issues (such as biodiversity, pollution and populations, consumers, and workers along the value chain), reporting depends on the outcome of the company's "double materiality" assessment. This dual materiality analysis procedure itself is the subject of reporting: the company must provide information in this respect, disclosing the processes it uses to identify its impacts, risks and opportunities, and to assess those that are significant.⁷²

13.- Double materiality, the criteria for determination of whether a sustainability information has to be included in the undertaking's sustainability report. - Double materiality provides criteria for determination of whether a sustainability topic or information has to be included in the undertaking's sustainability report. If a sustainability topic is material, a related disclosure requirements is compulsory. A sustainability matter shall thus be reported if it is material from

assessment of significance. The table refers to other European Union standards. e.g., concerning the tons of pollutants discharged by the company into water, the table refers to indicator 8 in table 1 of appendix 1 of the technical standards relating to the SFDR regulation adopted by the European Commission (RTS: *Regulatory Technical Standards*). This table specifies how these discharges should be measured.

⁷⁰ This is the information required by standards S1-1 to S1-9 of the ESRS S 1 project, including, e.g.: the characteristics of the salaried workforce, social policies relating to personnel, processes for dialogue with the workforce and its representatives about impacts, objectives for reducing material negative impacts, diversity indicators, adequate salaries.

⁷¹ Draft Commission delegated regulation, annex 1, *European sustainability reporting standards*, § 29, p. 6 : "Irrespective of the outcome of its materiality assessment, the undertaking shall always disclose the information required by ESRS 2 General Disclosures (i.e. all the Disclosure Requirements and data points specified in ESRS 2)". The EFRAG drafts and the European Commission's draft delegated act are put into perspective in the table annexed to this contribution.

⁷² EFRAG, "ESRS 1 General requirements", Draft european sustainability reporting standards, § 49, p. 14.

the impact perspective⁷³ or the financial perspective⁷⁴ or both.⁷⁵ The draft ESRS 1 standard sets out a methodology for companies to carry out their dual materiality analysis and, consequently, to identify the information to be published, considering the short-, medium- and long-term horizons. This process is summarised below for a better understanding of double materiality as defined by the CSRD.

The first step is to identify the actual and potential impacts, both negative and positive, in collaboration with the stakeholders and experts concerned. Firstly, for the impact materiality, the company's impact on people or the environment in the short, medium or long term is taken into account.⁷⁶ Impacts include those caused or contributed to by the undertaking, and those which are directly linked to the undertaking's own operations, products or services through its business relationships. For example, the use of child labour by a mining company will be considered as a negative impact directly linked to the products of a company manufacturing electric vehicles using cobalt extracted by this mining company, through its business relationship with the mining company. Secondly, in terms of financial materiality, a sustainability matter is material if it triggers or may trigger material financial effects on the undertaking (having a material influence on the undertaking's cash flows, development, performance, position, cost of capital or access to finance).⁷⁷ For example, when the undertaking's business model depends, on a natural resource, it is likely to be affected by potential changes in the quality, availability and pricing of that resource. The oil companies' dependence on oil springs to mind. In addition, the financial materiality also includes information on the risks and opportunities attributable to business relationships with other companies: one company may e.g. be affected by the dependence on the natural resources of another if the latter is its supplier. The relationships necessary for the first company's commercial process will thus be weakened.

Finally, the materiality assessment process also encompasses the material impacts or risks arising from actions to address sustainability matters.⁷⁸ This concerns

⁷³ The impact materiality concerns the undertaking's material actual or potential, positive, or negative impacts on people or the environment over the short-, medium- and long-term time horizons. This includes impacts caused or contributed to by the undertaking and impacts which are directly linked to the undertaking's operations, products, and services through its business relationships (EFRAG, Draft European sustainability reporting standards, "Appendix VI, Acronyms and glossary of terms", nov. 2022, p. 18; see also recitals 33 and 38 of the CSRD).

⁷⁴ A sustainability matter is material from a financial perspective if it triggers or may trigger material financial effects on the undertaking (EFRAG, *Ibid.*, p. 15).

⁷⁵ EFRAG, *Ibid.*, p. 13.

⁷⁶ The draft ESRS 1 standard defines the short-term horizon as the period adopted by the undertaking as the reporting period in its financial statements; the medium-term horizon as starting from the end of the short-term period and per above to five years, and the long-term horizon as more than five years (EFRAG, Draft European sustainability reporting standards, "ESRS 1 General requirements", § 82, p. 17). It should be noted that the topical standards may provide for other time horizons: the time horizon for climate change, e.g., is longer.

⁷⁷ EFRAG, *Ibid.*, § 52, p. 12.

⁷⁸ *Ibid.*, § 56, p. 13.

situations in which the implementation of actions by the company, aimed at remedying certain impacts or risks in relation to one sustainability matter, also entails significant risks in relation to one or more other sustainability issues. For example, a company implementing an action plan to decarbonise production that involves abandoning certain products must then consider the material negative impacts of this plan (impacts on the company's workforce if abandoning these products leads to a reduction in human capital requirements and financial impacts due to redundancy payments).

14.- Disclosure of material sustainability information. - Once the risks and opportunities have been identified, the company must determine which of them are material by adopting thresholds to determine which sustainability issues will actually be covered in its sustainability reporting. Once again, the standards indicate what materiality should be based on. With regard to the impact materiality, for actual negative impacts, materiality is based on the severity of the impact (assessed on the basis of the scale, scope and irremediable nature of the impact),⁷⁹ while for potential negative impacts it is based on the severity coupled with the likelihood of the impact⁸⁰ (being specified that severity must take precedence over likelihood in the case of an impact on human rights).⁸¹ As for the assessment of financial materiality, the materiality of risks and opportunities is assessed based on the combination of the likelihood of occurrence and the size of the potential financial effects.⁸²

At the end of this process, if the undertaking concludes that a sustainability matter is material as a result of its materiality assessment, it shall report according to the Disclosure Requirements (including Application Requirements) related to that specific sustainability matter in the corresponding topical ESRS. If, on the other hand, the conclusion is negative and the undertaking therefore omits all the disclosure requirements set out in the associated topical ESRS, then it shall briefly

79 Appendix B of the ESRS 1 project specifies what is meant by scale, scope and irremediability (EFRAG, Draft European sustainability reporting standards, "ESRS 1 General requirements", Appendix B, p. 28). Seriousness is determined by scale (how serious is it, how serious is the negative impact or what is the benefit of the positive impact for people or the environment), scope (the extent of the negative or positive impacts, geographical perimeter or number of people affected, *e.g.*), and irremediability (whether, and to what extent, the negative impacts can be corrected, by restoring the previous state). Each of the 3 characteristics (scale, scope and irremediable nature) can make a negative impact serious. It should be noted that the indicators provided in the appendices are optional.

80 EFRAG, *Ibid*, § 48, p. 11.

81 It is regrettable that there is not the same concern for the environment. However, the link with the environment could be made through the prism of the human right to a healthy environment. In this regard, the Council of Europe recently called on its 46 member states to actively consider recognising, at national level, the right to a clean, healthy and sustainable environment, as a human right (Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment adopted on 27 September 2022).

82 EFRAG, "ESRS 1 General requirements", *supra*, Appendix B, p. 29.

explain the conclusions of its materiality assessment for this topic.⁸³ The Commission's draft delegated regulation referred to above, however, goes back on this point. It replaces the obligation ("it shall") with the possibility ("it may"), leaving companies free to explain or not the negative conclusions of its assessment of the relative importance of a particular topic.⁸⁴ In this version of standardization, companies are no longer legally obliged to explain why a sustainability issue is not considered material for them.

15.- Towards corporate sustainability. - The double materiality approach adopted by the European Union thus shifts the center of gravity from consideration of shareholders' common interests alone (simple materiality) to concern for external interests⁸⁵ by a company that must contribute to the "collective interest"⁸⁶ (double materiality). The directive's reference to "*corporate sustainability*" corroborates this holistic vision of sustainability. The sustainability report is therefore presented as a "model for corporate sustainability" (B).⁸⁷

B. *The corporate sustainability*

16.- A "corporate sustainability"? - The most notable contribution of the CSRD can certainly be seen in the use of the expression "corporate sustainability" and the philosophy behind it. The text refers successively to "corporate sustainability information"⁸⁸ and to "corporate sustainability reporting".^{89 and 90} The eleventh⁹¹ and fifteenth⁹² recitals refer to corporate sustainability without defining it.

