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Regulatory Developments on Sustainability Issues in Light of Delegated Regulation (EU) 2023/2772 (ESRS)

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Abstract: Sustainability reports have undergone significant evolution with the implementation of Directive 2022/2464 (CSRD). Despite the standardization efforts through the European Sustainability Reporting Standards (ESRS) developed by EFRAG, in 2023, the European Commission proposed significant reductions in reporting requirements, with cuts of up to 50%. This step back in the requirements has caused uncertainty about the CSRD's ability to ensure effective environmental sustainability reporting. The changes, formalized in Delegated Regulation (EU) 2023/2772, represent a turning point in regulating corporate sustainability, and their adequacy in achieving transparency and comparability objectives continues to be a matter of debate.

1. Introduction

A sustainability report, formerly known as the Non-Financial Information Statement (NFIS), represents an evolution in reporting aspects that go beyond mere financial accounting, promoting more responsible and sustainable corporate behavior.

Legislation in this area has advanced rapidly, culminating in December 2022 with the introduction of Directive 2022/2464,[1] known as

[1] European Parliament and Council of the European Union, Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) Nº 537/2014, Directive 2004/109/EC,

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the Corporate Sustainability Reporting Directive (CSRD). In March 2023, Spain took steps towards adopting this new law by drafting a preliminary bill[2] to implement the suggested changes; however, internal electoral processes stalled the progress.[3] While it appeared that Spain would lead the change in this area, France took the lead by transposing the directive into its domestic law in December 2023.[4]

The legislation before the CSRD, established by Directive 2013/34/EU,[5] did not require the preparation of an EINF, leaving its adoption at the discretion of companies. It was recognized that financial statements alone might not adequately reflect the actual economic situation of companies. The obligation for these reports was introduced by Directive 2014/95/EU[6] (Non-Financial Reporting Directive, NFRD), aiming to improve information transparency and comparability. However, efforts to achieve these goals were initially futile.[7] The lack of an adequate regulatory framework

Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, accessed July 30, 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464.

2 Spain, Anteproyecto de Ley xx/202X, de xx de xxxxxx, por la que se regula el marco de información corporativa sobre cuestiones medioambientales, sociales y de gobernanza, accessed July 30, 2024, https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion_publica/consulta/ficheros/APL_informacion_corporativa.pdf.

3 Elisa García Jara, José Muñoz Jiménez, and Antonio Prado Martín, "El informe sobre sostenibilidad en España, contenido y verificación," in *Medidas financieras, fiscales, sociales y procedimentales para la sostenibilidad*, eds. María Amparo Grau Ruiz, Eva Gil Cruz, Á. Falcón Pulido, and V. Martínez Torres (Aranzadi, 2024).

4 France, Ordonnance n° 2023–1142 du 6 décembre 2023 relative à la publication et à la certification d'informations en matière de durabilité et aux obligations environnementales, sociales et de gouvernement d'entreprise des sociétés commerciales, accessed July 30, 2024, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000048519395/.

5 European Parliament and Council of the European Union, Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, accessed July 30, 2024, https://eur-lex.europa.eu/eli/dir/2013/34/oj.

6 European Parliament and Council of the European Union, Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, accessed July 30, 2024, https://eur-lex.europa.eu/eli/dir/2014/95/oj.

7 Virginia Martínez Torres, "Análisis de las deficiencias en la normativa sobre los Estados de Información no Financiera," Asociación Española de Contabilidad y Administración de

allowed companies to limit their reports to "selected GRI indicators" based solely on their interpretation of needs, maintaining the voluntary nature of the reported sustainability information.

With the CSRD, sustainability reports must be included in the consolidated annual accounts, creating a link between financial and non-financial reporting, emphasizing their relevance to the market and the economy, thus supporting the green transition and highlighting the crucial role of investors and sustainable finance. In this context, the European Union tasked the European Financial Reporting Advisory Group (EFRAG) with developing the European Sustainability Reporting Standards (ESRS)[8] aimed at standardizing reported information, thereby facilitating the comparability of non-financial data.

Initial drafts of the reports were disseminated in November 2022, followed by a detailed analysis to identify areas in need of improvement. Nevertheless, in July 2023, the European Commission proposed a 25% reduction in reporting requirements. In August 2023, a new Delegated Act Proposal[9] was presented, suggesting significantly reduced disclosure requirements from 25% to 40% or, in some cases, up to 50%. This proposal also removed the requirement to include a wide range of content based on indicators initially proposed by EFRAG in the reports. Subsequently, in December 2023, Delegated Regulation (EU) 2023/2772[10] was enacted, whose terms are consistent with the provisions previously mentioned in the proposal of the delegated act.

This critical analysis focuses on assessing whether the recent regulations, which seem to set a transitional phase, are adequate for effective

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Empresas, 2022, accessed July 30, 2024, https://aeca.es/wp-content/uploads/ixjor/36e.pdf.

[8] European Financial Reporting Advisory Group (EFRAG), "The First Set of ESRS – The Journey from PTF to Delegated Act," accessed July 30, 2024, https://www.efrag.org/lab6.

