Preparing sustainability reporting: what framework?[1]

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Résumé *:*
Adoptée après la mise en application des textes relatifs à la finance durable, mais avant la proposition de directive sur le devoir de vigilance, la CSRD vient parfaire l'édifice législatif sur lequel l'Europe construit sa stratégie en matière de durabilité dans le prolongement du Green Deal. Elle est porteuse d'avancées majeures puisqu'elle renforce les exigences entourant le reporting de durabilité, mais reste laconique sur la phase pourtant cruciale d'élaboration de l'information préalablement à la publication. Cet article tente d'esquisser, à l'aune de l'obligation de s'informer pour informer, un régime afin d'encadrer ce travail préalable. Si cette piste soulève davantage de questions qu'elle n'apporte de réponses, elle permet au moins de mettre en lumière la manière dont la substance et le périmètre de l'information influent sur le comportement que l'on peut attendre de la part des entreprises assujetties.

Mots-clés : *directive CSRD – EFRAG – reporting de durabilité – obligation de dire – transparence – double matérialité – élaboration de l'information de durabilité – s'informer pour informer – qualité de l'information – réflexivité – potestativité – charge administrative – coûts et efforts – proportion – adaptation – chaîne de valeur.*

Abstract:
Adopted after the implementation of the texts relating to sustainable finance, but before the proposal for a directive on due diligence, the CSRD completes the legislative edifice on which the European Union is building its sustainability strategy in the wake of the Green Deal. It represents a major step forward, as it strengthens the requirements for sustainability reporting, but remains silent on the crucial phase of preparing information prior to publication. This article attempts to sketch out, in the light of the obligation to obtain information in order to inform others, a framework for this preliminary work. While this approach raises more questions than it answers, it does at least shed light on the way in which the substance and scope of the required information influence the behaviour that can be expected from the undertakings subject to the CSRD.

Keywords: CSRD – EFRAG – sustainability reporting – obligation to disclose – transparency – double materiality – preparing sustainability information – obtain information in order to inform others – qualitative information – reflexivity – arbitrariness – administrative burden – cost and efforts – proportionnality – relevance – value chain.

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"It is better to be making the news than taking it; to be an actor rather than a critic".[2]

Introduction

1.- Amending the 2013 *Accounting Directive*[3] and replacing the 2014 *Non-Financial Reporting Directive* (hereinafter "NFRD"),[4] the 2022 *Corporate Sustainability Reporting Directive* (hereinafter "CSRD")[5] requires certain undertakings[6] to include sustainability information in their annual reports. The CSRD is at the heart of Europe's sustainability strategy, as it is the cornerstone of a series of texts whose effectiveness depends on compliance with the reporting obligations set out in the CSRD.[7] Such is the case with the *Sustainable Finance Disclosure Regulation* (hereinafter "SFDR"), which aims to combat greenwashing in financial markets by introducing disclosure requirements on the policies of financial market participants and financial advisers as well as on financial products.[8] The same applies to the *Taxonomy Regulation*, which creates a classification system for environmentally sustainable economic activities, which applies to undertakings covered by the

2 W. S. Churchill, *The Story of the Malakand Field Force. An Episode of Frontier War*, 1898, Ch. VIII, online: https://www.gutenberg.org/files/9404/9404-h/9404-h.htm.

3 EP and Council, dir. 2013/34/EU, 26 June 2013, on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, *OJEU* L 182, 29 June 2013, p. 19-76.

4 EP and Council, dir. 2014/95/EU, 22 Oct. 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, *OJEU* L 330, 15 Nov. 2014, p. 1-9.

5 EP and Council, dir. (EU) 2022/2464, 14 Dec 2022, amending Regulation (EU) No 537/2014 and Directives 2004/109/EC, 2006/43/EC and 2013/34/EU as regards corporate sustainability reporting, *OJEU* L 322, 16 Dec. 2022, p. 15–80.

6 More precisely, to large undertakings (those exceeding two of the following three thresholds: €20,000,000 balance sheet total; €40,000,000 net sales; 250 employees on average during the financial year), as well as to SMEs (those exceeding at least two of the following thresholds: 350,000 in balance sheet total; €700,000 in net sales; 10 employees on average over the financial year) but on condition that these SMEs are public interest entities (which covers listed undertakings, credit institutions, insurance undertakings and any undertaking designated as such by a Member State), as well as parent undertakings of a large group (those exceeding two of the three thresholds for large undertakings). To this must be added the corporate form (for France, the *société anonyme*, the *société en commandite par actions*, the *société à responsabilité limitée*, the *société par actions simplifiée*). For the sake of brevity, the entities subject to these requirements will be referred to in this article as "undertaking" and "group". *Adde*, in this issue, regarding the liability of third country undertakings, see the article by J. Didry-Barca, "The application of the CSRD to third-country undertakings", p. 133, regarding the exemption of subsidiaries, see the article by E. Miglietta, "Le régime de l'information consolidée en matière de durabilité au sein des groupes de sociétés à l'aune de la directive CSRD", p. 119.

7 J.-M. Moulin, «L'irrésistible ascension de la RSE (premières vues sur la directive CSRD)», *RD bancaire et fin.* 2023, study 1, spec. n° 14 seq. On the European strategy, see European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final; The Green Deal for Europe, 11 Dec. 2019, COM(2019) 640 final; Financing the transition to a sustainable economy, 6 July 2021, COM(2021) 390 final.

8 EP and Council, reg. 2019/2088 (EU), 27 Nov. 2019, on sustainability disclosure in the financial services sector, *OJEU* L 317, 9 Dec. 2019, p. 1-16.

CSRD.[9] Without qualitative sustainability information provided by undertakings receiving financing, entities operating on the financial markets will not be able to meet their own obligations. Above all, and more concretely, it will not be possible to redirect financial flows towards sustainable activities and undertakings.

2.- As well as seeking to make finance more sustainable, the CSRD serves another, more indirect purpose: to make the undertakings concerned more accountable.[10] It should therefore be read in conjunction with the proposal for a *Directive on Corporate Sustainability Due Diligence* of February 2022.[11] According to the directive, the absence of information would lead to "an accountability deficit" which "could lead to lower levels of citizen trust in businesses."[12] Conversely, producing information in this area would make undertakings aware of the risks and impacts associated with their activities and, at the same time, take the measure of their responsibilities.[13] This information could then serve as a basis for dialogue with civil society actors, or even help to prove corporate failings in the event of litigation, particularly when it comes to uncovering fraudulent green claims by undertakings.[14]

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9 EP and Council, reg. 2020/852 (EU), 18 June 2020, on the establishment of a framework to encourage sustainable investment, *OJEU* L 198, 22 June 2020, p. 13-43, hereinafter "the Taxonomy Regulation", spec. art. 8.

10 The accounting consequences of which have not yet been drawn, as ESG factors do not yet have an impact on the calculation of an undertaking's profit: in this regard, J. Bardy, "Approche comptable de la RSE", *RLDA* févr. 2023, suppl. au n° 189, p. 28; v. égal. O. Buisine, «RSE et comptabilité environnementale», *BJS* sept. 2021, n° 200k5, spec. p. 62 seq.

11 EP resolution, 10 March 2021, with recommendations to the Commission on due diligence and corporate accountability, *OJEU* C 474 of 24 Nov. 2021, p. 11-40; Prop. of dir. of the EP and of the Council, 23 Feb. 2022, on Corporate Sustainability Due Diligence, COM/2022/71 final. For further developments on the European duty of care and its links with the CSRD, see p. de Gioia Carabellese, L. Macrì. "CSRD and CSDD: How the Sustainability Regulatory Evolution Impacts on Sustainable and Green Investments", European Company Law Journal, 2023, vol. 20, n° 3, p. 1-2; see also the article by M. de Pinieux in this issue, "Human rights due diligence: complementarity and synergy between the CSRD, the draft CSDDD and the proposal for a regulation on prohibiting products made with forced labour on the Union market", p. 185.

12 CSRD, Recital 14.

13 S. Pierson, M. Fournier de Saint Jean, «L'impact de la durabilité sur la stratégie et le fonctionnement interne des entreprises», *CDE* 2022, dossier 6. The regulation of operators through information is not new, particularly in financial markets law (see J.-B. Poulle, "La régulation par l'information en droit des marchés financiers", *LPA* 21 Jan. 2009, n° PA200901505, p. 6, spec. n° 23-26); on the use of transparency in CSR and its links with reflexive law, see V. Jentsch. "Corporate Social Responsibility between Self-Regulation and Government Intervention: Monitoring, Enforcement and Transparency", *European Business Law Review*, vol. 31, n° 2, 2020, p. 285-302, spec. p. 296 and references cited by the author; see also. D. Hess, "Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness", 25 *Journal of Corporation Law* 41-84 (1999); D. Hess, "Regulating Corporate Social Performance: A New Look at Social Accounting, Auditing, and Reporting", 11(2) *Business Ethics Quarterly*, 307-330. As regards the theoretical foundations of informational regulation in environmental matters, see the paper by A.-S. Epstein, *Information environnementale et entreprise*, *op. cit.* p. 419 seq. with special reference to p. 434 seq. *Adde* D. Bessire, "Gouvernance d'entreprise : que cache le discours sur la transparence ?", research paper n° 2003-03, Laboratoire orléanais de gestion, Jan. 2003 (online: https://www.researchgate.net/publication/46449740), spec. p. 10: based on the writings of M. Foucault, the author draws a parallel between making undertakings transparent and J. Bentham's Panopticon with a view to disciplining them from within.