83 EFRAG, *Ibid.*, § 38, p. 10; EFRAG, "ESRS 2 General disclosures", § 56, p. 15.

84 Paragraph 57 of ESRS 2, as it would result from the European Commission's delegated act if adopted as it stands, reads as follows: "When all the Disclosure Requirements in a topical ESRS are omitted because the topic is assessed not to be material for the undertaking, the undertaking may provide a brief explanation of the conclusions of its materiality assessment for the topic in question" (annex 1, "European sustainability reporting standards", draft delegated regulation supplementing Directive 2013/34/UE, § 57, p. 52). Paragraph 38 of ESRS 1, as it would result from the delegated act if adopted as it stands, goes in the same direction (*ibid.*, § 31, p. 7).

85 For a study of the concept of "stakeholders" at the heart of the CSRD, see *inclure ici la référence de l'article de Théo Vuarnet publié dans la présente revue.*

86 N. NOTAT, J.-D. SÉNARD, *L'entreprise, objet d'intérêt collectif*, 9 mars 2018, p. 38.

87 The expression is borrowed from French Professor B. PARANCE, in the title of her aforementioned article.

88 CSRD Directive, recitals 11 and 15. In the French version of the text, "corporate sustainability information" is translated as "*informations en matière de durabilité des entreprises*".

89 CSRD Directive, title, recitals 9 and 21. Numerous references are also made in the body of the directive. In the French version of the text, "corporate sustainability reporting" is translated as "*publication d'informations en matière de durabilité par les entreprises*".

90 J.-B. BARBIERI also made this observation at the stage of the directive proposal (J.-B. BARBIERI, *supra*, p. 99).

91 CSRD Directive, recital 11: "*There has been a very significant increase in demand for corporate sustainability information in recent years, especially on the part of the investment community. (...)*".

92 *Ibid.*, recital 15: "*The Commission report on the review clauses and its accompanying fitness check also identified a significant increase in requests to undertakings for information about sustainability matters aimed at addressing the existing information gap between users' information needs and the*

The above-mentioned 2019 Commission guidelines had in fact already referred to corporate sustainability.⁹³ In addition, the notion of “corporate sustainability”⁹⁴ is at the heart of the “Sustainable Corporate Governance initiative”, which aims to better align the interests of companies, their shareholders, managers, stakeholders and society. It would help companies to better manage sustainability-related matters in their own operations and value chains.⁹⁵

Alongside the expression “corporate sustainability” we find that of “sustainable enterprise” specifically in the discourse of the ILO⁹⁶ which links it to the concept of decent work.⁹⁷ The 2007 International Labour Conference, which founded a program to promote sustainable enterprises,⁹⁸ defines sustainable enterprises as economic entities pursuing profit through fair competition but being socially useful and contributing to social development by providing goods and services produced in accordance with ethical practices.⁹⁹ Enterprises are thus entrusted with the mission “to create a sustainable society through business activities comprehensively reflecting economic, environmental, and social aspects”.¹⁰⁰ While the expression “sustainable enterprise” seems to be confined to ILO discourse, “corporate sustain-

available corporate sustainability information. (...)”

93 European Commission, Communication, “Guidelines on non-financial reporting: Supplement on climate-related information”, *op. cit.* p. 2: “Without sufficient, reliable and comparable sustainability-related information from investee companies, the financial sector cannot efficiently direct capital to investments that drive solutions to the sustainability crises we face (...)”. The French version of these guidelines is even more revealing, using the expression “durabilité de l’entreprise” (corporate sustainability): « Si les entreprises susceptibles de recevoir des investissements ne communiquent pas suffisamment d’informations fiables et comparables sur leur durabilité (...) ».

94 Translated into french by « entreprise durable ».

95 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

See also the European Parliament resolution on sustainable corporate governance of 17 December 2020.

96 See in particular: International Labour Conference, 96th session, *Report VI. The promotion of sustainable enterprises*, sixth item on the agenda, Geneva, 2007; International Labour Conference, 98th Session, *Declaration on Social Justice for a Fair Globalization*, Geneva, 2008; International Labour Conference, 99th Session, *Report VI. Employment policies for social justice and fair globalization*, Geneva, 2010; ILO, Report, *Sustainable enterprises: Creating more and better jobs*, 2014.

97 The concept of decent work was born at the eighty-seventh session of the ILC in 1999 (ILO, *Report of the Director-General to the 87th International Labour Conference: Decent Work*, Geneva, 1999). It is one of the organisation’s priorities. Indeed, in his above-mentioned report, the Director-General of the ILO refers to it in these terms: “The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”.

98 The strategic framework developed by the ILO to promote job creation through the development of sustainable enterprises is based on the following three pillars: the creation of an environment conducive to sustainable enterprises and employment (1), the creation of sustainable and responsible workplaces (2), and the development of entrepreneurship and economic activity (3).

99 International Labour Conference, 96th session, *Report VI. The promotion of sustainable enterprises*, sixth item on the agenda, Geneva, 2007, p. 6.

100 *Ibid.*

ability” is gradually gaining ground in the literature,¹⁰¹ the work of the UN¹⁰² and is now being incorporated into EU law.

17.- An expected contribution from companies to sustainable development. - Not only does the CSRD tie in with sustainable development from the outset, but above all it seems to set a course for companies: that of making a positive contribution to sustainable development in general,¹⁰³ and to the objectives of sustainable development in particular.¹⁰⁴ The idea of companies making a commitment to sustainable development is not new, and flexible law has been guiding companies in this direction for decades.¹⁰⁵ The Johannesburg Declaration (2002) illustrates

¹⁰¹ See in particular B. SHEEHY, F. FARNETI, “Corporate Social Responsibility, Sustainability, Sustainable Development and Corporate Sustainability: What Is the Difference, and Does It Matter?”, *Sustainability*, 2021, 13, 5965; T. DYLLICK, K. HOCKERTS, “Beyond the Business Case for Corporate Sustainability”, *Business Strategy and the Environment*, March 2002, p. 130.

¹⁰² UN report, *Blueprint for corporate sustainability leadership*, 2010. It should be noted, however, that in the French version of this report the English expression “corporate sustainability” is translated as “*développement durable des entreprises*” and not as “*durabilité des entreprises*”.

¹⁰³ While the beginnings of this concept can be found in the 1972 Report of the Club of Rome and the 1972 Stockholm Declaration, the now famous definition of sustainable development was established fifteen years later in the Brundtland Report as development that “*meets the needs of the present without compromising the ability of future generations to meet their own needs*” (Brundtland Report, « Our Common Future », 1987, p. 15). On page 34, after recalling the definition of sustainable development, the report states that it is “far from requiring the cessation of economic growth”. The Brundtland report went on to define sustainable development more broadly, but it is a definition that is rarely mentioned: “*In its broadest sense, the strategy for sustainable development aims to promote harmony among human beings and between humanity and nature*” (p. 50).

¹⁰⁴ In the sixth recital, sustainability is linked to the United Nations 2030 Agenda (resolution of 25 September 2015, A/RES/70/1): “*The 2030 Agenda has at its core the UN Sustainable Development Goals (SDGs) and covers the three dimensions of sustainability: economic, social and environmental*”. The directive is therefore part of the sustainable development dynamic as it has existed since the 1987 Brundtland Report, which seems logical insofar as the European Union has long affirmed its ambition to be a pioneer in this area and in achieving the various SDGs. Indeed, the explanatory memorandum to the proposed CSRD directive set the objective of the proposal to “*contribute to the transition towards a fully sustainable and inclusive economic and financial system in accordance with the European Green Deal and the UN Sustainable Development Goals*” (COM/2021/189 final, p. 3).

¹⁰⁵ In the various texts that have contributed to the construction of sustainable development, the role of business in this process has already been emphasised. As early as the Brundtland Report (1987), elements were included in this vision: “*Transnational corporations have a special responsibility to smooth the path of industrialization in the nations in which they operate*.” (Chairman’s Foreword, §68); “*Industry takes materials from the natural resource base and introduces both products and pollution into the human environment. It has the power to improve or damage the environment; it invariably does both*” (Chapter 8, § 3); “*(...) national governments should clearly define environmental objectives and require industrial companies to implement environmental laws, regulations, incentives and standards*” (Chapter 8, p. 171); “*Industry’s response to pollution and resource degradation has not been and should not be limited to compliance with regulations. It should accept a broad sense of social responsibility and ensure an awareness of environmental considerations at a levels. Towards this end, all industrial enterprises, trade associations, and labour unions should establish company wide or industry-wide policies concerning resource and environmental management (...)*” (Chapter 8, § 61). Agenda 21 (1992) is also clear on this point: it states that “*governments should encourage the establishment and operations of sustainably managed enterprises*” (point 30.19, p. 414) and point 30.22 states that “*business and industry, including transnational corporations, should be encouraged to establish world-wide corporate policies on sustainable development*”. Ten years later, the Johannesburg Declaration (2002) shared this vision, extending it to the private sector as a whole, and not just industrial companies: “*We agree that in pursuit of its legitimate activities the*

this by stating in paragraph 27 that “*in pursuit of its legitimate activities the private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies*”.

