

# What normativity for stakeholders' capitalism under CSRD?

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The Corporate Sustainability Reporting Directive,<sup>1</sup> known as CSRD, is sparking an impressive terminological renewal in company law. The directive aims to introduce a broad array of newly defined terms to facilitate the comparison of reported information among companies. The text is therefore outstandingly rich in new categories and concepts.

To enhance the standardization process, the directive grants the European Commission the power to adopt delegated acts.<sup>2</sup> In this regard, the European consultative group named EFRAG has already published twelve very detailed proposals, the ESRS,<sup>3</sup> which specifies the content of sustainability reporting. While these proposals have yet to be approved, they offer valuable insights into the overall coherence of the reporting standards.

Even if French law has often been a pioneer in terms of social and environmental reporting,<sup>4</sup> the actual French regime is encountering problems of effectiveness. The text contains certain formal constraints and as stated in recital 13 of CSRD, “many undertakings do not disclose material information on all major sustainability-related topic”. This situation undermines the reliability of any company statement and fuels the risk of greenwashing.

In order to highlight the challenges related to normativity, we opted to concentrate on stakeholders, with a specific focus on “users,” “stakeholders,” and the concept of stakeholders’ “interests”. Despite the expectations raised by the establishment of a “stakeholder capitalism”,<sup>5</sup> the notion is raising a normativity issue (1).

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1 Directive (EU) 2022/2464 of the European Parliament and of the Council of 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.

2 See Directive (EU) 2022/2464, recital 54.

3 “*European Sustainability Reporting Standards*”.

4 Loi n° 2001-420 of 15 May 2001, *loi sur les nouvelles régulations économiques*, had required companies to publish information on “the way in which society takes into account the social and environmental consequences of its activity” (art. L. 225-102-1 C.com.) before the reporting obligations on social responsibility of the 2001 Green Paper in the 2001 Green Paper (Green Paper “Promoting a European framework for the social responsibility of undertakings”, Commission of the European Communities, 18 July 2001, p. 18). Similarly, Law No. 2017-399 of 27 March 2017 on the duty of vigilance of parent companies prev. was a pioneer. On these points, see C. MALECKI, “L’information non financière”, *RLDA* 2021, n° 176, p. 19.

5 On the debates sparked by aborted projects, see P.-H. CONAC, « Les projets de normes durabilité ESRS (European Union Sustainability Reporting Standards) de l’EFRAG renoncent à promouvoir le

CSRD is embedding the category of “users” of corporate reporting information. Defined in the Directives’ recitals and in EFRAG proposed norms, the users of the information are distinct from the company’s stakeholders. They represent a distinct subset of stakeholders with a specific interest in accessing information (II). This standard is major step forward in understanding more concretely the different stakeholders’ expectations. Indeed, the Directive assigns a more concrete role to the company’s stakeholders. Article 19a 2 a) iv) requires companies to indicate how the undertaking’s business model and strategy take account of the interests of the undertaking’s stakeholders. However, the content of this obligation is tempered (III) in the proposals for delegated acts sent by EFRAG to the Commission.

## I° The normativity issue raised by the term “stakeholders” in French Law

Considering the social and environmental shift recently taken by French company law, stakeholders and governance is a paradox. On the one hand, stakeholders are an important part of the definition of CSR<sup>6</sup> and the concept of stakeholders designates one of the most influential CSR theories.<sup>7</sup> On the other hand, while the interest of scholars in stakeholders’ capitalism under company law is raising,<sup>8</sup> stakeholders have never had a preponderant role in governance.

The concept of stakeholders encompasses “any group or individual who can affect or is affected by the achievement of the organization’s objectives”.<sup>9</sup> This broad scope has been identified as the primary theoretical obstacle to considering stakeholders’ interests in company law. This argument was debated prior to the adoption of the French Grenelle II Act.<sup>10</sup> Several years later, following the enactment of the

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‘capitalisme des parties prenantes’ », *Rev. sociétés* 2023. 56.

6 See the definition now being considered a reference: Commission of the European Communities, “Green Paper – Promoting a European framework for corporate social responsibility”, 18 July 2001, § 20: The 2001 Green Deal defined CSR as “Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”

7 E. FREEMAN *et al.*, *Stakeholder Theory: Concepts and Strategies*, Cambridge, 2018. F.-G. TREBULLE, « Stakeholders Theory et droit des sociétés », part. 1: *BJS* 2006, n° 12, p. 1337 ; part. 2: *BJS* 2007, n° 1, p. 7.

8 See C. HANNOUN, « Le droit des sociétés à l’épreuve de la modernité », in *Mélanges B. Oppetit*, Litec, 2009, p. 309; N. CUZACQ, « Quelle place peut-on octroyer aux parties prenantes dans le puzzle de la gouvernance des sociétés ? », *D.* 2017.1844; V. MERCIER, « Le rôle des parties prenantes dans l’évolution du droit des sociétés », *BJS* 2019, n° 11, p. 44. See also, IFA, « Le conseil d’administration et l’information extrafinancière », avril 2021, p. 33.