14 CSRD, Recital 14; Prop. for a dir. of the EP and of the Council, 22 March 2023, on the justification

3.- With this legislative context in mind, the CSRD aims to harmonise the sustainability information provided by undertakings in order to improve its comparability.[15] It thus seeks to meet the needs of the two categories of addressees identified as a priority: investors and civil society actors.[16] To do this, it first extends the obligations to large unlisted undertakings and small and medium-sized listed undertakings.[17] Secondly, it requires the information to be of high quality, *i.e.* reliable and relevant, but also understandable, comparable and verifiable.[18] Lastly, it sets out a much more detailed list of points that must be covered by the statement, which must be both retrospective and prospective and thus linked to different time horizons.[19] To ensure the quality of the information, the audit committee, which has been mandatory since 2006, is expected to monitor the preparation of sustainability information in the same way as financial information.[20] Externally, the information should be subject to a control giving rise to an assurance opinion, the level of which should gradually be increased.[21]

4.- In order to guide preparers and auditors of information and to standardise it as much as possible so as to make it truly comparable, mandatory standards adopted by the Commission will replace the former non-binding guidelines.[22] These standards will be based on the work of the European Financial Reporting Advisory Group (hereinafter "EFRAG"), which has already published a first set of projects

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and communication of explicit environmental claims, COM(2023) 166 final.

15 CSRD, Recital 10.

16 CSRD, Recitals 9, 11, 12; shareholders are therefore no longer the primary addressees. V. Draft ESRS 1, *General requirements*, which lists several categories of stakeholders: users of information and affected stakeholders (p. 9, §26), to which should be added nature, silent stakeholders and the classic categories (p. 28, §AR 1-2). On these notions, see also Th. VUARNET's article in this issue, "What normativity for stakeholders' capitalism under CSRD?", p. 113.

17 CSRD, Recital 18: this extension of the scope of application to unlisted undertakings is "essentially motivated by concerns relating to the impact and responsibility of these undertakings, including throughout their value chain".

18 Accounting Directive, art. 29b(2)(1). For a definition of each of these terms, see Draft ESRS 1, p. 8, §23, and p. 35 seq. QC. 1 seq.

19 For the list of areas of information: see Accounting Directive, art. 19a(2), and 29a(2); on the nature of the information, see Accounting Directive, art. 29b(3): "The reporting standards… shall specify the prospective, retrospective, qualitative and quantitative information, if any, that undertakings must disclose"; art. 19a(2) and 29a(2): "The information… shall include information relating to short-, medium- and long-term time horizons, as appropriate".

20 Dir. 2006/43/EC of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, *OJEU* L 157 of 9 June 2006, p. 87-107, as amended by the CSRD, art. 39(6).

21 Article 28a of Directive 2006/43/EC provides that the statutory auditor or audit firm shall present the results of the assurance on the sustainability information in an assurance report prepared in accordance with the assurance standards set out in Article 26a of the Directive. Article 26a provides for the adoption by the Commission of limited assurance standards by 1er Oct. 2026 and reasonable assurance standards by 1er Oct. 2028, if this proves feasible for auditors and audit firms as well as for undertakings. For the time being, the transition from limited assurance to reasonable assurance has not been fully achieved. For an explanation of the difference between reasonable assurance and limited assurance, see Recital 60 of the CSRD.

22 For standards for preparers of information, see Accounting Directive 2006/43/EC, art. 29b, 29c and 40c; for standards for controllers of information, see Accounting Directive 2006/43/EC, art. 26a.

in November 2022, consisting of twelve standards.[23] Two of these standards are cross-cutting and therefore concern all sustainability issues. The first standard provides for general requirements and the second for general information.[24] The next ten are topical. Five relate to the environmental factors listed in Article 29b(2)(a) of the *Consolidated Accounting Directive*, namely climate change mitigation and adaptation, pollution, water and marine resources, biodiversity and ecosystems, and resource use and the circular economy.[25] Four others relate to factors linked to social and human rights set out in point (2)(b) of the said Article. They are not organised by theme but according to the persons potentially affected. The first concerns the undertaking's own workforce, the second workers in the value chain, the third affected communities and the fourth consumers and end users.[26] The last topical project relates to the governance factors referred to in point (2)(c) of the Article.[27]

5.- In short, the CSRD is interested in the finished product, which is the sustainability information, and in the auditing of accounts carried out *a posteriori*. On the other hand, it does not say much about the *preliminary phase* of preparing the information. This preliminary work only appears once in the text in the form of additional disclosure: undertakings are required to describe "the process carried out to identify the information that they have included in the management report."[28] The purpose of this provision is to make the methods and procedures used to prepare the information more transparent. However, its scope is open to discussion, since it refers to the paragraph on the principle of double materiality.[29] This

23 Accounting Directive, art. 49(3b). The draft ESRS are available on EFRAG's website (https://www.efrag.org/lab6). For a commentary on the *Exposure drafts ESRS* of Apr. 2022, see P.-H. Conac, "Les projets de normes de durabilité ESRS de l'EFRAG et leur conception de la gouvernance d'entreprise", *Rev. soc.* 2022, p. 576, and the *Drafts ESRS* of Nov. 2022, P.-H. Conac, "EFRAG's draft European Union Sustainability Reporting Standards (ESRS) renounce the promotion of 'stakeholder capitalism'", *Rev. soc.* 2023, p. 56. Available only in English, any translations will be our own, with a difficulty linked to the fact that the vocabulary used by the Draft ESRS does not always seem to be aligned with that of the CSRD, and therefore uncertainties as to the correspondences that can be established between the text of the above-mentioned directive and the standards (*e.g.*, the indicators in art. 19a(2)(f) and 29a(2)(f) seem to have been translated by the expression *metrics*, which seems both less broad and broader). As regards the timetable, the Commission has until 30 June 2023 to adopt standards relating at least to the information that financial market participants subject to the obligations under the SFDR need in order to comply with their obligations and until 30 June 2024 to adopt the supplementary standards, the sector-specific standards and the standards applicable to SMEs (see aforementioned Accounting Directive, Art. 29b(1) and 29c(1)).

24 Draft ESRS 1, above; Draft ESRS 2, *General disclosures*.

25 Draft ESRS E1, Climate change ; Draft ESRS E2, Pollution ; Draft ESRS E3, Water and marine resources ; Draft ESRS E4, Biodiversity and ecosystems ; Draft ESRS E5, Resource use and circular economy.

26 Draft ESRS S1, Own workforce ; Draft ESRS S2, Workers in the value chain ; Draft ESRS S3, Affected communities ; Draft ESRS S4, Consumers and end-users.

27 Draft ESRS G1, *Business conduct*.

28 Accounting Directive, art. 19a(2) and 29a(2).

29 Articles 19a(2) and 29a(2) provides that this is the process for determining "the information which they have included in the annual report in accordance with *paragraph 1 of this Article* [emphasis added]".

principle was already present in the NFRD.[30] It requires an undertaking to provide information only to the extent necessary to understand its impact on sustainability matters (impact materiality) on the one hand, or to understand how sustainability matters affect its situation, results and the development of its business (financial materiality) on the other.[31] The materiality of a piece of information thus determines its inclusion in the management report, and its evaluation is the final stage in the preparation process. The undertaking would therefore only be obliged to disclose the process implemented during this final phase of preparation.[32] The consequence would be that the phase of information preparation would be governed simply by transparency, possibly fragmented, with no substantial regulation.

6.- This preliminary observation is reductive for at least two reasons. Firstly, the preliminary work involved in compiling data and constructing information is crucial. The quality of the finished product depends on it. It is one thing to entrust undertakings with the task of producing information, leaving them free to decide how to go about it, but it is quite another not to demand anything of them in terms of the effectiveness and quality of the processes used. To neglect this process is to run the risk of obtaining mediocre information. This is the exact opposite of the stated objectives of the CSRD, which relies on the quality of information to guide the behaviour of undertakings, and the financial flows towards the most sustainable of them.

7.- Secondly, unlike more traditional information obligations, the reporting obligation has a specific feature: the undertaking must inform others about itself, in such a way that its object and subject merge. It is therefore a reflexive obligation: I have to say what I do. Information depends as much on what the undertaking does, as on what it says it has done. Therefore, the undertaking controls what it says about itself: the information depends on its will, or goodwill, which makes it arbitrary.[33] The arbitrary dimension of information is reinforced by the fact that

30 See in this sense, Accounting Directive, art. 19a(1) and 29a(1), as well as the European Commission's guidelines: Guidelines on non-financial information, C/2017/4234, *OJEU* C 215 of 5 July 2017, p. 1-20, spec. p. 5; Guidelines on non-financial information: Supplement on climate-related information, C/2019/4490, *OJEU* C 209 of 20 June 2019, p. 1-30, spec. p. 4.

31 Accounting Directive, art. 19a(1) and 29a(1). In contrast to simple materiality, which focuses on the relevance of information in financial terms alone, as advocated by the standards of the *International Sustainability Standards Board*, double materiality is "thus aligned with the provisions of article 1833 of the Civil Code" (C. Nouel, "Directive CSRD: la durabilité au cœur de la stratégie et de la gouvernance des entreprises", *BJS* mars 2023, n° BJS201v6, p. 62). For further developments on double materiality, see the article by M. Desbat in this issue, "From non-financial reporting to corporate sustainability reporting: formal or substantial evolution?", p. 69.

32 For more details on the obligation to provide information relating to this procedure, see Draft ESRS 1, p. 9 seq. and p. 41 and Draft ESRS 2, p. 14-15.