There is a plethora of literature highlighting the benefits for companies of moving in this direction.¹⁰⁶ For example, the guide for business action on the SDGs developed by the *SDG Compass*¹⁰⁷ (2018) stresses the competitive advantage that companies will have if they are the first to transform their business model to bring it into line with the SDGs.¹⁰⁸ In the same vein, the comments on the OECD Guidelines for Multinational Enterprises underlined the economic benefits for business of implementing an environmental management system (reduced operating and insurance costs, improved energy and resource conservation, reduced compliance and liability charges, improved access to capital and skills, improved customer satisfaction, and improved community and public relations).¹⁰⁹

But corporate sustainability reconsiders the company’s place at the heart of sustainability issues, going beyond the company’s interest in committing itself to this path and going beyond minimising its negative impact on society. In that way, the global vision of sustainability promoted by the CSRD supports this, by defining the impact as “*the undertaking’s contribution, negative or positive, to sustainable development*”.¹¹⁰ This dynamic is strongly confirmed by the CS3D proposal, which expresses it unambiguously. The fourteenth recital of the directive states that “*this Directive aims to ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies (...)*”.¹¹¹

private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies.” (§ 27). More recently and concomitantly with the development of the seventeen SDGs, the resolution adopted by the General Assembly on 25 September 2015 encourages “all businesses to apply their creativity and innovation to solving sustainable development challenges. (...)” (§ 67).

106 For a summary of the opportunities of the SDGs for the private sector, see e.g. : OECD, Policy note on sustainability, *Business for 2030 : Putting the SDGs at the core*, 2018.

107 Developed by GRI, the UN Global Compact and the World Business Council for Sustainable Development (WBCSD).

108 *SDG Compass, The guide for business action on the SDGS*, 2018, p. 8.

109 OECD, *The OECD Guidelines for Multinational Enterprises*, 2011 ed., p. 44.

110 EFRAG, Draft European sustainability reporting standards, “Appendix VI, Acronyms and glossary of terms”, p. 28. The European Commission’s draft delegated regulation also uses this definition (Annex II, “Acronyms and glossary of terms”, draft delegated regulation supplementing Directive 2013/34/EU, p. 29).

See also, on the notion of impact and its measurement, the report by the French institution France Stratégie published in February 2023 under the title *Impact(s), responsabilité et performance globale*.

111 Commission, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final, 23 February 2022, recital 14.

18.- The corporate sustainability in the CSRD. In the CSRD, we find the expressions “corporate sustainability reporting”¹¹² and ¹¹³ and “corporate sustainability information”.¹¹⁴ It may lead to think that “corporate sustainability information” is the information communicated by companies about sustainability, and not the information regarding the sustainability of the company. As Jean-Baptiste Barbieri underlined at the CSRD proposal stage, the term “sustainability” can refer both to the term that follows it, i.e. “reporting” or “information”, and to the term that precedes it, “corporate”.¹¹⁵ He concludes that “it would therefore be necessary to publish either information on sustainability, in a corporate context (corporate sustainability reporting), or information on corporate sustainability (corporate sustainability reporting)”.¹¹⁶ In our view, the directive takes the latter approach. An additional claim leads to this path: the passage from the activities of the company to the company as a whole. Before the CSRD, extra-financial information included a description by the company of the “impact of its activity”.¹¹⁷ From now on, sustainability information will include information that enables us to understand “the undertaking’s impacts on sustainability matters”.¹¹⁸ It is no longer just the company’s activities that must be sustainable, but the company that must aim for sustainability.

19.- Managing companies to ensure their sustainability. - Companies managed to ensure sustainability, this was the wish announced by Agenda 21 in 1992,¹¹⁹ and the CSRD directive gives concrete expression to this today. In the words of French Professor Benoît Lecourt, “this new term ‘sustainability’ (...) sets the tone and in itself reveals the ambitious nature of the text: the aim is to go beyond the publication of information relating to environmental and social issues and to publish information on the way in which large companies are managed (...)”.¹²⁰

¹¹² Which is translated in french as “*publication d’informations en matière de durabilité par les entreprises*”.

¹¹³ Directive CSRD, title of the directive, recitals. 9 and 21.

¹¹⁴ Which is translated as “*informations en matière de durabilité des entreprises*”.

¹¹⁵ J.-B. BARBIERI, *op. cit.* p. 99.

¹¹⁶ *Ibid.* The exact quote in its original version is as follows: « *Il faudrait donc publier soit des informations quant à la durabilité, dans un contexte sociétair (corporate sustainability reporting), soit des informations sur la durabilité sociétair (corporate sustainability reporting).* »

¹¹⁷ Art. 19a, 1 of Directive 2013/34 as it stood between the adoption of the NFRD and the CSRD, read as follows: “1. *Large undertakings (...) shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking’s development, performance, position and impact of its activity, (...)*”.

¹¹⁸ Art. 19a of Directive 2013/34 in its consolidated version now refers to “*the undertaking’s impacts on sustainability matters (...)*” (art. 19a, 1.; art. 19a, 2, a), iv)).

¹¹⁹ UN, Rio Earth Summit, “Agenda 21”, 1992, point 30.19: “*Governments should encourage the establishment and operations of sustainably managed enterprises*”. In the French version : « *Les gouvernements devraient faciliter la création et le fonctionnement d’entreprises gérées de façon à assurer leur durabilité.* »

¹²⁰ B. LECOURT, *supra*, p. 639. The exact quote in its original version is as follows: « *Ce nouveau terme “durabilité” [...] donne le ton et révèle à lui seul le caractère ambitieux du texte : il s’agit d’aller au-delà de la publication d’informations relatives aux questions environnementales et sociales et de publier des informations sur la façon dont les grandes sociétés sont gérées [...].*”

Indeed, the CSRD Directive affects the management of companies by requiring the publication of information on the sustainability targets set by them and the progress made towards achieving them, the business strategy, and information about it, and the resilience of the business model and strategy in relation to risks related to sustainability matters.¹²¹ The fourteenth recital refers to “the efforts of undertakings to ensure that their business models and activities are sustainable”. The structure of the draft ESRS also reflects the directive’s managerial approach. Each standard is divided into three pillars: general disclosures (governance, business model and strategy); impact, risk and opportunity management, and metrics and targets.¹²² Finally, it is not insignificant that this information must be published in the management report.

20.- Towards guiding the behaviour of companies. - In addition to informing market players, the CSRD aims to “steer companies in a more sustainable and long-term direction”.¹²³ The directive thus goes beyond a simple reporting obligation, as it contains the seeds of an obligation for companies to have a sustainability strategy with specified objectives. The CSRD’s holistic vision of sustainability is thus accompanied by a redefinition of the obligations of companies (II).

I. A redefinition of obligations

21.- Plan. - Formally, the CSRD contains disclosure requirements, as was also provided for in the NFRD. However, the obligations have been strengthened, since they are no longer subject to the “*comply or explain*” principle. Moreover, the disclosure requirements are more action-oriented than before (A). The monitoring of compliance with these obligations has also been significantly strengthened, although the penalties for non-compliance have not been standardised across Europe. The change in terminology, abandoning the term “extra-financial”, reflects the desire to make sustainability information as important as the information provided in the financial statements, and to place it in an accounting dynamic, in line with what is required for the latter. The CSRD therefore requires assurance of sustainability reporting (B).

In the same vein, see N. CUZACQ, *supra*, p. 82: “in the future, management and the law will have to refine the features of a sustainable company”, “the European Union is beginning to draw up a standard for a sustainable company (...)”.

121 CSRD Directive, recital 30; Directive 2013/34 in its consolidated version, art. 19a, 2, a).

122 This structure is also in line with the ISSB and TCFD frameworks.

123 European commission, Communication, “Action Plan: Financing Sustainable Growth”, *op. cit.*, p. 3: “Corporate transparency on sustainability will not only inform market participants, but also help to steer companies in a more sustainable and long-term direction”.

A. Strengthened and action-oriented reporting obligations

22.- A strengthening of obligations by abandoning the “comply or explain” principle¹²⁴. - The obligations on companies are strengthened, not only because the fields covered by the information are multiplied (this has been studied above), but also because the CSRD clears the way by abandoning the “comply or explain” principle¹²⁵ which prevailed under the NFRD. The NFRD left some degree of freedom for companies: if an undertaking did not apply a policy relating to one of the “extra-financial” risks, the statement had to clearly explain the reasons for this failure. The provision for this in the old version of article 19a 1. of directive 2013/34 has not been reproduced by the CSRD, thus indicating renunciation of this principle. In the EFRAG’s draft standard setting out the general requirements (ESRS 1), the rule is as follows: “When reporting on policies, actions and targets in relation to a sustainability matter, the undertaking shall include the information prescribed by all the Disclosure Requirements in the topical ESRS related to that matter and in the corresponding Disclosure Contents on policies, actions, and targets required under ESRS 2 (including their datapoints). However, if the undertaking cannot disclose the information prescribed by either the Disclosure Requirements in the topical ESRS or the Disclosure Contents in ESRS 2 (including their datapoints) on policies, actions and targets, because it has not implemented the respective policies, actions and targets, it shall disclose this to be the case and it may report a timeframe in which it aims to have these in place”.¹²⁶ Thus, the company must disclose that it has not implemented the necessary policies and actions: the text no longer leaves room for justification.