9 E. FREEMAN, *Strategic management: A Stakeholder approach*, Cambridge 1984, reprint 2010, p. 46: “A stakeholder in an organization is (by definition) any group or individual who can affect or is affected by the achievement of the organization’s objectives”.

10 Loi n° 2010-788 of 12 July 2010 *portant engagement national pour l’environnement*. At the time, in order to refrain from establishing a consultation of stakeholders in company law, parliamentary work (Ph. MARINI, Report n° 703 made on behalf of the *Commission des finances du Sénat*, tabled on September 14, 2010, p. 248) had pointed to the “weak legal scope” of concepts such as those of “stakeholders” and their “particularly vague nature”. The *Commission des finances du Sénat* was

due diligence Act in 2017,<sup>11</sup> the *Conseil constitutionnel* had to assess the constitutionality of the stakeholders' concept.<sup>12</sup> The court emphasized the "incentive effect" of the rule and concluded that, "under these circumstances," the law did not violate the objective of making laws accessible and comprehensible. Consequently, one could argue that the lack of precision in the term hinders the establishment of mandatory provisions regarding stakeholders' involvement in governance.

## II° The development of a standard of stakeholders with a specific interest in information

In the NFRD system, non-financial information and undertakings obligations were mainly designed to fit investors and shareholders' expectations.<sup>13</sup> CSRD breaks with this logic and considerably broadens the so called "users" of reported information.

The conventional user of corporate sustainability reporting is no longer limited to investors. In recent years, there has been a shift where climate activists, for instance, have become shareholders and exercised their shareholder rights.<sup>14</sup> In recognition of this changing landscape, the recitals of the CSRD significantly expand the scope of users of reported information<sup>15</sup> First, the information published by companies is now also expressly addressed to trade unions and workers' representatives. But even more, "all citizens would benefit from a stable, sustainable and inclusive economic system". The category of users then also includes "civil society actors, including non-governmental organisations and social partners, which wish to better hold undertakings to account for their impacts on people and the environment".<sup>16</sup> CSRD preamble is giving these stakeholders a certain legitimacy. There is no doubt that the targeted users will take advantage of this new status in the context of litigation.<sup>17</sup>

The term user is of critical importance in EFRAG's proposals.<sup>18</sup> In ESRS 1, the user stands for stakeholders with a specific interest in the undertaking's infor-

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concerned that "any association or customer, supplier, partner, or observer who had contact with the company could thus request to include its opinion in the management report".

11 Loi n° 2017-399 of 27 March 2017 *relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

12 Decision n° 2017-750 DC of 23 March 2017 *loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

13 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance known as NFRD, see recital 3.

14 Club des juristes, « Note de suivi du rapport "Activisme actionnarial" », chaired by M. PRADA, 2022, p. 7.

15 Directive (EU) 2022/2464 above.

16 Directive (EU) 2022/2464 above, recital 9.

17 A.-M. ILCHEVA, « La RSE dans le secteur des industries extractives », *RLDA* 2023, n° 189, p. 50.

18 EFRAG has proposed a set of sustainability reporting standards. According to the Directive, v.

mation. After a more exhaustive list of possible users of information,<sup>19</sup> the ESRS 1 provides: “Sustainability information is relevant when it may make a difference in the decisions of users under a double materiality approach”.<sup>20</sup> In accordance with the idea set out in the recitals,<sup>21</sup> the relevance of the information to be reported by undertakings is assessed in the light of the impact of the information on users’ decisions.

The foundation of such a standard to assess the relevance of reporting information is a major step forward. Following the EFRAG logic, users may have an even more central place than the one expressly granted in the recitals. Indeed, the directives’ Article 19a § 1<sup>22</sup> provides that undertakings “shall include in the management report information necessary to understand the undertaking’s impacts on sustainability matters, and information necessary to understand how sustainability matters affect the undertaking’s development, performance and position”. Considering the above, who else but a user should be able to understand the impact of the business and how sustainability issues affect business development? Users listed in the Directive and the draft delegated acts do not necessarily have the financial means of an investor. The information published by companies will have to be adapted to these new recipients.

### III° The content of the obligation to take account of the interests of stakeholders

The most obvious entry of stakeholders into European company law is certainly that of Article 19a 2 a) iv).<sup>23</sup> This text requires companies to indicate “how the undertaking’s business model and strategy take account of the interests of the undertaking’s stakeholders.”