33 v° Potestatif, -ve, *in* G. Cornu et al (dir.), *Vocabulaire juridique*, 12th edn, PUF, 2018. The '*potestativité*' is a French concept that has no equivalent in Anglo-American legal scholarship. It is consequently hardly translatable. The adjective 'potestative' exists in English but being obsolete, it will not be used here. To avoid making reading too difficult, I chose —a bit arbitrarily perhaps— the term 'arbitrariness' and the adjective 'arbitrary' to refer to the French concept of '*potestativité*' and the related adjective '*potestatif, -ve*'.

there is total informational asymmetry between the recipients of the information and the undertaking. This is not a simple asymmetry in access to, or understanding of, information, but a much greater asymmetry, since the undertaking *creates* the information it must transmit, and which holds the data to do so.[34] There is therefore a latent conflict of interest. The principle of double materiality requires the undertaking to include information about the influence of its activities on sustainability issues and, conversely, about the influence of sustainability issues on its activities. For both, one would think that it would be in the undertaking's best interests to map them correctly. However, the undertaking may succumb to the temptation to play them down, since its reputation and, by extension, its financing, depend on it; there is a risk that the undertaking will only say what it is willing to say.

8.- This is ever more the case as it is clear that the CSRD does not impose any substantive obligation requiring undertakings to become effectively sustainable.[35] It only imposes a formal obligation, an obligation to disclose.[36] However, by requiring the undertaking to provide qualitative information, and in particular reliable and relevant information,[37] it seems, implicitly but necessarily, to impose on the undertaking a behavioural obligation relating to the preparation of this information. Controlling the preparation of information would provide an anchor point to ensure its quality and at the same time avoid the pitfall of arbitrariness. This means that the undertaking can do what it wants as long as it says what it does.

9.- The question thus becomes one of how to regulate the preliminary work, and the answer may lie in sketching out the first lines of a regime for the development of information, which is what this contribution will attempt to do. There are several conceivable ways of doing this.[38] The one chosen here is based on the obligation to obtain information in order to inform others. This mechanism was

34 On the production of information, see A.-S. Epstein, *Information environnementale et entreprise : contribution à l'analyse juridique d'une régulation*, pref. G. J. Martin, thesis Nice [2014], Institut Universitaire Varenne, LGDJ-Lextenso éditions, 2015, p. 245 seq.

35 Such an obligation is contained in the aforementioned proposal for a directive on the duty of care of undertakings.

36 On the distinction between acting and saying, see the article by M. Desbat in this issue, "From non-financial reporting to corporate sustainability reporting: formal or substantial evolution?", p. 69.

37 These are the two fundamental characteristics of information quality (see ESRS 1, p. 8, para. 23).

38 Notably that of the civil liability of the declaring undertaking that caused damage due to insufficient or misleading information (see in particular A.-S. Epstein, *Information environnementale et entreprise, op. cit.* p. 639 seq.), but also that of the annulment of contracts allowing the financing of declaring undertakings due to a defect in consent caused by the poor quality of the information. Financial law and the transparency obligations of listed undertakings should also not be overlooked, as sustainability information has officially been included in the so-called Transparency Directive, 2004/109/EC of the European Parliament and of the Council, 15 December 2004, *OJEU* L 390, 31 December 2004, p. 38-57 (CSRD, art. 2). It must therefore now be monitored in the same way as financial information by the financial market regulatory authorities, which previously posed difficulties in certain Member States where the national authorities considered themselves incompetent to supervise non-financial information (*Fitness Check on the EU framework for public reporting by companies*, SWD(2021) 81 final, 21 April 2021, p. 58).

invented by French civil law judges for a very specific purpose: to sanction the illegitimate ignorance of the debtor of an obligation to inform, the person who did not know but should have known.[39] In civil law, it takes the form of an exception to the principle that prior knowledge of the information is a condition for the existence of the obligation to inform.[40] This exception is most often justified by the fact that the debtor of the duty to inform is acting in the course of business.[41] In the context of the CSRD, since it is a matter of providing information about one's own practices, it would be justified by the reflexive nature of the obligation to inform.[42]

10.- That said, the obligation to obtain information in order to inform others is not without limits. Whether in French civil law or in the context of the CSRD, if it were to be recognised, it would rather be an obligation of means: the debtor of the obligation to inform would be required to use diligent means to seek out and/or formulate the information.[43] The undertaking's preparation of sustainability information should therefore be assessed against the yardstick of reasonableness. This is, moreover, what the European legislator invites us to do, as reference is made to the "administrative burden" on reporting undertakings, which must not be "disproportionate."[44] Thus, if we accept that this "administrative burden" should be approached from the angle of an obligation to obtain information in order to inform others, we should ask ourselves what would be the reasonable means that the reporting undertaking should use to prepare its sustainability statements.

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39 It is used in both contractual and non-contractual matters. In contract law, art. 1112-1 of the C. civ. refers only to the case where a person knows information and not where he ought to have known it. However, this should not prevent the case law under the old law (*e.g.*, Cass. civ. 1re, 7 Apr. 1998, nº 96-16.148, *Bull.* I nº 150 p. 99 : *RTD civ.* 1998. 84, obs. J. Mestre, 1st March 2005, nº 04-10.063, *Bull.* I nº 109 p. 94: *RDC* 2005. 1051, obs. D. Fenouillet) be maintained (see M. Fabre-Magnan, «Le devoir d'information dans les contrats : essai de tableau général après la réforme», *JCP G* 2016, news. 706). In the extra-contractual field, the Cour de cassation has ruled on the basis of articles 1382 and 1383 of the C. civ. that a person who has agreed to provide information has a duty to inform themself in order to provide information with full knowledge of the facts (Cass. civ. 2e , 19 Oct. 1994, nº 92-21.543, *Bull.* II nº 200 p. 115, 19 June 1996, nº 94-12.777, *Bull.* II nº 161 p. 97, Cass. civ. 1re, 20 Dec. 2012, 11-28.202, *Bull.* I, nº 274, 16 Apr. 2015, 14-14.012, unpublished).

40 V. J. Ghestin, G. Loiseau, Y.-M. Sérinet, *La formation du contrat*, t. 1 : *Le contrat, le consentement*, 4e éd., LGDJ : Lextenso éditions, coll. Traité de droit civil, 2013, p. 1387 seq., §1706 et seq, spec. §1713 seq.; M. Fabre-Magnan, *De l'obligation d'information dans les contrats : essai d'une théorie*, pref. J. Ghestin, thesis Paris 1, LGDJ, 1992, p. 190-197, nº 244-251.

41 M. Fabre-Magnan, above-mentioned thesis, p. 192, nº 247.

42 In accounting matters, this exception could even become the principle insofar as the true and fair view provided by the accounting documents is constructed by the entity. In fact, "the true and fair view, if we conceive of it as objective, is a chimera. Only a duty of curiosity, which flows naturally from the duty to inform, would make it possible to achieve the objective of a true and fair view. Thus, imposing an obligation on the debtor of accounting documents to know his undertaking and the transactions to which it is a party is part of *the* true and fair view" (J. Gasbaoui, *Normes comptables et droit privé : analyse juridique des documents comptables*, pref. J. Mestre, Aix thesis [2012], PUAM, 2014, p. 210, nº 417).

43 M. Fabre-Magnan, above-mentioned thesis, p. 196-197, nº 151.

44 Accounting Directive, art. 29b(3).

11.- To answer this question, we must rely on the Accounting Directive as amended by the CSRD and as supplemented by the Commission's reporting standards.[45] As these standards have not yet been definitively adopted, the draft standards published by EFRAG will serve as a basis for the research conducted here, the conclusions of which can only be provisional. More specifically, the second and third paragraphs of Articles 19a and 29a will be examined in detail.[46] These provisions have an impact on the preparatory work which is the responsibility of the undertaking. The second paragraph, by listing the areas in which the undertaking must provide information, informs us of the substance of the information to be provided (Part I), while the third, by providing for a certain perimeter within which the undertaking must provide information, sheds light on its scope (Part II).

Part I. Preparing the information in the light of its substance

12.- The second paragraph of Articles 19a and 29a lists a number of areas in which the undertaking must provide information, supplemented by a list of topics provided for in Article 29b(2). The information listed is provided in the abstract, and it is up to each reporting undertaking to give it concrete content by presenting it in a dedicated section of their management report.[47] These areas are quite varied: they range from the undertaking's strategy and business model to its sustainability policies and organisation, including plans, objectives, actions and measures, as well as the description and management of the main risks, both those to which it is exposed and those to which it exposes others.[48]

13.- On reading these provisions, a fairly intuitive observation can be made: the work required to prepare this information is not the same depending on the type of information concerned, due to its degree of arbitrariness, which varies according to the fields of information envisaged. This gradation in the degree of arbitrariness leads to distinguish two categories of information. Although this distinction is not expressly formulated in the text, it seems possible to draw legal consequences from it in terms of expected behaviour from the undertaking. This difference in the degree of arbitrariness of information (A) may therefore lead to a divergence in the framework for its preparation (B).

45 Accounting Directive, art. 29b and 29c.

46 Art. respectively applicable to the sustainability information due by the reporting undertaking and to the consolidated information due by the reporting parent undertaking concerning the group at the head of which it is located.

47 Accounting Directive, art. 19a(1) and 29a(1): "The information referred to in the first subparagraph shall be clearly identifiable within the [where applicable consolidated] management report, through a dedicated section of the [where applicable consolidated] management report".

48 The list is given in Articles 19a(2) and 29a(2) of the Accounting Directive. The list is exactly the same whether the information is consolidated or not. Article 19a(6), however, provides for a reduced list of information for small and medium-sized undertakings, which may, if they so wish, benefit from a lighter regime.