However, residual traces of the mechanism remain. On the one hand, for the first three years of the application of the directive there is an exemption for undertakings from the obligation to provide information on the entire value chain,¹²⁷ on condition that an enhanced “comply or explain” is provided,¹²⁸ and ¹²⁹ but the aim is ultimately to abandon the mechanism. On the other hand, a transitional regime for SMEs listed on regulated markets is provided for: until 2028, they may decide not to include in their management report the sustainability information. In such cases,

¹²⁴ For a detailed study of the residue of the “comply or explain” mechanism in the CSRD system, see C. TREBERT, *insérer la référence exacte de son article dans la présente revue lorsqu’elle sera disponible*.

¹²⁵ Art. 19a 1. of Directive 2013/34 as it stood between the adoption of the NFRD and the CSRD, read as follows: “Where the undertaking does not pursue policies in relation to one or more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so”. In French law, this is found in art. R. 225-105 I of the French Commercial Code.

¹²⁶ EFRAG, Draft European sustainability reporting standards, “ESRS 1 General requirements”, § 34, p. 10.

¹²⁷ Only in the event that not all the necessary information regarding its value chain is available.

¹²⁸ Directive 2013/34 in its consolidated version, art. 19a 3; Directive CSRD, recital 33.

¹²⁹ The undertaking shall explain the efforts made to obtain the necessary information about its 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.

the undertaking shall, nevertheless, briefly state in its management report why the sustainability reporting was not provided.¹³⁰ In addition, companies are allowed a certain degree of freedom. In particular, they may deviate from the definitions of the short, medium and long term set out in the draft standards, provided that the company discloses the reasons justifying the application of its own definitions rather than that of the draft standard.¹³¹

Finally, the CSRD will not have been an opportunity to definitively remove the corporate governance statement from the “comply or explain”. The latter still applies to the diversity policy set out in Article 20 of the consolidated Directive 2013/34.¹³²

23.- Action-oriented information obligations. - Formally, the CSRD system includes information obligations, multiplying their number compared to the NFRD system. In substance however, the border between obligations to inform and obligations to act sometimes seems very fine.

Firstly, to be effective, the transparency obligation requires reporting to be organised within the company and therefore implies several obligations¹³³ (implementation of management tools, control of the effectiveness of the information system, selection of information, *etc.*).¹³⁴ In this respect, the *Haut Comité Juridique de la Place Financière de Paris*¹³⁵ stressed in a recent report that, for the most part, reporting obligations require underlying organisational rules.¹³⁶

Above all, the materiality assessment method described above allows the identification of the negative points that need to be corrected and acted upon. Identifying a risk or an opportunity is in fact the first step in materiality assessment, which leads companies to identify elements that they might find difficult to display with pride. For example, the company of our previous example (I.-,A.-), which have a business relationship with a mine in which children were exploited, would probably

¹³⁰ Directive 2013/34 in its consolidated version, art. 19a 7.

¹³¹ EFRAG, Draft European sustainability reporting standards, “ESRS 2 General disclosures”, *op. cit.* p. 6: when it has deviated from the medium- or long-term time horizons defined by draft ESRS 1, the undertaking shall describe its definitions of each horizon and the reasons for applying those definitions. The ESRS 2 standard, as set out in Annex 1 to the Commission’s draft delegated regulation, is also along these lines (see Annex 1, “European sustainability reporting standards”, draft delegated regulation supplementing Directive 2013/34/UE, § 9, p. 41).

¹³² Article 20, 1, f) of the Directive 2013/34 in its consolidated version: “(...) *If no such policy is applied, the statement shall contain an explanation as to why that is the case*”.

¹³³ For a study of obligations to act in company law, see S. KOUHAIZ, *Les obligations de faire en droit des sociétés*, IRJS Éditions, 2020, 532 pp.

¹³⁴ This comment is not specific to the CSRD; the NFRD was already moving in this direction, in particular by requiring the publication of “non-financial key performance indicators” (the CSRD now refers to “indicators” as standardised by the information standards). Such publication of information requires the prior development of these indicators as well as the tools and methods for monitoring their development.

¹³⁵ French institution that produces legal analyses and makes them public. It is made up of lawyers, academics and other qualified personalities.

¹³⁶ Haut Comité Juridique de la Place Financière de Paris, *op. cit.* p. 48.

prefer to change its commercial partner rather than risk seriously damaging its reputation disclosing this situation.

Finally, the disclosure of information on strategy, targets and policies presupposes the existence of such elements, unless it is assumed that nothing will be done in all of these. Undertakings are not directly bound by the CSRD to have policies on sustainability issues. According to the EFRAG's draft ESRS 1, the undertaking will be legally obliged ("shall") to communicate that it has not implemented the policies and actions necessary to obtain the required information on sustainability, and it will be able ("may") to indicate the timeframe within which it aims to put these policies and actions in place.^{137 and 138} Paragraph 34 of the draft ESRS 1 reads as follows: *"if the undertaking cannot disclose the information prescribed (...) because it has not implemented the respective policies, actions and targets, it shall disclose this to be the case and it may report a timeframe in which it aims to have these in place"*.¹³⁹ This wording in terms of possibility, "it may",¹⁴⁰ qualifies the observation that could have been made of a clearly substantial change. This wording is also used in the various draft topical standards.¹⁴¹

24.- Communication of transition plans. - In the same vein, companies must report on their plans for the compatibility of their business model and strategy with limiting global warming and the objective of climate neutrality.¹⁴² On this point, the recitals are more cautious than the body of the directive, since, although recital 30 refers to *"any plans [the undertakings] may have"*,¹⁴³ the information provided in Article 1 of the CSRD includes *"a brief description of the undertaking's business model and strategy, indicating: (...) the plans of the undertaking (...) to ensure that*

¹³⁷ EFRAG, Draft European sustainability reporting standards, "ESRS 1 General requirements", § 34, p. 10 : *"if the undertaking cannot disclose the information prescribed by either the Disclosure Requirements in the topical ESRS or the Disclosure Contents in ESRS 2 (including their datapoints) on policies, actions and targets, because it has not implemented the respective policies, actions and targets, it shall disclose this to be the case and it may report a timeframe in which it aims to have these in place"*.

¹³⁸ The Commission's draft delegated regulation published in June 2023 is also along these lines. See the comparative table appended to this contribution.

¹³⁹ EFRAG, "ESRS 1 General requirements", *Draft european sustainability reporting standards*, § 34, p. 10.

¹⁴⁰ *Ibid.*, p. 5: "may disclose – indicates voluntary disclosure to encourage good practice".

¹⁴¹ By way of illustration, for information relating to the negative impact on workers and the channels available to them for reporting their concerns, it is stipulated that if the company cannot disclose the required information because it has not adopted a whistleblowing channel for workers, then it *must* disclose this and *may at the same time* indicate the timeframe within which it intends to set up this system (Efrag, Draft European sustainability reporting standards, "ESRS S1 Own workforce", p. 11).

¹⁴² Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, known as the "European Climate Act", Article 1 of which establishes a binding objective of climate neutrality in the Union by 2050 with a view to achieving the long-term temperature objective set out in Article 2(1)(a) of the Paris Agreement.

¹⁴³ CSRD Directive, recital 30.

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 (...),¹⁴⁴ thus abandoning the any reference to eventuality. This provision could be read as an implicit obligation for companies to adopt a climate or transition plan.¹⁴⁵ Article 15 of the CS3D proposal requires companies to adopt such a plan.

In addition, the draft standard ESRS E1, which it is not yet known whether it will be part of the information that will always be required to be published as explained above (I.A), (I.-, A.-), sets out detailed requirements for the content of these plans.¹⁴⁶ and ¹⁴⁷ Paragraph 16 of this standard states that “*in case the undertaking does not have a transition plan in place, it shall indicate whether and, if so, when it will adopt a transition plan*”¹⁴⁸. Formally, therefore, there is no obligation for a company to draw up such a plan. On the other hand, if it does not, it must indicate this in the management report. Moreover, if it communicates its intention to introduce a climate plan, it cannot simply justify that it intends to initiate the process but must back up this information with a concrete data: the planned implementation date. In this situation, companies are subject to the obligation to set a deadline, but the choice of the deadline remains up to them. A question arises: what will be the legal consequences for a company that has not adopted a climate plan once the deadline, previously set by the company in a previous management report, has passed? This is something that activist shareholders and civil society could be able to mobilise.