At first sight, this text faces the same criticisms as the aforementioned ones.<sup>24</sup> First, the obligation to indicate “how” has more than an incentive effect. Secondly, the Directive does not define the concept of stakeholders. It seems difficult to conceive of taking into account the “interests” of stakeholders without knowing precisely which stakeholders are concerned. In this regard, it would have been ben-

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Directive (EU) 2022/2464 prev., Art. 29b 1, the Commission should use this guidance to specify by 30 June 2023 the information to be disclosed by companies in relation to all information areas and sustainability issues.

19 EFRAG, “ESRS 1 – General requirements”, § 26, b): “users of sustainability statements: primary users of general-purpose financial reporting (existing and potential investors, lenders and other creditors, including asset managers, credit institutions, insurance undertakings), as well as other users, including the undertaking’s business partners, trade unions and social partners, civil society and non-governmental organisations, governments, analysts and academics”.

20 ESRS 1 prev., v. spec. QC 1.

21 Directive (EU) 2022/2464 above, especially Recitals 44, 46 and 55.

22 Directive (EU) 2022/2464 above.

23 Directive (EU) 2022/2464 above.

24 See part I above.

eficial to include a definition of the stakeholders in the directive. This omission is particularly unfortunate considering that the proposal for a directive on the corporate duty of care on sustainability includes a comprehensive list of the stakeholders affected by the directive in the section dedicated to definitions.<sup>25</sup>

The standards proposed to the Commission by EFRAG<sup>26</sup> are filling the gap. Apart from users, stakeholders are defined in ESRS 1, § 26 as “individuals or groups whose interests are affected or could be affected – positively or negatively – by the undertaking’s activities and its direct and indirect business relationships across its value chain”.

EFRAG’s standards also encompass the concept of stakeholder “interests”. According to the ESRS 1 proposal, stakeholder interests are evaluated through the lens of materiality assessment regarding potential negative impacts.<sup>27</sup> In essence, under the EFRAG standards (and possibly under the Directive as well), a stakeholder’s interest primarily lies in avoiding adverse effects caused by the company’s operations.<sup>28</sup> Consequently, the requirement to consider stakeholder interests necessitates a thorough examination of the impact of the company’s activities. As a result, the provision outlined in Article 19a §2 (a) (iv) gains significant clarification.

The proposals for delegated acts take additional steps and introduce a dialogue mechanism for evaluating the impact of company activities.<sup>29</sup> Consequently, companies are encouraged to actively engage with their stakeholders to identify their respective interests. In essence, this dialogue process aligns with the overall proposed standards, requiring companies to engage in discussions to ascertain whether their activities are negatively affecting their stakeholders.

Considering this standpoint, it is reasonable for company law scholars to raise questions regarding the establishment of a structured dialogue between companies and stakeholders.<sup>30</sup> Nevertheless, the existing dialogue framework outlined in the ESRS standards primarily focuses on assessing stakeholders’ interests rather than actively incorporating them. Integrating stakeholder interests into the decision-making process remains predominantly internal to the company. For now, European law does not mandate a formal institutionalization of this consideration.

25 Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, 23 Feb. 2022.

26 Under Articles 29b and 49 of Directive (EU) 2022/2464 above.

27 ESRS 1 prev., not. § 28, § 46 and § 62.

28 In this respect, it is important to underline the fact that neither Article 19a § 2 a) iv) of the Directive nor the EFRAG standards have required the “expectations” of stakeholders to be taken into account, as ISO 26000 standards do, for example.

29 ESRS 1 above, Appendix B. On this point: B. LECOURT, « La “directive RSE 2” (“directive CSRD”) : le nouveau visage de l’information en matière environnementale et sociale », *Rev. sociétés* 2023, 639.

30 J.-J. DAIGRE, « Vers un “conseil des parties prenantes” dans les grandes sociétés ? », *JCP E* 2022, n° 51-52, ét. n° 1411 ; P. H. CONAC, « Les projets de normes de durabilité ESRS de l’EFRAG et leur conception de la gouvernance d’entreprise et du rôle des parties prenantes », *Rev. sociétés*, 2022, 576.

The conclusion drawn from this concise overview of stakeholder interest integration in the Directive may appear somewhat paradoxical. The normative force of the CSRD Directive largely relies on the inseparable unity of its text, recitals, and implementing rules. The logical coherence established by the implementing rules, the selected examples, and the underlying theoretical assumptions expressed in the recitals prove to be crucial elements for reading and interpreting the provisions, thus contributing to their normativity. Ahead of the transposition, the French financial markets authority (AMF) now urges listed companies to consider, “to the best of their ability” the “new requirements” and “new standards” arising from the directive.<sup>31</sup> The EFRAG proposals, which undoubtedly enrich the Directive, also present a significant challenge for the Commission: ensuring improved accessibility of information and establishing more direct connections between the implementing rules and the Directive’s text.

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<sup>31</sup> AMF, « Dialogue actionnarial sur les questions environnementales et climatiques », mars 8 2023.