A.- A difference in the degree of arbitrariness of the information

14.- All information that an undertaking must provide as part of its sustainability report has an arbitrary dimension.[49] Its quality, and above all its relevance and reliability, depends on the goodwill of the undertaking in fulfilling its obligation to provide information. But some information is doubly dependent on the goodwill of the undertaking, because its very existence is conditional on the more or less sustainable orientation that the undertaking may give to its activities, and therefore on one or more decisions to give concrete form to this orientation, which it is free to take, or not. Other information exists independently of any decision by the undertaking in this direction. Its existence depends on a certain reality that is beyond the undertaking's control. It is this reality that the undertaking must reflect in its report, which may obviously be done with varying degrees of rigour. Thus, whatever the information in question, the undertaking has the power to control it; but this will either condition the existence and content of the information, or only its content.

15.- This distinction is not absolute. More precisely, information of the first category is likely to fall into the second category. In fact, once the decision which conditions the existence of the information has been taken and the information therefore exists, it integrates this reality which means that it partly escapes the arbitrariness of the undertaking. Once it has been constructed by the undertaking, the information enters the sphere of the given. A shift from the first category to the second can be observed, as and when the undertaking takes decisions for which it will have to be accountable. It is with this reservation in mind that an attempt to classify the information listed in paragraph 2 of Articles 19a and 29a of the Accounting Directive can be made.

16.- The first category includes all information whose very existence depends on the goodwill of the undertaking, foremost among which is information concerning the undertaking's strategy and business model, viewed through the prism of sustainability. The directive requires that, first of all, the undertaking describe the plans, whether in terms of actions or financing, that it has defined to ensure the compatibility of its business model and strategy with the transition to a sustainable economy and the objectives of limiting global warming to 1.5°C and achieving climate neutrality by 2050.[50] It must then describe how its business model and strategy take into account the interests of its stakeholders and its impact on sustainability matters.[51] Finally, it must describe how it has implemented its strategy with regard to the latter.[52]

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49 See above n° 7.

50 Accounting Directive, art 19a(2)(a)(iii) and 29a(2)(a)(iii).

51 Accounting Directive, art. 19a(2)(a)(iv) and 29a(2)(a)(iv).

52 Accounting Directive, art. 19a(2)(a)(v) and *29a*(2)(a)(v).

17.- To this can be added everything that has to do with the undertaking's organisation and governance. For example, it should describe the role it has assigned to its governing bodies with regard to sustainability issues, their expertise and skills in this area and the opportunities they are given to acquire this expertise and skills.[53] The undertaking must also provide information on the existence of incentive systems relating to sustainability issues that are offered to its members.[54] It must also describe the main features of its internal control and risk management systems, its activities and commitments relating to the exercise of its political influence and the management and quality of its relations with its customers and suppliers.[55]

18.- In addition to these two types of systemic information, the directive requires undertakings to provide more specific information. For example, it must describe the time-bound objectives it has set itself[56] and the sustainability policies it has adopted.[57] It must also describe the due diligence procedure it implements in this area.[58] Finally, there is the information relating to its attitude to impacts and risks. It must describe the measures it has taken, both to identify and monitor[59] actual or potential negative impacts, and to prevent, mitigate, correct or eliminate them.[60] It must also describe how it manages the risks associated with its own sustainability matters.[61] Finally, we should mention the set of indicators used in each area of information that the undertaking may choose to assess itself.[62]

19.- In the second category, we find information whose existence does not depend on the goodwill of the undertaking. This includes the degree of resilience of the business model and strategy,[63] the opportunities presented by sustainability matters,[64] the undertaking's exposure to coal, oil and gas activities[65] and a description of the undertaking's main dependencies on sustainability matters.[66] To this should be added a description of the undertaking's main impacts, actual or

53 Accounting Directive, art. 19a(2)(c) and 29a(2)(c) and 29b(2)(c)(i).

54 Accounting Directive, art. 19a(2)(e) and 29a(2)(e).

55 Accounting Directive, art. 29b(2)(c), spec. (ii), (iv) and (v).

56 Accounting Directive, art. 19a(2)(b) and 29a(2)(b). The Articles specify that this includes, "where appropriate, absolute greenhouse gas emission reduction targets for at least 2030 and 2050".

57 Accounting Directive, art. 19a(2)(d) and 29a(2)(d).

58 Accounting Directive, art. 19a(2)(f)(i) and 29a(2)(f)(i). On this point, a distinction must be made according to whether the undertaking is obliged by EU requirements to adopt and implement such a procedure or whether it does so on a voluntary basis. In the first hypothesis, the information is no longer truly arbitrary since the undertaking is, at least theoretically, assumed to have taken the decision to introduce a due diligence procedure in order to comply with the legal requirements.

59 Accounting Directive, art. 19a(2)(f)(ii) and 29a(2)(f)(ii).

60 Accounting Directive, art. 19a(2)(f)(iii) and 29a(2)(f)(iii).

61 Accounting Directive, art. 19a(2)(g) and 29a(2)(g).

62 Accounting Directive, art. 19a(2)(h) and 29a(2)(h).

63 Accounting Directive, art. 19a(2)(a)(i) and 29a(2)(a)(i).

64 Accounting Directive, art. 19a(2)(a)(ii) and 29a(2)(a)(ii).

65 Accounting Directive, art. 19a(2)(a)(iii), *in fine* and 29a(2)(a)(iii), *in fine*.

66 Accounting Directive, art. 19a(2)(g) and 29a(2)(g).

potential, as well as the main risks it faces.[67] Finally, information is required on the progress made, both in achieving the sustainability objectives set[68] and in the results obtained from the measures taken to prevent, mitigate, correct or eliminate negative impacts.[69]

20.- Each time, it is a question of drawing up a factual report or taking stock of the actions and policies implemented. Of course, the content of this report will depend on the choices previously made by the undertaking, and therefore on the decisions it may have taken. But, unlike information in the first category, these decisions have no influence on the existence of the information itself. For example, the degree of resilience of the business model and strategy may be more or less robust depending on whether or not the undertaking has taken ESG issues into account. But whether or not it has taken ESG issues into account, its business model and strategy will always have a certain degree of resilience. Whether the undertaking has mapped the risks correctly or not, whether it has assessed the progress it has made in achieving its objectives, this information exists beyond its control.

21.- To sum up, these two categories of information differ in degree rather than in kind. They are all arbitrary, but pieces of information belonging to the first category are arbitrary to a higher degree than those of the second category.[70] This intuitive distinction is obviously not perfect. It is based on a simplification that is crude in some respects, and only partially reflects the complexity of the situation. It does, however, appear to be of undeniable interest from a legal point of view: by highlighting the difference in the degree of arbitrariness of the information, it calls for a distinction in the legal framework of the undertaking's prior work, *i.e.* what can be expected of the undertaking under the obligation to obtain information in order to inform others.

B.- A divergence in the way information is prepared

22.- At first glance, the wording of Articles 19a and 29a of the Accounting Directive suggests that all the information listed must appear in the management report of the undertaking or group, provided of course that it has passed the double materiality test provided for in paragraph 1.[71] As no distinction is made according to whether a prior decision is necessary to give rise to the information, there would be

67 Accounting Directive, art. 19a(2)(f)(ii) and (g) and 29a(2)(f)(ii) and (g).

68 Accounting Directive, art. 19a(2)(b) and 29a(2)(b).

69 Accounting Directive, art. 19a(2)(f)(iii) and 29a(2)(f)(iii)

70 In much the same way as a condition may be purely arbitrary, and depend "solely on the goodwill of one of the parties", or merely arbitrary, and depend "on an event whose realisation is undoubtedly voluntary on the part of one of the parties, but at the cost of a decision which depends on contingencies" (see "Potestatif, -ve", *in* G. Cornu (ed.), *Vocabulaire juridique*, *op. cit.*).

71 As a reminder, the only information that needs to be included is "information that provides an understanding of the undertaking's impact on sustainability issues, as well as information that provides an understanding of how sustainability issues affect the development of the undertaking's business, results and position", the others need not be mentioned.

no need to distinguish. From the point of view of the prior work that the undertaking must provide, this would mean that it must be done regardless. As the choice of information to be transmitted is not left to the discretion of undertakings, they would have to comply with the text and communicate all the information required.

23.- However, the behaviour required to produce the information is not the same for each of these two types of information. In the case of information arbitrary to a lower degree, it is essentially a matter of enquiry and investigation: the undertaking must search for or compile data, cross-reference it where necessary, analyse it and then present this analysis in the form of intelligible information. In the case of information arbitrary to a higher degree, this preliminary work takes a particular turn: it is more a matter of asking and trying to answer questions. In short, the obligation to obtain information is limited, at best, to an obligation to reflect,[72] if not to a simple invitation to reflect, which may eventually lead to the undertaking taking a decision. It is therefore not obvious that the adage *Ubi lex non distinguit* can be applied unreservedly here, because a preliminary question arises concerning information arbitrary to a higher degree. What happens if an undertaking has not taken the decision that determines the existence of the information for which it is accountable? Before looking at the ways in which the duty to inform is enforced (2), it is necessary to understand the consequences that the need for a prior decision may have on the substance of the duty to inform (1).

1) When a prior decision is necessary

24.- On the basis of the provisions of the directive, or more precisely the national texts that will transpose it, can we force an undertaking to reflect and take a decision? What if the undertaking does not adopt a sustainability policy, does not set itself objectives or does not assign a sustainability role to its governing bodies? Does the obligation to inform include an obligation to decide? The text requires the undertaking to describe its policy, objectives and plans, but not explicitly to write them down.[73] Is it possible to go beyond this? The question arises insofar as

72 On the power of reporting obligations, see M. Tirel, "Prendre la RSE au sérieux", *BJS* nov. 2022, n° BJS201m1, spec. p. 49.