As a reminder, the company is not directly obliged by the CSRD to implement the policies raised by the latter. In substance, however, as justifications or deliberately vague promises are not allowed, the information “the company has not adopted or implemented a transition plan and does not intend to adopt one” could be

¹⁴⁴ Directive CSRD, art. 1. 4; Directive 2013/34 in its consolidated version, art. 19a, 2, a).

¹⁴⁵ T. ARONS, M. LOKIN, “The Corporate Climate Transition Plan: How to Ensure Companies are Paris - Proof”, *Tijdschrift Ondernemingsrecht* 2023/35, april 2023, p. 249.

¹⁴⁶ EFRAG, Draft European sustainability reporting standards, “ESRS E1 Climate change”, § 15, p. 6; *Ibid*, Appendix B, p. 21.

In addition, the transition plan is defined by EFRAG as “an aspect of the undertaking’s overall strategy that lays out the entity’s targets and actions for its transition towards a lower-carbon economy, including actions such as reducing its GHG emissions and with the objective of limiting climate change to 1.5° C and climate neutrality” (*Ibid.*, Annex A, p. 20).

¹⁴⁷ The draft delegated regulation proposed by the European Commission in June 2023 includes the requirements for the content of such plans, but unlike the EFRAG’s draft, it excludes ESRS E1 from the information that is still mandatory.

¹⁴⁸ EFRAG, “ESRS E1 Climate change”, *Draft european sustainability reporting standards*, § 16, p. 6.; Annex 1, “European sustainability reporting standards”, draft delegated regulation supplementing Directive 2013/34/UE, § 17, p. 72.

very poorly received by the information users. Indeed, the fears associated with the climate emergency are spreading to consumers,¹⁴⁹ investors¹⁵⁰ and employees¹⁵¹ alike.

Finally, the European Parliament's position adopted on June 2023 on the "CS3D" proposal¹⁵² reveals the influence of the "CSRD" Directive (obligations to say) on the future of "CS3D" (obligations to act). In particular, the European Parliament has adopted an amendment proposed by the ENVI Committee last February¹⁵³ to Article 15 of the "CS3D" proposal. This amendment substantially aligns Article 15 (on climate transition plans) with the "CSRD" Directive.¹⁵⁴ It plans to include in this article a reference to the disclosure requirements set out in the "CSRD" directive (the proposed amendment especially mentions Articles 19a 2, a), iii) and 29a, 2, a, iii) of Directive 2013/34 in its consolidated version). In addition, it adds to article 15 a description of

149 A whole range of semantics are being used to describe these consumers: *consom'actor*, *committed consumer*, *responsible consumer*, *citizen or ethical consumer*, *etc.* By way of illustration, Eurobarometer 468 highlights the trend towards awareness of the individual and voluntary role that consumers can play. The response to question QD5.1 shows that more than eight out of ten Europeans (87 %) agree that, as individuals, they can play a role in protecting the environment (Special Eurobarometer, 468 "Attitudes of European citizens towards the environment", 2017, p. 12). Furthermore, 7 out of 10 French people say they see the link between their consumption choices and the future of the planet, according to the fifteenth edition of the *GreenFlex* and *ADEME* Responsible Consumption Barometer published in 2022 (in French).

150 For a recent example, in April 2023, a coalition of 34 responsible investors asked the French Minister for the Economy to use the reindustrialisation bill to regulate the climate resolutions submitted by companies to a shareholder vote. They are calling for certain key indicators to be communicated by management to shareholders on a mandatory basis (e.g. the company's net-zero trajectory by 2050 and its short- and medium-term greenhouse gas emission reduction targets for the three scopes). They are also calling for a review of the legislative framework to facilitate such "*say on climate*".

151 Environmentally aware employees are no longer confining their environmental responsibility to the private sphere and now want to extend it to the workplace. In France, a "Manifesto for an Ecological" Awakening ("*manifeste pour un reveil écologique*") was published in 2019 on the initiative of several students. It calls for people to work for employers whose activities are consistent with the ecological emergency. It has received a considerable response (more than 31,000 students have signed it). In addition, a study conducted by *Ekodev* and published in 2017 revealed that almost 80% of employees consider CSR to be important in the life of their company and would like to become more involved in these initiatives. There is therefore a challenge in terms of internal and external employer brand.

152 Amendments (1) adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)). Available online here: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

153 European Parliament, Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 10 Feb. 2023, p. 53. Available online: https://www.europarl.europa.eu/doceo/document/ENVI-AD-734465_EN.pdf.

154 It should be noted that the report also proposes aligning the scope of these two directives, taking as a reference the more ambitious scope (that of CSRD directive).

the content required for these plans,¹⁵⁵ clearly aligning itself with the body of legislation resulting from the “CSRD” directive.¹⁵⁶

25.- The role of the Board of Directors and management bodies in relation to sustainability issues. - Under the CSRD, information must also be disclosed on the role of the Board of Directors (BoDs) and senior management in relation to sustainability matters.¹⁵⁷ BoDs are also required to provide information on how the undertaking’s business model and strategy take account of the interests of the undertaking’s stakeholders and of the impacts of the undertaking on sustainability matters.¹⁵⁸ Finally, there is only one little step to take to achieve the “directors’ duty of care” proposed in Article 25 of the CS3D proposal. This article states that sustainability issues must be considered as a part of directors’ duties¹⁵⁹ (“*directors of companies (...) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term*”). Although some fears have been expressed about the adoption of Article 25 in view

¹⁵⁵ The proposed wording by the CS3D proposal of the second paragraph of this Article 15 is as follows: “*This plan shall include a description of: (a) the resilience of the company’s business model and strategy to risks related to climate matters; (b) the opportunities for the company related to climate matters; (c) an identification and explanation of decarbonization levers within the company’s operations and value chain, including the exposure of the company to coal-, oil- and gas-related activities, as referred to in Articles 19a(2), point (a)(iii), and 29a(2), point (a)(iii), of Directive 2013/34/EU; (d) how the company’s business model and strategy take account of the interests of the company’s stakeholders and of the impacts of the company on climate change; (e) how the company’s strategy has been implemented and will be implemented with regard to climate matters, including related financial and investment plans; (f) the time-bound, science-based targets related to climate change set by the company for scope 1, 2 and, where relevant, 3 emissions, including absolute emission reduction targets for greenhouse gas for 2030 and in five-year steps up to 2050, a description of the progress the company has made towards achieving those targets; (g) a description of the role of the administrative, management and supervisory bodies with regard to climate matters*”.

There is a clear parallel with the content of the articles expressly cited by the amendment, but also with Article 19a, 2, a), iv) and v) of the consolidated Directive 2013/34, as well as with recitals 30 and 47 of the CRSD Directive and with paragraph 15 of the draft ESRS E and Annex B specifying this latter.

¹⁵⁶ There is a clear parallel with the content of the articles expressly cited by the amendment, but also with Article 19a, 2, a), iv) and v) of the consolidated Directive 2013/34, as well as with recitals 30 and 47 of the CRSD Directive and with paragraph 15 of the draft ESRS E and Annex B specifying this latter.

¹⁵⁷ Directive 2013/34 in its consolidated version, Art. 19a, 2, c).

¹⁵⁸ *Ibid.*, Art. 19a, 2, a), iv).

¹⁵⁹ See M. OLAERTS, “Corporate sustainability and the duty of care of directors”, *Ondernemingsrecht* 2023/38, April 2023, p. 281. The author stresses in this respect that these developments are in line with the directions taken by French, Dutch and German law. Article L. 225-64 of the French Commercial Code recently introduced consideration of social, environmental, cultural and sporting issues. This article, which applies to French public companies (SA’s), states that: “[*The Board of Directors*] determines the direction of the company’s business and ensures that it is implemented in accordance with its corporate interests, considering the social, environmental, cultural and sporting aspects of its business” (In French original version : « [*Le conseil d’administration*] détermine les orientations de l’activité de la société et veille à leur mise en œuvre, conformément à son intérêt social, en considérant les enjeux sociaux, environnementaux, culturels et sportifs de son activité »).

of the Council's position on the matter,¹⁶⁰ the CSRD Directive, for its part, has been adopted. Thus, the Boards of Directors of large companies will have to take sustainability into account when defining their strategy, even in the absence of Article 25 of the CS3D proposal.

26.- Monitoring compliance with obligations. - The obligations imposed by the CSRD are therefore obligations to say, freed from the “comply or explain” principle, and strongly oriented towards action. The monitoring of compliance with these obligations has also been significantly strengthened, although the penalties for non-compliance have not been standardised at European level (B).

B. More controlled enforcement of obligations with contrasting consequences

27.- Verification and assurance of sustainability information. - Under the old regime (NFRD), European Union law allowed, but did not require, Member States to introduce verification of extra-financial information by an independent third party. Only three states had introduced it: France,¹⁶¹ Italy and Spain. As for the CSRD directive, it requires assurance of sustainability information, which will be added to the auditing of accounts. On the basis of a limited assurance mission in the first instance, the statutory auditors or independent assurance service providers will have to issue an opinion on the compliance of the sustainability information with the directive requirements (and standardisation) and the process of identifying the information to be published carried out by the undertaking (described above, *I.A*). Ultimately, the aim is to have a similar level of assurance for financial and sustainability information through a reasonable assurance engagement.¹⁶² The Directive lists several requirements to which independent assurance providers will be subjected,¹⁶³ which will not be detailed in this contribution.

In the initial version of the drafts ESRS, a rebuttable materiality presumption was established, whereby all sustainability information was presumed to be material and therefore had to be disclosed by the undertaking unless there was evidence of the contrary. This presumption has been removed in the final version of the draft

¹⁶⁰ Article 25 was deleted in the Council's compromise text published on 30 November 2022.

¹⁶¹ Under the French system, the statutory auditor draws up a certificate attesting to the presence of the information in the management report (C. com., art. L. 823- 10, para. 4). In addition, the information contained in the DPEF (“*declaration de performance extra financière*”) is verified by an independent third-party organisation (OTI), whose opinion on the conformity and fairness of this declaration is sent to shareholders at the same time as the management report when companies exceed certain thresholds (€100 million in total assets or sales and 500 employees) (C. com., art. L. 225-102-1 V). Listed companies that do not meet these thresholds are not required to do so.

¹⁶² According to the sixtieth recital of the CSRD Directive, the conclusion of a limited assurance engagement is usually provided in a negative form of expression by stating that no matter has been identified by the practitioner to conclude that the subject matter is materially misstated. In a limited assurance engagement, the auditor performs fewer tests than in a reasonable assurance engagement.

¹⁶³ CSRD Directive, recital 61 and following.

standards published in November 2022. As a result, sustainability information assurance is paramount, as the publication of many disclosures depends on the undertaking's own assessment of the materiality of these matters. An undertaking's silence on an aspect of a topical standard that isn't part of the core information which is always mandatory will be taken as a negative conclusion of its assessment of the materiality of the issue. It will only have to explain this if it omits all the disclosure requirements of a thematic standard.¹⁶⁴ As for the European Commission's draft delegated regulation, it leaves it up to companies whether or not to explain the negative conclusions of its assessment of the materiality of a particular topic¹⁶⁵. Consequently, in order to avoid having to disclose information on a sustainability issue, a company could be tempted to distort the assessment of the materiality of this thorny issue.

This evolution introduced by the directive is nevertheless contrasted by the lack of uniformity at European level regarding the penalties applied in the event of poor or non-execution of the obligations resulting from the directive.

28.- The legal consequences of an assurance engagement revealing non-compliance with the requirements of the Directive. - The certification of information makes it possible to reveal false information so that sanctions can be applied accordingly.

The reputational sanction of “*name and shame*”¹⁶⁶ is common to all companies in the EU. In the event of a notice of non-compliance, or insufficient compliance, this notice will accompany the publication of the sustainability report. Publicity is wide-ranging in that all companies covered by the directive will have to make their management report public by posting it free of charge on the company's website.¹⁶⁷ Market players (consumers, investors, but also employees,¹⁶⁸ as noted above) are expected to react.

¹⁶⁴ EFRAG, Draft European sustainability reporting standards, “ESRS 1 General requirements”, § 38, p. 10.

¹⁶⁵ See § 14 of this contribution.

¹⁶⁶ See N. CUZACQ, “Le mécanisme du Name and Shame ou la sanction médiatique comme mode de régulation des entreprises”, *RTD com*, 2017, p.473.

¹⁶⁷ In France, the DPEF is published on the website within eight months of the end of the financial year and must be kept online for five years (art. R. 225-105-1, III, of the French Commercial Code).

¹⁶⁸ However, the economic penalty is not so obvious. As far as consumer choices are concerned, consumers still need to be offered accessible alternatives, and the inherent limits of purchasing power are constantly recalled in the debates. Secondly, as far as employees are concerned, while resignation allows an employee to terminate an employment contract on his or her own initiative, subject to certain conditions being met, it seems clear that the choice of leaving one's company is a difficult one, since an employee who resigns forfeits his or her salary and does not benefit from severance pay. Labour law could make this thorny decision easier for employees by introducing a conscience resignation clause (as exists for journalists) for the benefit of employees more generally. Following the example of consumers who boycott certain brands, employees could thus exercise a power of influence over companies. See I. VACARIE, « *L'implication écologique du salarié* » in *Droit du travail et droit de l'environnement*, Actes du Colloque de la SFDE, Toulouse, 30 September-1 October 1993. Collection « Droit et économie de l'environnement », 1994, p. 123.

29.- A lack of uniformity of sanctions at EU level. - Whether it is a question of sanctioning company bodies for inadequate reporting or sanctioning inadequate or non-compliant sustainability reporting assurance, there is no standardisation of sanctions at EU level.

Firstly, concerning the sanctioning of company bodies in the event of inadequate reporting, article 33 of Directive 2013/34/EU in its consolidated version formulates the collective responsibility of the administrative, management and supervisory bodies of companies. They are responsible for ensuring that the management is drawn up and published in accordance with the requirements of the CSRD directive. Such responsibility already existed under the NFRD.

Then, the CSRD proposal was intended to strengthen the system of penalties provided for in Directive 2013/34 (accounting directive) by specifying the minimum types of sanctions and administrative measures that Member States should provide in the case of infringements of the Directive's requirements. It was proposed to add a second paragraph to article 51 of the Directive 2013/34, requiring Member States to provide for at least three administrative measures and sanctions: a public statement indicating the natural person or the legal entity responsible and the nature of the infringement, an order requiring this latter to cease the conduct constituting the infringement and to desist from any repetition of that conduct, and administrative pecuniary sanctions. The following paragraph of the same article specified the information and circumstances to be taken into account when determining the type and level of administrative measures and penalties.¹⁶⁹

But this step forward came up against a Council amendment rejecting it. There is no trace of this change in the final text of the "CSRD" directive, as the provision was deleted by a Council amendment.¹⁷⁰ Member States thus have a wide margin of maneuver to define the penalties in the case of infringements of the national provisions transposing the sustainability reporting requirements of the Accounting

¹⁶⁹ Proposal for a directive CSRD, art. 1, 12): "*Amendments to Directive 2013/34/EU (...) Article 51 is replaced by the following: (...)*

2. In case of a breach of the national provisions transposing Articles 19a, 19d and 29a, Member States shall provide for a least the following administrative measures and sanctions: (a) a public statement indicating the natural person or the legal entity responsible and the nature of the infringement; (b) an order requiring the natural person or the legal entity responsible to cease the conduct constituting the infringement and to desist from any repetition of that conduct; (c) administrative pecuniary sanctions.

3. Member States shall ensure that, when determining the type and level of penalties, administrative sanctions or measures referred to in paragraph 2, all relevant circumstances are taken into account, including: (a) the gravity and the duration of the breach; (b) the degree of responsibility of the natural person or legal entity responsible; (c) the financial strength of the natural person or legal entity responsible; (d) the importance of profits gained or losses avoided by the natural person or legal entity responsible, in so far as such profits or losses can be determined; (e) the losses sustained by third parties as a result of the breach, in so far as those losses can be determined; (f) the level of cooperation of the natural person or legal entity responsible with the competent authority; (g) previous infringements by the natural person or legal entity responsible."

¹⁷⁰ Council of the European Union, Document ST_6292_2022_INIT 18 February 2022, p. 6.

Directive. The sole condition that they take “all measures necessary to ensure that those penalties are enforced” and that “the penalties provided for [are] effective, proportionate and dissuasive”.¹⁷¹

Secondly, there is a similar requirement regarding the sanctioning of non-compliant sustainability information assurance. After detecting inadequate implementation of sustainability assurance thanks to an effective investigation system, member States shall apply “effective, proportionate and dissuasive sanctions in respect of statutory auditors and audit firms, where statutory audits or assurance of sustainability reporting are not carried out in conformity with the provisions adopted in the implementation of this Directive”.¹⁷²

As a result, the nature and level of penalties may differ from one Member State to another.