73 Articles 19a and 29a each use the word "description", except for two areas: indicators [art. 19a(2)(h) and art. 29a(2)(h)], and incentive systems linked to sustainability issues, for which "information on [their] existence" only must be given, but not a priori on their modalities [art. 19a(2)(e) and art. 29a(2)(e)].

the *comply or explain* rule[74] which existed under the NFRD[75] was abandoned with the adoption of the CSRD. While the previous rule gave undertakings the choice of whether or not to apply a policy, this may no longer be the case.

25.- Before looking at the state of the law after the reform, it is important to understand the mechanism that prevailed before. If an undertaking had chosen not to adopt a policy, the NFRD did not relieve it of any obligation to inform. Simply, the object of the obligation changed: the description of the policies was replaced by a clear and reasoned explanation of not doing so. If, on the other hand, the undertaking had chosen to adopt a policy,[76] it would have to describe it. This mechanism was not maintained with the 2022 reform. Point 36 of the CSRD's recitals spells out: "The different treatment of disclosures on the policies that undertakings may have, compared to the other reporting areas included in those Articles, has created confusion among reporting undertakings and has not helped to improve the quality of the reported information." The *comply or explain* mechanism has thus disappeared from the text of Articles 19a and 29a, at least in the general provisions. It is found on two occasions, in relation to SMEs and the value chain, for which the mechanism is reinstated but only on a provisional basis.[77] The new wording thus seems to establish as a principle the prohibition on the use of explanations in place of the information requested, while explicitly providing for detailed and temporary exceptions.[78]

26.- Such an interpretation is possible, but the question remains as to what should be required of the undertaking if it has not adopted policies, plans, objec-

74 A. Couret, "The 'Comply or explain' principle: From a simple financial markets regulation to a wide method of regulation", *RTDF* 2010, n° 4, p. 4-11; on the reception of the principle in the French C. com. see, in particular, P. Deumier, "Le principe 'appliquer ou expliquer', appliquer la norme autrement ?", *RTD civ*. 2013, p. 79; P. Durand-Barthez, "Le principe 'appliquer ou expliquer'", *CDE* 2016, n° 2, p. 25-31; A. Couret, "Comply or explain: the French destiny of the principle", *BJS* March 2017, n° 116c8, p. 202. For a French history of the principle, see J.-B. Poulle, "L'apparition du principe se conformer ou expliquer en droit français", *RTDF* 2008, n° 1, p. 41-47; for an English history of the principle and the reasons for its spread, see I. MacNeil, I.-M. Esse, "The Emergence of 'Comply or Explain' as a global model for Corporate governance Codes", *European Business Law Review* 2022, vol. 33, n° 1, p. 1-56.

75 Accounting Directive, art. 19a(1) and 29a(1), in their version resulting from the NFRD: "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." While the mechanism was explicitly aimed at only one of the areas of information covered by the NFRD, *i.e.* policies, it could logically be extended to the description of the results of these policies (former Articles 19a(1)(c) and 29a(1)(c)), as well as to due diligence procedures insofar as these were conceived as an integral part of the policies (former Articles 19a(1)(b) and 29a(1)(b)).

76 And to apply it! Since the old article stipulated that only if an undertaking did not apply a policy would it have to explain itself, a literal interpretation could lead to the conclusion that a policy adopted but not applied should not appear in the non-financial declaration.

77 For financial years starting before 1st January 2028 in the case of SMEs (Art. 19a(7) of the Accounting Directive) and for the first three years of application of the measures to be adopted by the Member States in accordance with Article 5(2) of Directive (EU) 2022/2464 (Art. 19a(3) and 29a(3)).

78 This interpretation is supported by the letter of the text, which explicitly states that it is "by way of derogation" that the *comply or explain* mechanism is provided for SMEs (Article *19a*(7) of the Accounting Directive).

tives or organisation to take ESG issues into account. There are several possible responses. On the one hand, some might consider that, where the information does not exist because the undertaking has not taken a decision to create it, the undertaking can simply remain silent. However, such an option seems to have to be ruled out as it would contradict too directly the objective of harmonisation pursued by the CSRD and would lead to a regression in relation to the previous state of the law.

27.- On the other hand, the most exacting response would be to force the undertaking to adopt and implement a decision, whatever it may be, whenever that decision conditions the possibility of being held to account for it. By adding to the formal obligation to disclose a substantive obligation to act, with the aim of then being able to say what has been done, this approach would actually result in the undertaking being obliged to take action in favour of sustainability. However, this is arguably not the aim of the reform proposed by the European legislator: although the CSRD is part of a trend towards making undertakings more responsible,[79] its stated ambition is to meet the needs of users and the market for sustainability information and not to impose an obligation on undertakings to act.[80] Effective consideration of sustainability issues is conceived only as a desirable and desired side-effect of regulation through information, and not as an obligation *per se*.[81]

28.- Between these two directions, which therefore seem doomed, at least two other paths can still be explored. The first would be to allow the undertaking to explain itself when it has not taken the necessary prior decision to which the information relates in certain areas. However, this route appears to be blocked, as it would lead to an extension of the *comply or explain* mechanism introduced by the NFRD, even though it has been abolished by the CSRD. The second option would be to give undertakings a free hand when it comes to taking decisions, but require them to be transparent and to state explicitly that they have not taken the decision in question. This would require the undertaking to confess, admit or say that it did not do so.[82] Not having a policy is still a policy; not having objectives, plans or competent bodies is still valuable information for investors and civil society actors. In this case, the *comply or explain* approach would be replaced by a *comply or not, but say so* approach.[83] The difference with the previous approach is that the undertaking would

79 See above, n° 2.

80 The European legislator itself admits this when it explains that undertakings "should also be required to publish *any* plans they may have drawn up… [our emphasis]" (CSRD, Recital 30).

81 See above, n° 2 and the references cited in fn. n° 11.

82 If "to confess is to acknowledge one's guilt", in this case it is more a question of "confessing in order not to be guilty" (F. Gros, "Coopérer contre soi-même" *in* A. Garapon, P. Servan-Schreiber (eds.), *Deals de justice*, PUF, 2020, p. 158-159).

83 To our knowledge, the contours of this variant of the *comply or explain* mechanism have not been clearly identified. The French legislator seems to have already used it in the area of solidarity-based entrepreneurship (H. Durand, "Le principe 'comply or explain' appliqué aux entreprises sociales et solidaires: se conformer, sans pouvoir se justifier", *D.* 2014, p. 641) and for the corporate governance code in arts. L. 225-37 and L. 225-68 of the C. com. by instituting the variant *apply or explain, and if you apply, comply or explain* (B. Fasterling, J.-C. Duhamel, "Le *comply or explain* :

not be able to replace the expected information with relatively free explanations. It would be required to be more transparent: it would have to say what it does and what it does not do, without being able to expand on the reasons for its failure to do so. On the one hand, this would prevent explanations that sometimes border on greenwashing and improve comparability between undertakings. On the other hand, it would be highly likely that, in practice, undertakings would provide explanations of their own accord, without it being clear what sanction(s) might apply.

29.- A study of the draft standards published by EFRAG shows that a combination of the *comply or explain* and *comply or not, but say so* approaches seems to have been chosen. This is firstly evidenced by the requirements regarding policies and the actions that derive from these policies. Each topical section dedicated to them[84] must be read and applied in consideration of the provisions of the general standard which requires that, if the undertaking cannot publish the information on the policies and actions required, because it has not adopted policies and/or actions with regard to the sustainability matter concerned, it must disclose this to be the case and provide the reasons why it has not done so.[85] It is also stipulated that the undertaking may indicate the deadline by which it intends to adopt such measures.[86] It is therefore a case of mandatory *comply or explain*, with optional disclosure of the timetable for adoption or implementation. For some policies, on the other hand, the mechanism is more like *comply or not, but say so.* This is the case for anti-corruption and protection of whistleblowers: if the undertaking does not have a policy in these areas, it must only indicate whether it intends to adopt them and, if so, according to what timetable.[87] Secondly, if the undertaking has not adopted measurable objectives based on results, the information required varies according to the undertaking's intention: if it intends to adopt them, it must say so and specify the timetable; if it does not intend to adopt them, it must explain why.[88] Finally, with regard to the transition plans provided for in Articles *19a*(2)(a)(iii) and *29a*(2)(a)(iii), the standards provide for a similar mechanism. The standard

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la transparence conformiste en droit des sociétés", *RIDE* 2009, n° 2, p. 129-157, specs. nos. 7, 10 seq.), also formulated by the triptych *apply or explain, comply or disclose, disclose and explain* (A. Couret, "The 'Comply or explain' principle: From a simple financial markets regulation to a wide method of regulation", *op. cit.* specs. n^{os} 11-24).

84 Draft ESRS E1 *op. cit.*, DR E1-2, p. 8, §20-23 and DR E1-3, p. 8, §24-27; Draft ESRS E2 *op. cit.*, DR E2-1, p. 5-6, §11-14 and DR E2-2, p. 6, §15-18; Draft ESRS E3 *op. cit.*, DR E3-1, p. 5-6, §8-13 and DR E3-2, p. 6, §14-18, DR E3-1, p. 5-6, §8-13 and DR E3-2, p. 6, §14-18; Draft ESRS E4 *op. cit.*, DR E4-2, p. 9-10, §23-27 and DR E4-3, p. 10, §28-31; Draft ESRS E5 *op. cit.*, DR E5-1, p. 5-6, §12-16 and DR E5-2, p. 6, §17-21; Draft ESRS S1 *op. cit.*, DR S1-1, p. 9-10, §23-27 and DR E5-2, p. 6, §17-21, DR S1-1, p. 9-10, §19-25 and DR S1-4, p. 11-12, §36-44; Draft ESRS S2 *op. cit.*, DR S2-1, p. 6-7, §14-19 and DR S2-4, p. 9-10, §30-39; Draft ESRS S3 *op. cit.*, DR S3-1, p. 6-7, §14-19 and DR S3-4, p. 9-10, §30-39, DR S3-1, p. 6-7, §12-17 and DR S3-4, p. 8-9, §29-38; Draft ESRS S4, DR S4-1, p. 6, §12-16 and DR S4-4, p. 8-9, §27-36; Draft ESRS G1, DR G1-1, p. 5, §7-10.