30.- Penalties envisaged in France when the directive is transposed. - Currently in France, there are no specific penalties for non-compliance with the French provisions transposing the NFRD Directive,¹⁷³ apart from a summary injunction procedure. Under this procedure, any person may ask the president of the commercial court, acting in summary proceedings, to order the board of directors or the management board to disclose the non-financial information required in the management report, subject to a penalty payment if necessary.¹⁷⁴ Where this request is granted, the penalty payment and the costs of the proceedings are to be borne, individually or jointly as the case may be, by the directors or members of the Management Board. Other sanctions, not specifically created to ensure compliance with the extra-financial report, are possible but often have to comply with strict conditions. They have been described in the legal literature, to which this contribution refers.¹⁷⁵

As part of the transposition of the CSRD Directive, Article 8 of the French draft legislation on green industry¹⁷⁶ provides for a mechanism to exclude economic operators who do not comply with sustainability reporting obligations from public

¹⁷¹ Directive 2013/24 in its consolidated version, art. 51.

¹⁷² CSRD Directive, art. 3, 20), amending art. 30 of Directive 2006/43/EC.

¹⁷³ French law requires companies to publish a « *declaration de performance extra-financière* » whose acronym is « DPEF » (a declaration of extra-financial performance) in their management report.

¹⁷⁴ Art. L. 225-102-4, II, of the French Commercial Code.

¹⁷⁵ See: P. ABADIE, *Entreprise responsable et environnement*, Bruylant, 2013, 878 pp. in particular p. 522-550 ; V. MERCIER, « La publication d’informations extra-financières devient un outil de pilotage stratégique de l’entreprise », in B. BRIGNON, I. GROSSI (dir.), *Les nouvelles contraintes des sociétés*, Joly, 2018, p. 65-85; A.-S. EPSTEIN, « Chapitre 14. Les objectifs climatiques publiés par les entreprises, nouvel Eldorado de la régulation par l’information », in C. CURNIL (dir.), *La fabrique d’un droit climatique au service de la trajectoire « 1,5 »*, Pedone, 2021, p. 293-322, in particular p. 304-316; Haut Comité Juridique de la Place Financière de Paris, *op. cit.*, in particular p. 61-70.

¹⁷⁶ At the time of writing, the final stage in the process of adopting the law (“*loi industrie verte*”) is the presentation of the draft legislation to the French Council of Ministers on 16 May 2023.

procurement procedures and concession contracts. A similar mechanism yet exists in French law for due diligence plans: the Climate Resilience Act has effectively introduced the possibility of excluding companies that do not draw up a due diligence plan from public procurement and concession procedures.¹⁷⁷

Ultimately, making sustainability information reliable is one of the aspirations of the CSRD, which imposes the control and assurance of such information. This very substantial development introduced by the directive must, however, be qualified by the lack of ambition at European level regarding the sanctions attached to non-compliance with the directive's requirements. This weakness could be remedied by the future CS3D directive, in terms of the sanctions attached to the obligations to act, if the trialogue were equal to the scale of the sustainability challenges.¹⁷⁸ *“How are individuals in the real world to be persuaded or made to act in the common interest? The answer lies partly in (...) law enforcement. (...) Well-enforced laws and strict liability legislation can control harmful side effects”*.¹⁷⁹ The Brundtland Report recommended this as early as 1987.

Conclusion

31.- From extra-financial information to sustainability information, the evolution is not simply a change of term.

Far from being limited to a list of five factors, as a hasty reading of Article 2 of the CSRD might lead to conclude, sustainability raises the question of the contribution of the company, and the law governing it, to the sustainable development of societies. The sustainability penetrates the companies, through the channel of “corporate sustainability”, inviting them to act, and not just to communicate. This renewal of sustainability is reinforced by a redefinition of the obligations placed on companies: the fields covered by the required information are multiplied, the “*comply or explain*” approach is largely abandoned, and the information is controlled.

However, the scope of the CSRD system remains uncertain at the time of writing, as the draft delegated regulation published last June by the Commission clearly weakens it. The mandatory nature of certain disclosures has been abandoned (in particular those relating to the company's climate or employees, but also an explanation of why the company considers that a particular sustainability issue is not

¹⁷⁷ French law, “Loi n°2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets”, art. 35.

¹⁷⁸ However, in the proposal for a directive as of the date of publication of this contribution, climate change is the subject of a specific provision (art. 15 mentioned above), which is not covered by art. 22 providing for a civil liability mechanism in the event of non-compliance with the due diligence obligations set out in articles 7 and 8 of the proposal. To date, the text does not yet appear to be equal to the scale of the sustainability challenges. See A. STEVIGNON, « L'article 15 de la proposition de directive sur le devoir de vigilance : signe d'un renforcement normatif de la RSE ? », *RLDA* 7657, n° 189, février 2023, p. 15-21.

¹⁷⁹ Brundtland Report, *op. cit.*, Chapter 2, § 16 and 20.

material for it). Finally, while it maintains the publication requirement for the materiality assessment process, the draft delegated act nevertheless introduces some flexibility into this process. The binding force of the system is thus undermined.

The implications of the change in terminology have been examined in this contribution, but the choice made by French law of the term “*durabilité*” to replace the former term (“*extra-financier*”), could have been questioned. In English, a distinction is made between the term “durability” (to evoke the durability of a product over time) and the term “sustainability”, which corresponds to sustainability in its global vision. In French, we use the same term for two different meanings. In the context of the CSRD system, the two English terms are used. For example, the draft ESRS E5 standard uses the term “durability” to designate the sustainability of products in the context of the circular economy,¹⁸⁰ while the draft ESRS E3 standard (about water and marine resources) refers to the “*sustainable use of the oceans and seas*”¹⁸¹ to designate the sustainable use, in a broad sense, of water resources.

The use of the same French term “*durabilité*” to designate both “durability” and “sustainability” raises questions and reopens the now well-established lexicological debate concerning the choice of “*durable*” rather than “*soutenable*” when it came to translating “sustainable development”.¹⁸² In this respect, the French CSR platform (France *stratégie* – *Plateforme RSE*) expressed regret, before the adoption of the CSRD, that the French version of the proposal directive had been translated by the term “*durabilité*” and not “*soutenabilité*”. In her view, the latter term more clearly reflects the environmental and social issues at stake.¹⁸³

¹⁸⁰ EFRAG, Draft European sustainability reporting standards, “ESRS E5 Resource use and circular economy”, p. 8, 11 and 12: refers to *durability* as a design principle of the circular economy. Annex VI (glossary) also defines “durability” as the ability of a product, component or material to remain functional when used as intended. It should be noted that the definition given is consistent with that set out in directive 2019/771.

¹⁸¹ EFRAG, Draft European sustainability reporting standards, “ESRS E3 Water and marine resources”, p. 5.

¹⁸² See in particular. G. MONEDIAIRE, “Développement durable”, in M. TORRE-SCHAUB et al (dir.), *Dictionnaire juridique du changement climatique*, éd. Mare & Martin, 2022, p. 180: “*It has been suggested that the word ‘sustainable’ (...) or ‘bearable’ or ‘responsible’ should be substituted. The objection to the word durable is that it suggests the possibility of infinite growth in a finite world, whereas the other adjectives draw attention to the concept of limits*”. The exact quote in its original version is as follows: “*Il a été proposé de lui substituer « soutenable » (...) ou « supportable », ou encore « responsable ». Le grief à l’égard du mot durable tient à ce qu’il laisserait supposer la possibilité d’une croissance infinie dans un monde fini, alors que les autres adjectifs attireraient l’attention sur le concept de limites*”.

See also A. VAN LANG, “Droit et transition écologique”, in *Dictionnaire des transitions écologiques*, op. cit., p. 300-309: the author advocates the use of “ecological transition” rather than sustainable development.

¹⁸³ France Stratégie, Rapport, *La RSE, un enjeu européen*, 2021, p. 10: “*the CSR Platform stresses the importance of the choice of words, and regrets that the French version of the proposal directive currently available has been translated by the term ‘durabilité’ and not ‘soutenabilité’, which more clearly takes account of environmental and social issues*”. The exact quote in its original version is as follows: « *La Plateforme RSE souligne l’importance du choix des mots, et regrette que la version française actuellement disponible du projet de directive ait été traduite par le terme “durabilité” et non*

Anyway, the French word “*durabilité*” is becoming more firmly rooted in the legal vocabulary resulting from the French translation of European Union legal acts in recent years with the multiplication of sustainability texts. There seems to be a real “path dependence”,¹⁸⁴ making the change of this French term “*durabilité*” very difficult.

pas “soutenable” qui rend compte plus clairement des enjeux environnementaux et sociaux ».