85 Draft ESRS 2, p. 16, §60.

86 Draft ESRS 2, p. 16, §60.

87 Draft ESRS G1, p. 5, §2(b) and (d); another example can be found in the standard applicable to the use of water and marine resources (Draft, ESRS E3, p. 6, §13).

88 Draft ESRS 2, p. 19, §79(a).

on climate change states that if an undertaking does not have a climate change plan, it must indicate whether and, if so, when it will adopt one, without being given the opportunity to explain.[89] EFRAG has considered another transition plan in the standard on biodiversity and ecosystems not specifically provided for by the CSRD. In this case, if the undertaking does not have such a plan in place, it must explain its ambitions in this area and indicate if and when it will be adopted.[90] The undertaking must therefore provide explanations, not for the reasons why it does not have a plan, but as to its ambitions.

30.- Broadly speaking, it can be concluded from this review of EFRAG's draft standards that a combination of the *comply or explain* and *comply or not, but say so* approaches, with either an obligation or an option to specify a timetable, has been chosen for all information arbitrary to a high degree. If we adhere to this interpretation, there is no doubt that the logic of *comply or explain* and its variants remains, even if it has officially been abandoned.[91] Once the existence of the information has been established, the framework within which the preliminary work is carried out, *i.e.* the procedures for fulfilling the obligation to provide information still needs to be established.

2) When a prior decision is not needed or was taken

31.- In the case of information belonging to the second category, as well as information belonging to the first category, but which has become part of the second as a result of a decision taken by the undertaking, the question arises: what are the reasonable means that the undertaking should use to prepare the information? In the case of information whose degree of arbitrariness was originally high but became lower, it is essentially a question of reformulating the information so as to make it intelligible. A narrative is therefore expected. This category does not call for much more detailed observation. On the other hand, when it comes to information which, by its very nature, is weakly arbitrary, the undertaking will also have to put it into a story, but this is preceded by a preliminary phase of data collection and analysis, and therefore by the allocation of resources, be they technical, scientific, organisational, human and/or financial. Whether it is to establish its degree of resilience, map its impacts or risks, or assess its progress or the results of the actions and measures it has put in place, the undertaking will have to investigate and gather the necessary data, cross-reference and then analyse it before it can deliver the expected information to investors and civil society actors.

89 Draft ESRS E1, p. 7, §16.

90 Draft ESRS E4, p. 6, §18.

91 This raises the question of whether EFRAG's draft standards comply with the text of the Directive. Article 290 of the TFEU, which governs the exercise of delegated powers, provides for a complex regime (see S. Thiery, *Les actes délégués en droit de l'Union européenne*, pref. B. Brunessen, thesis, Rennes [2018], Bruylant, 2020, spec. p. 139 seq., n° 147 seq.). However, this would require a more detailed examination, which will not be carried out in the context of this study.

32.- However, Articles 19a and 29a of the directive are silent on the extent of the resources to be deployed. The chapter on information standards provides a clue. These standards are assigned the objective of guaranteeing "the quality of reported information, by requiring that it is understandable, relevant, verifiable, comparable and represented in a faithful manner".[92] It is also specified that these standards "shall avoid imposing a disproportionate administrative burden on undertakings".[93] The burden referred to in fact refers to the cost and effort involved in preparing the information.[94] The proportionality requirement laid down is directed at the Commission, which will have to take account of existing frameworks when adopting the delegated acts so as not to multiply the divergences and make the reporting work too complex for undertakings subject to other reference frameworks.[95]

33.- Consequently, while this proportionality requirement is not imposed directly on undertakings, it does call for a balancing of means and ends when judging the rigour of the information produced. The means to be provided, *i.e.* the cost and effort involved, must be proportionate to the ends, *i.e.* the quality of the information and, by extension, the needs of users such as investors and civil society actors. There is therefore a balancing standard weighing the interests of the recipients of the information and those of the undertakings subject to it. This standard provides a norm of behaviour for undertakings' reporting. If it is understood that the quality of information must neither lead to the ruin of the undertaking, nor be sacrificed on the altar of profitability, it remains however difficult to say, given the indeterminacy intrinsic to any standard, what means should be implemented between these two extremes.

34.- What is certain is that, to provide qualitative information, the undertaking will have to make an effort, particularly when it comes to describing the main risks and the main negative impacts.[96] This description is essential because the rest of the information, first and foremost the assessment of its materiality, depends on it. To be able to describe only the *main* risks and impacts,[97] it is necessary to have first identified all of them, which requires an excellent practical knowledge of the undertaking's activities. It is therefore necessary to put in place mechanisms for alerting, both internally and to those outside who are potentially affected by the undertaking's activities. Staff must also be made aware of the need to alert their superiors if necessary. Once risks and impacts have been identified, they need to

92 Accounting Directive, art. 29b(2).

93 Accounting Directive, art. 29b(2).

94 CSRD, Recital 46.

95 It is even obliged to do so in respect of certain international standards by virtue of Article 29b(5)(a) of the Accounting Directive, to which point 2(1) refers. The European legislator, in Recital 43 of the CSRD, also invites it to take account of the above-mentioned non-binding guidelines that it has already adopted in 2017 and 2019 in accordance with art. 2 of the NFRD.

96 Accounting Directive, art. 19a(f)(ii) and (g) and 29a(f)(ii) and (g).

97 For a description of risk management procedures, see ISO 31000:2018, Risk management: Guidelines.

be analysed and evaluated to distinguish the main ones from the others, according to their degree of seriousness and probability.[98] This risks and impacts assessment requires, for some of them, a very good scientific knowledge. In this respect, it may seem salutary that the CSRD requires an undertaking to accompany any sustainability objectives with "a statement of whether the undertaking's targets related to environmental factors are based on conclusive scientific evidence."[99] It is therefore essential that the members of the governing bodies collectively have a genuine understanding of ESG issues and sound expertise in dealing with them.

35.- Therefore, to be effective, the obligation to inform should include an obligation to train and develop the appropriate skills as well as an obligation to collect information. However, the text is rather disappointing in this respect. With regard to training, it states that the reporting undertaking must describe the role assigned to the management, administrative and supervisory bodies with regard to sustainability, their expertise and skills in exercising this role or the opportunities available to them to acquire such expertise or skills.[100] It is therefore entirely possible for board members to be completely incompetent or not have access to experts, even though they have a collective responsibility to ensure that sustainability information is prepared and published in accordance with the Directive and the disclosure standards.[101] We can only hope that the liability they incur under national laws will lead the undertaking to do some training. As for the audit committee, while it must include at least one member with accounting and/or auditing expertise, nothing is specified about its sustainability expertise, even though its remit has been extended to this area.[102]

36.- As for the obligation to collect information, while the Directive certainly stipulates that the "management of the undertaking shall inform the workers' representatives at the appropriate level and discuss with them the relevant information and the means of obtaining and verifying sustainability informations",[103] EFRAG's draft standards seem to be more accommodating. They provide that if an undertaking cannot say how it takes into account the views of its own workforce, workers in its value chain, affected communities and consumers and end-users, because it has not adopted a general process to engage with these persons, it must only say so and may indicate the timeframe within which it intends to put such a procedure in place.[104] With regard more specifically to channels available to the above-mentioned

98 In terms of impact, severity must be assessed with regard to the seriousness of the impact, its scale and its irremediable nature (CSRD, Recital 31; Draft ESRS 1, p. 28, §AR 5).

99 Accounting Directive, art. 19a(2)(b) and 29a(2)(b).

100 Accounting Directive, art. 19a(2)(c) and 29a(2)(c).

101 Accounting Directive, art. 33.

102 Dir. 2006/43/EC, art. 39, spec. (1) and (6). However, para. (4a) of this article provides that the functions assigned to the audit committee in relation to sustainability may be performed by the administrative or supervisory bodies or by a specialised committee set up by these bodies.

103 Accounting Directive, art. 19a(5) and 29a(6).

104 Draft ESRS S1, DR S1-2, p. 10, §30; Draft ESRS S2, DR S2-2, p. 8, §24; Draft ESRS S3, DR S3-2,

persons to raise concerns, it is provided in the same way that, if the undertaking is not in a position to communicate this information because it has not put them in place, it must say so and may indicate a timetable.[105] It is therefore a case of *comply or not, but say so*. On this point, it would seem that the interests of the undertakings subject to the obligation are taken into account to a greater extent in the balance that must be struck between their own interests and those of the recipients of the information.

37.- Finally, with regard to the analysis of any information collected, the undertaking must describe "the main features of [its] internal control and risk management systems, in relation to the sustainability reporting and decision-making process."[106] It is required to disclose its methodology and how it takes into account the results of these procedures.[107] It must also explain how it assesses the materiality of the information and, as such, how it evaluates the severity and likelihood of the negative impacts as well as the likelihood of the financial effects resulting from the risks and opportunities.[108] However, this is merely a disclosure without any substantive requirement as to the methods used.

38.- Ultimately, this analysis shows that the information will certainly be reliable, in that it will correctly reflect the level of in-house training and information, but it will not be credible if this level is low. An undertaking can hardly claim to provide information on its impacts and risks if it has not mapped them on the basis of conclusive data using a rigorous method. The Directive seems to rely on the attention that undertakings will pay to their reputation, with no guarantee that this type of process will be truly effective. Furthermore, differences in rigour and methods between undertakings can only lead to information that is difficult to compare.

39.- We have just seen how the substance of the information requested influences the legal requirements regarding the work involved in preparing this information. This is also the case for the scope of the information defined by the text. By extending its scope beyond the traditional boundaries of the undertaking, it also modifies the preparation of sustainability information.

p. 7, §23; Draft ESRS S4, DR S4-2, p. 7, §21.

105 Draft ESRS S1, DR S1-3, p. 11, §35; Draft ESRS S2, DR S2-3, p. 9, §29; Draft ESRS S3, DR S3-3, p. 8, §28; Draft ESRS S4, DR S4-3, p. 8, §26.

106 Accounting Directive, art. 29b(2)(c).

107 Draft ESRS 2, DR GOV-5, p. 10, §32-34.

108 Draft ESRS 1, p. 9-13, §25-61; Draft ESRS 2, DR*s* IRO-1 and IRO-2, p. 14-15, §49-52.

Part II. Preparing the information in the light of its scope

40.- The CSRD has changed the scope of the reporting obligation, extending it to cover the entire value chain. This extension already existed under the NFRD, but only for a specific area of information, namely the description of risks.[109] All areas are now covered by this extended scope. The section of the management report devoted to sustainability must therefore contain "information about the undertaking's [or group's] own operations and about its value chain, including its products and services, its business relationships and its supply chain."[110] The CSRD has supplemented this general provision with a special clause on negative impacts, which must be reported if they are "connected with the undertaking's [or group's] own operations and with its value chain."[111]

41.- This new scope gives rise to at least two difficulties of interpretation. The first relates to its definition, which in practice determines the scope of reporting for each undertaking (A). The second relates to the meaning to be given to the expression "where appropriate" used by the European legislator to introduce the extension of the scope and which seems to condition it (B).

A) An indefinite extension of the scope

42.- The scope of accountability provided for in the CSRD seems to contain two sub-areas: that of the undertaking's own operations and that of the value chain. Originating in management literature,[112] the concept of value chain made its appearance a few years ago in law.[113] For the moment, it does not have a stable

109 Accounting Directive, art. 19a(1)(d) and 29a(1)(d) : the non-financial statement thus had to include "the principal risks relating to [environmental issues, social and personnel issues, respect for human rights and the fight against corruption] in connection with the activities of the undertaking [or group], including, where relevant and proportionate, the undertaking's business relationships, products or services, which are likely to have an adverse impact in these areas, and the way in which the undertaking [or group] manages these risks".

110 Accounting Directive, art. 19a(3) and 29a(3).

111 Accounting Directive, art. 19a(1)(f)(ii) and 29a(1)(f)(ii).

112 It first appeared in an article by M. Porter and V. Millar in 1985. Millar in a 1985 article aimed at modelling the creation of value within an undertaking ("How information gives you competitive advantage", *Harvard Business Review*, vol. 63, 4, p. 149-174). Porter and Millar defined the value chain as a system of interdependent activities and considered that the value chain of an undertaking in a given sector is part of a wider set of activities which they called the "value system" and which includes the undertaking's supply chain and distribution chain (p. 150). The meaning of the concept has thus evolved to correspond, more or less, to what these inventors meant by "value system".

113 See *e.g.* and to stick to the main international texts: UN, *Guiding Principles on Business and Human Rights*, 2011 (mentioned twice on p. 17 and 21, the notion is not defined but seems to refer to impacts to which it has not contributed but which arise "directly from its activities, products or services through its business relationships" [p. 17, 20]); OECD, *The OECD Guidelines for Multinational Enterprises*, 2011 (the notion is not mentioned but it appears in hollow in various places, spec. p. 23, §12 which refers to the impact "directly related to their activities, products or services by virtue of a business relationship"); OECD, *Guide on Due Diligence for Responsible Business Conduct*, 2018 (the expression is used twice at p. 67-68 without being defined). See also the above-mentioned directive on European duty of care, in which the term is used 112 times, 45 times in the explanatory

definition and the European legislator, in the Directive analysed, has refrained from clearly specifying its content. Although not explicitly mentioned by the NFRD, its presence was perceptible since the text referred to the company's business relations, products or services.[114] The CSRD added to this list the supply chain.[115] The value chain would thus include, in particular, the undertaking's products and services, its business relations and supply chain,[116] whether or not they are located in the EU.[117] A definition can also be found in the EFRAG's drafts.[118] This would be "all the activities, resources and relationships linked to the undertaking's business model(s) and the external environment in which it operates,"[119] these external environments being financial, geographical, geopolitical and regulatory.[120] From the list proposed by the legislator combined with this first definition, we can therefore deduce that the value chain extends horizontally: upstream from the undertaking, towards the supply chain; downstream, towards its products and services. But we can also consider that it spreads in all directions, through the business relationships maintained by the undertaking. While EFRAG's definition of the supply chain is fairly standard,[121] its conception of these business relationships is confusing.[122] In particular, it includes "entities in the value chain" so that, according to EFRAG, business relationships extend beyond the chain, even though included in the Directive. An additional layer of confusion is introduced by EFRAG's definition of "actors in the value chain", which covers upstream and downstream actors but leaves out the external environments previously mentioned.[123]

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memorandum, 35 times in the Recitals and 23 times in the articles, and a definition is given in Article 2(h); on this point, see L. VENTURA, "Corporate Sustainability Due Diligence and the New Boundaries of the Firms in the European Union", *European Business Law Review,* 2023, vol. 34, n° 2, p. 239-268.

114 The non-financial statement had to cover only risks relating to "the undertaking's business relationships, products or services" (former Accounting Directive, art. 19a(1)(d) and 29a(1)(d)); the supply chain was not mentioned.

115 However, this addition seems more declarative than prescriptive, since the European Commission, in its 2017 guidelines, appears to include in the "business relationships" referred to by the NFRD the supply chain, the subcontracting chain, commercial relationships and "other aspects" (Guidelines on non-financial information, 2017, p. 12-13).

116 Accounting Directive, art. 19a(3) and 29a(3).

117 CSRD, Recital 33.

118 Draft ESRS 1, p. 26-27.

119 Draft ESRS 1, p. 26: "Value chain is the full range of activities, resources and relationships related to the under-taking's business model(s) and the external environment in which it operates".

120 Draft ESRS 1, p. 26-27.

121 Draft ESRS 1, p. 26: "The full range of activities or processes carried out by entities upstream from the undertaking, which provide products or services that are used in the development of the undertaking's own products or services. This includes upstream entities with which the undertaking has a direct relationship (often referred to as a first-tier supplier) or an indirect business relationship."

122 Draft ESRS 1, p. 25: "The relationships the undertaking has with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services…".

123 Draft ESRS 1, p. 25: "Actors in the value chain are individuals or entities in the upstream or downstream value chain…".

43.- While the texts do not provide a clear positive definition of the value chain, neither do they offer an unequivocal negative definition. The Directive contrasts the value chain with the undertaking's own operations, but without defining them. These operations would be those carried out by the undertaking itself, or by the group in the case of consolidated information – so that the perimeter of the value chain should not be confused with that of the group.[124] It is not specified whether they include activities carried out by others on behalf of the undertaking, *i.e.* in short all outsourcing hypotheses, or whether these should rather be included within the value chain. Furthermore, although the undertaking's own operations appear to be opposed to the value chain, it is not certain that they should be excluded. Indeed, the CSRD's recitals and the EFRAG's drafts include the undertaking's "own operations" within its chain.[125]

44.- Behind all these provisions lies a landscape that is hazy, to say the least. No criteria are specified to distinguish between what should be included within or excluded of the perimeter of the value chain. Where should the undertaking stop? Are tier 10 suppliers concerned? What about tier 100 suppliers? What about their own customers' customers? And end consumers? And all its partners, be they commercial, financial, governmental or associative? Assuming that these people fall within the scope of reporting, should all their activities be taken into account, or only those related to the reporting undertaking? While the directive does not answer these questions, EFRAG's drafts suggest a series of cumulative criteria. They define the value chain as follows: "A value chain encompasses the activities, resources and relationships the undertaking uses and relies on to create its products or services from conception to delivery, consumption and end-of-life."[126] These are the activities, resources and relationships required to create the product or service, from conception to end-of-life (i), that the undertaking uses (ii) and relies on (iii). While the criteria of purpose and use do not pose any particular problem, the latter is more difficult to define because the verb *rely on* can be understood in two ways, each of which conveys a different meaning. The first would in fact refer to use and would therefore be redundant with the previous criterion. The second would refer to dependence, in the sense of the absence of an alternative solution. Stricter than the previous one, it would render it useless. This difficulty needs to be combined with the definition given by EFRAG of actors in the value chain, mentioned above, which only mentions the use criterion.[127] The idea that emerges from this other defi-

124 For more details on the scope of consolidation, see the article by E. Miglietta, "Le régime de l'information consolidée en matière de durabilité au sein des groupes de sociétés à l'aune de la directive CSRD", p. 119.

125 CSRD, Recital 33; Draft ESRS 1, p. 26: "Relevant activities, resources and relationships include: a) those in the undertaking's operations…".

126 Draft ESRS 1, p. 26.

127 Draft ESRS 1, p. 25: "The entity is considered downstream from the undertaking (*e.g.*, distributors, customers) when it *receives* products or services from the undertaking; it is considered upstream from the undertaking (*e.g.*, suppliers) when it provides products or services that are *used* in the development of the undertaking's own products or services.

nition is that, as soon as the undertaking uses the products or services of another, or another uses the products or services of the undertaking, that other must be included in its value chain. In addition to all this, there is the practical detail that an undertaking may have multiple value chains. EFRAG only requires a description of the key value chains,[128] which means that the undertaking will have to determine which of all its value chains are more important, again with an irreducible element of discretion.