¹⁸⁴ This concept has its origins in management science, particularly in the evolutionary theory of the firm (R. NELSON et S. WINTER, *An Evolutionary Theory of Economic Change*, 1982), which suggests that strategic and organizational decisions are part of a historically constrained trajectory. The idea was then taken up and theorised in economic science with an article published in the *American Economic Review* in 1985 and written by Paul David, an American economist (who called this phenomenon “*path dependency*”). Initial choices can lock in evolutionary possibilities: an initial decision, even a fortuitous one, can trigger a self-reinforcing mechanism. This reasoning can be transposed to our thinking on the choice of the term “*sustainable*”.

Annex: table comparing the standards resulting from EFRAG’s drafts with those resulting from the Commission’s draft delegated regulation, only for the paragraphs used in this contribution.

<p>DOCUMENT LEGEND:</p> <p>Roman: content unchanged, whether formally (word-for-word) or substantially (reworded but without any substantial change in content).</p> <p>Bold: change introduced by the Commission’s draft delegated regulation.</p> <p><i>Italic</i>: deletion by the Commission’s draft delegated regulation.</p> <p><u>Underline</u>: added by the Commission’s draft delegated regulation.</p>
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To determine which information must be disclosed based on a double-materiality analysis, and which information is always mandatory, regardless of the outcome of this analysis:

EFRAG, DRAFT ESRS 1 ¹	EUROPEAN COMMISSION, DRAFT DELEGATED REGULATION, ANNEX 1, DRAFT ESRS 1 ²
§ 31. “For this purpose, a sustainability matter is ‘material’ for the undertaking when it meets the criteria defined for impact materiality (see section 3.4 of this [draft] Standard) or financial materiality (see section 3.5 of this [draft] Standard) or both.”	§ 28. “A sustainability matter is ‘material’ when it meets the criteria defined for impact materiality (see section 3.4 of this Standard) or financial materiality (see section 3.5 of this Standard) or both.”
§ 32. “Irrespective of the outcome of the materiality assessment, the undertaking shall always disclose the following information: (a) [draft] ESRS 2, i.e., all its Disclosure Requirements (including their datapoints); (b) <i>the datapoints prescribed in topical [draft] ESRS that are listed in [draft] ESRS 2 Appendix C List of datapoints in cross-cutting and [draft] topical standards that are required by EU law which stem from other EU legislation;</i> (c) [draft] ESRS E1, i.e., all its Disclosure Requirements (including their datapoints); and (d) only for undertakings with 250 or more employees, the Disclosure Requirements ESRS S1-1 to S1-9 (including their datapoints) in [draft] ESRS S1 Own workforce.”	§ 29. “Irrespective of the outcome of its materiality assessment, the undertaking shall always disclose the information required by ESRS 2 General Disclosures (i.e. all the Disclosure Requirements and data points specified in ESRS 2).” (...)

¹ Source: <https://www.efrag.org/lab6>

² Source: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13765-European-sustainability-reporting-standards-first-set_en

<p>§ 34. “When reporting on policies, actions and targets in relation to a sustainability matter, the undertaking shall include the information prescribed by all the Disclosure Requirements in the topical ESRS related to that matter and in the corresponding Disclosure Contents on policies, actions, and targets required under ESRS 2 (including their datapoints). However, if the undertaking cannot disclose the information prescribed by either the Disclosure Requirements in the topical ESRS or the Disclosure Contents in ESRS 2 (including their datapoints) on policies, actions and targets, because it has not implemented the respective policies, actions and targets, it shall disclose this to be the case and it may report a timeframe in which it aims to have these in place.” § 34. “When reporting on policies, actions and targets in relation to a sustainability matter, the undertaking shall include the information prescribed by all the Disclosure Requirements in the topical ESRS related to that matter and in the corresponding Disclosure Contents on policies, actions, and targets required under ESRS 2 (including their datapoints). However, if the undertaking cannot disclose the information prescribed by either the Disclosure Requirements in the topical ESRS or the Disclosure Contents in ESRS 2 (including their datapoints) on policies, actions and targets, because it has not implemented the respective policies, actions and targets, it shall³ disclose this to be the case and it may report a timeframe in which it aims to have these in place.”</p>	<p>§ 32. “Subject to paragraph 33, when disclosing information on policies, actions and targets in relation to a sustainability matter that has been assessed to be material, the undertaking shall include the information prescribed by all the Disclosure Requirements and datapoints in the topical and sector-specific ESRS related to that matter and in the corresponding Minimum Disclosure Requirement on policies, actions, and targets required under ESRS 2. If the undertaking cannot disclose the information prescribed by either the Disclosure Requirements and datapoints in the topical or sector-specific ESRS, or the Minimum Disclosure Requirements in ESRS 2 on policies, actions and targets, because it has not adopted the respective policies, implemented the respective actions or set the respective targets, it shall disclose this to be the case and it may report a timeframe in which it aims to have these in place.”</p>
<p>§ 35. “When reporting on metrics for a material sustainability matter according to the Metrics and targets section of the relevant [draft] topical ESRS, the undertaking:</p> <p>(a) shall include the information prescribed by a Disclosure Requirement, if it assesses such information to be material; and</p> <p>(b) may omit the information prescribed by a datapoint of a Disclosure Requirement, if it assesses such information to be not material, and concludes that such information is not needed to meet the objective of the Disclosure Requirement.”</p>	<p>§ 33. “When disclosing information on metrics for a material sustainability matter according to the Metrics and Targets section of the relevant topical ESRS <u>and when disclosing the datapoints that derive from other EU legislation listed in Appendix B of ESRS 2</u>, the undertaking:</p> <p>(a) shall include the information prescribed by a Disclosure Requirement, if it assesses such information to be material; and</p> <p>(b) may omit the information prescribed by a datapoint of a Disclosure Requirement, if it assesses such information to be not material, and concludes that such information is not needed to meet the objective of the Disclosure Requirement.”</p>

3 Emphasis added.

<p>§ 38. “If the undertaking concludes that a topic is not material and therefore it omits all the Disclosure Requirements in a [draft] topical ESRS, it shall briefly explain the conclusions of its materiality assessment for the topic (see [draft] ESRS 2 IRO-2 Disclosure Requirements in ESRS covered by the undertaking’s sustainability statements). <i>In this case, the undertaking shall nevertheless report the information referred to in paragraph 32</i>”.</p>	<p>§ 31. “If the undertaking concludes that a topic is not material and therefore it omits all the Disclosure Requirements in a topical ESRS, it may briefly explain the conclusions of its materiality assessment for that topic (see ESRS 2 IRO-2 Disclosure Requirements in ESRS covered by the undertaking’s sustainability statement) (...)”</p>
<p>§ 39. “When reporting on metrics, if the undertaking omits information prescribed by either a Disclosure Requirement or a datapoint of a Disclosure Requirement in the Metrics and Targets section of a [draft] topical ESRS, such information is considered to be implicitly reported as ‘not material’ for the undertaking”.</p>	<p>§ 36. “When reporting on metrics <u>and when disclosing the datapoints that derive from other EU legislation listed in Appendix B of ESRS 2</u>, if the undertaking omits information prescribed by either a Disclosure Requirement or a datapoint of a Disclosure Requirement in the Metrics and Targets section of a topical ESRS, such information is considered to be implicitly reported as ‘not material’ for the undertaking.”</p>

For disclosure obligations concerning the analysis of the materiality of a sustainability theme:

<p>EFRAG, DRAFT ESRS 2</p>	<p>EUROPEAN COMMISSION, DRAFT DELEGATED REGULATION, ANNEX 1, DRAFT ESRS 2</p>
<p>§ 49. “The undertaking shall disclose its processes to identify its impacts, risks and opportunities and to assess which ones are material”.</p>	<p>§ 51. “The undertaking shall disclose its process to identify its impacts, risks and opportunities and to assess which ones are material.”</p>
<p>§ 56. “When all the Disclosure Requirements in a [draft] topical ESRS are omitted as the topic is assessed not to be material for the undertaking, the undertaking shall report a brief explanation of the conclusions of its materiality assessment for the topic.”</p>	<p>§ 57. “When all the Disclosure Requirements in a topical ESRS are omitted because the topic is assessed not to be material for the undertaking, the undertaking may provide a brief explanation of the conclusions of its materiality assessment for the topic in question.”</p>

For the publication of the transition plan:

<p>EFRAG, DRAFT ESRS E1</p>	<p>EUROPEAN COMMISSION, DRAFT DELEGATED REGULATION, ANNEX 1, DRAFT ESRS E1</p>
<p>§ 16. “In case the undertaking does not have a transition plan in place, it shall indicate whether and, if so, when it will adopt a transition plan.”</p>	<p>§ 17. “In case the undertaking does not have a transition plan in place, it shall indicate whether and, if so, when it will adopt a transition plan.”</p>