45.- This review of the Directive and the draft standards shows that the definition of the value chain is far from clear and fixed, and that the criteria for defining the scope of reporting are still in draft form.[129] In very practical terms, this jeopardises the correct delimitation by undertakings of their value chains, and hence the standardisation of the resulting information, which is necessary if it is to be comparable and therefore of high quality. In any event, the undertaking must indicate what its "general basis of preparation" is, that enables us to understand how it prepares its sustainability statement. It must indicate to what extent the information covers its upstream and downstream value chain.[130] This recourse to a new form of transparency suggests that, ultimately, each undertaking will be able to determine the extent of its value chain in a relatively discretionary manner, with the onus on it to be transparent about the choice it has made. Should this interpretation be the one adopted from the text of the directive and EFRAG's drafts, it will limit the interest of a more precise definition of the perimeter, and with it the hope of having information delivered according to coherent and identical criteria for all undertakings.

46.- To this indeterminacy of the extended scope, it seems necessary to add a condition induced by the expression used to introduce this requirement. It is provided that "*where applicable*, the information referred to in paragraphs 1 and 2 shall contain information on the undertaking's [or group's] own activities and value chain."[131] The extension of the scope of reporting is therefore conditioned by something, but by what?

B) A conditional extension of the scope

47.- Before exploring the different possible meanings of the expression "where applicable," it should be noted that it is not used in the special provision concerning

128 Draft ESRS 2, p. 12, para. 39(c).

129 Not to mention the consistency that will have to be found between the CSRD and the related standards and other European texts, in particular the above-mentioned directive on the duty of vigilance.

130 Draft ESRS 2, p. 5, § 5(c). It is also stipulated that in the presentation of this information, it may distinguish between (a) the extent to which its assessment of the relative importance of impacts, risks and opportunities extends to its value chain; (b) the extent to which its policies, actions and objectives extend to its value chain; and (c) the extent to which it includes data relating to the value chain in the publication of indicators (*Ibid*., p. 22, §AR 1).

131 Accounting Directive, art. 19a(3) art. 29a(3).

the main negative impacts.[132] It would therefore seem that for this area of information, the extension of the scope of reporting to the value chain is unconditionally mandatory, whereas for others, it remains mandatory but is subject to one (or more) reservation(s).

48.- That being said, the ambiguity of the expression "where applicable" forces us to consider several interpretations. Intuitively, this condition seems to refer to the existence of a value chain in practice. However, this first interpretation would be a little absurd, or at least not discriminating in practice, because what undertaking has no customers, suppliers or relationships of any kind? Alternatively, it could be taken to mean "if it is appropriate, if it is relevant." The criterion could therefore be that of the importance of the information, which would in fact refer to the double materiality provided for in the first paragraph of the articles relating to sustainability information. However, such a reservation would be unnecessary since the provision already expressly refers to that paragraph. Should we deduce from this that it is simply redundant, or an introductory proposal devoid of any normative value?

49.- This would be too hasty, as its scope can also be understood in the light of the previous provision resulting from the NFRD. It provided for three reservations. The first, implicit, referred to the materiality of information, which concerned all areas of information.[133] The next two, explicitly mentioned, referred only to the main risks associated with social and environmental issues in relation to the undertaking's business relationships and products or services: these were to be described where relevant and proportionate.[134]

50.- The expression "where applicable" can therefore be seen as the reintroduction of this series of reservations. In addition to the reservation relating to the materiality of the information, which must be renewed in view of the reference made by the Article to the paragraph providing for it, a second series of reservations will be found in the article relating to the information standards that the Commission will have to adopt. It stipulates that the standards "shall specify the information to be published on value chains which is proportionate and relevant to the capacities and the characteristics of undertakings in value chains, and to the scale and complexity of their activities."[135]

51.- Thus, in line with the NFRD, information on the value chain must be proportionate. This requirement echoes the standard of balancing the interests of reporting undertakings against the interests of users referred to earlier.[136] Here, however, it is not the "administrative burden" that must avoid being "dispropor-

132 See above n° 40.

133 Former Accounting Directive, art. 19a(1) and 29a(1): "to the extent necessary for an understanding of the undertaking's [or group's] development, performance, position and impact of its activity".

134 Previous Accounting Directive, art. *19a*(1)(d) and *29a*(1)(d): "where relevant and proportionate".

135 Accounting Directive, art. 29b(4).

136 See above, n°s 32-33.

tionate" but the "information" that must be "proportionate." It is not certain that this difference in wording should lead to a difference in meaning. The underlying question is still the same: information must be qualitative, but at what price?

52.- The text then sets out a relevance reservation. The information must therefore be relevant. This pertinence should not, however, be understood as the ability to achieve the aim pursued, *i.e.* the quality of the information,[137] but rather its suitability in relation to the situation of the undertaking. More precisely, the information must be relevant "to the capacities and characteristics of the undertakings in the chain" and "to the scale and complexity of their activities."[138] Relevance as understood in this way is largely confused with the previous proviso, which may cast doubt on its practical usefulness.

53.- There is another point that should be highlighted. It is specified that, to assess the relevance and proportionality of the means, account must be taken not only of the reporting undertakings, which are obliged to report, but also of the undertakings "in the value chain." The CSRD seems to exclude its own activities from the value chain, whereas EFRAG and the recitals seem to include them.[139] If we stick to the only text currently in positive law, this would mean that the proportionate and appropriate nature of the means would not be assessed on the basis of the reporting undertaking, which is required to implement them, but on the basis of the actors in its chain, who are not required to report. This paradoxical situation, to say the least, raises questions about the Directive's presuppositions regarding the preparation of information about the chain. Is it intended to distribute the production of information among the various entities concerned? If the burden of *publication* falls solely on the reporting undertakings, the burden of *preparation* could be shared. This would make sense, as each undertaking in the chain is best placed to produce high-quality information about itself at the lowest possible cost. But, in this case, this distribution, and any transfers of liability it might entail, would need to be more clearly organised. Moreover, it is regrettable that the opportunity to regulate the clauses governing the production of information throughout the chain has not been seized by the European legislator, even though they are already used in practice.[140]

54.- This implicit sharing of the preparatory work relating to the value chain seems to be supported by a reading of the rest of the paragraph providing for in-

137 As suggested by the use of the adjective '*adaptées*' in the French version.

138 Accounting Directive, art. 29b(4).

139 See above n° 43.

140 All the more so since the Commission, in its explanatory memorandum which preceded the 2021 CSRD proposal, seemed to have this breakdown in mind (above-mentioned proposal, 21 April 2021, COM(2021) 189 final, p. 4: "It will provide clarity and certainty as to the sustainability information that preparers must publish and will make it easier for them to obtain the information they need for this purpose from their own business partners (suppliers, customers and investees)").

formation standards mentioned above.[141] Under the terms of its provisions, and assuming that the actor in the chain is not subject to declaration or is a supplier from an emerging economy or market, it is stipulated that the standards "take account of the difficulties that undertakings may encounter in gathering information" from them.[142] If the actor in the chain is an SME subject to declaration – and therefore benefiting from a lighter regime – the standards must not require information about them that goes beyond this lighter regime.[143] There remains the hypothesis, not regulated by the text, where the actor in the chain to be included is a large undertaking subject to the same publication requirements as the reporting undertaking. In this case, and in the absence of an explicit prohibition, it seems possible that the reporting undertaking could rely on the information disclosed by such an actor in its own statement.

55.- In view of all these uncertainties, it should be noted in conclusion that a transitional regime has been put in place for the first three years of application of the standards transposing the directive into national law.[144] The undertaking must explain the efforts made, the reasons for their failure and what it intends to do to obtain the information in the future. Although this is temporary, it undoubtedly marks a return to the logic of the *comply or explain* principle.

56.- In conclusion, the CSRD and the draft standards leave the reader wondering. We understand the pragmatic approach of the legislator, who does not want to put European undertakings at a disadvantage in international competition by imposing an additional administrative burden. We also understand the use of framework concepts such as disproportionality, relevance and materiality, whose intrinsic indeterminacy allows the requirements to be modulated according to the strength of the undertakings. However, it has to be said that there is no single answer to the research question that prompted these developments. The threat of reputational sanction, which consists of forcing undertakings to publicly admit their shortcomings, through a kind of self-denunciation, seems to have found another fertile ground to grow on. It seems that every time the *comply or explain* principle or one of its variants comes back into play, we will have to be content with greater transparency. This will certainly give a true and fair view of undertakings, but it will not provide rigorous and credible information about their sustainability impacts, risks and opportunities. It is to be hoped that this will be sufficient to properly guide investors' choices and provide civil society actors with congruent arguments that

141 Accounting Directive, art. 29b(4).

142 Accounting Directive, art. 29b(4).

143 Accounting Directive, art. 29b(4).

144 Accounting Directive, art. 19a(3) and 29a(3).

can form the basis of a dialogue with undertakings about their socio-environmental performance.[145] But this is doubtful…

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145 F. Drummond, « Des limites de la portée normative des obligations d'information », *BJB* janv. 2022, n° BJB200l8. It should be added that the CSRD seems to conceive of the recipient of the information as a rational economic agent, whereas his cognitive biases will certainly lead him to perceive, and therefore to receive, the information differently, which amounts to questioning 'the real effectiveness of this act of information', the point of knowing whether 'the objective pursued by the provision of this information has been achieved' (P.-E. Audit, « De quelques enseignements de l'analyse comportementale du droit en matière d'information du contractant », *RTD civ.* 2021, p. 545).