[9] European Commission, Commission Delegated Regulation (EU) 2023/2465 of 17 August 2023 supplementing Regulation (EU) Nº 1308/2013 of the European Parliament and of the Council as regards marketing standards for eggs, and repealing Commission Regulation (EC) Nº 589/2008 C/2023/5509, accessed July 30, 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302465.

[10] European Commission, Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, accessed July 30, 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302772.

reporting on environmental sustainability. Furthermore, this article aims to foster an academic dialogue on a topic that, despite its relevance, has not yet been widely explored in the legal field, resulting in very limited literature on this subject.

2. Aspects Related to Sector Analysis and Specific Requirements

2.1. Criteria for Materiality Determination and Temporal Perspective

The ESRS represent three main categories: cross-cutting, thematic and sectoral. Cross-cutting standards are mandatory in terms of their development and publication. The sectoral ones are still pending publication, and the thematic ones are subject to a rebuttable presumption based on whether the company, through its double materiality analysis, considers it relevant to report this information. The thematic standards include environmental categories such as climate change, pollution, water, marine waste, biodiversity and ecosystems, natural resources, and circular economy.[11]

We have chosen to classify thematic standards as voluntary, as their application depends on the relevance the company attributes to each issue in its double materiality analysis. This allows for the omission or reduction of previously mandatory information considered essential in the CRSD, thus weakening the regulatory impact on these thematic areas through the delegated regulation.

Understanding how the relevance of an issue is determined is crucial to grasping the concept of double materiality. Materiality is based on information that could influence stakeholders' decisions about the company. Double materiality considers two dimensions: materiality in terms of impact and in financial terms (or internal). Materiality in terms of impact refers to the potential environmental effects of the company in the short, medium, and long term. These timeframes are defined in paragraph 77 ESRS 1[12] as short-term, the period of publication of the financial statements (annually); medium-term, up to five years; and long-term, more than five years. However, paragraph 80 of ESRS 1[13] allows companies to adapt these time

[11] Ramón Bastida and Pablo Verdugo. *Normas europeas de Información de Sostenibilidad (NEIS): Guía de aplicación práctica*. Barcelona: Profit Editorial, 2023.

[12] European Commission, Commission Delegated Regulation (EU) 2023/2772, (77).

[13] Ibid., (80).

horizons to their specific characteristics, leading to greater subjectivity in the decision to include environmental information as material, avoiding or postponing the preparation of thematic reports on this matter. In the case of negative impacts, in materiality in terms of impact, it is crucial to analyze the magnitude, scope, and irreparable nature of these impacts. Financial materiality refers to how the environment affects the company, assessing the likelihood of negative events occurring and the potential significance of their financial effects.[14]

This high subjectivity in determining what constitutes material information introduces considerable variability in the quality and consistency of sustainability reports presented. While this flexibility may seem beneficial to companies, allowing them to tailor reports to their specific circumstances, it poses significant challenges for stakeholders, who rely on this information to make informed decisions. In this sense, the lack of uniformity in sustainability reports makes it difficult for investors, regulators, and other stakeholders to effectively compare environmental performance between companies, which may lead to erroneous assessments of risk and corporate sustainability. This situation is exacerbated by allowing companies to discretionarily determine what information is relevant, resulting in the possible omission of critical data on negative environmental impacts and reducing the overall transparency of the reports. This reduction in transparency not only affects stakeholders' ability to make accurate assessments but can also damage the perception of the company's integrity and responsibility. Additionally, subjectivity in reporting can erode stakeholders' trust, who expect clear and complete reports that faithfully reflect the environmental challenges and risks companies face. These reporting practices can put companies at a strategic disadvantage compared to those that adopt stricter and more uniform standards, better aligning with global expectations of

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[14] Transparency regarding time horizons is required in relation to the impacts and the anticipated financial effects, as set out in parts c) and e) of paragraph 48 of SBM-3 of ESRS 2: c) Details on how significant incidents affect people or the environment, their origin in relation to the business strategy, the time horizons of these incidents, and the company's involvement in them through its activities or business relationships; e) The estimated future financial impacts of risks and opportunities in financial terms over the short-, medium-, and long-term, considering risk management strategies, investment and divestment plans, and anticipated funding sources.

transparency and corporate responsibility, but in no case will they improve the overall transparency and comparability of companies or sectors.

This situation is like walking a tightrope between clouds of transparency and mists of concealment, where each discretionary step can dangerously sway the bridge of trust between companies and their stakeholders.

2.2. Standards and Specifications in Thematic Disclosure According to the ESRS

As discussed, determining materiality is crucial, especially because the disclosure of environmental information under the thematic ESRS on the environment is not mandatory when a company decides it is not materially relevant. In such situations, the company may limit itself to briefly explaining why it considers the issue not materially important. However, in the case of the ESRS E1 related to climate change, a more detailed justification is required as stipulated in IRO-2 of the ESRS 2,[15] but its submission is not enforced.

This flexibility represents a turning point for the original expectations of these regulations, as the assessment of environmental impact was considered fundamental since the 2013 Directive, which was also maintained in Directive 2464/2022.[16] Even the EFRAG had contemplated the mandatory evaluation of Scope 3 emissions for all companies. However, we now face the possibility that, under certain circumstances, information on aspects that should be considered, in our opinion, materially relevant may not be reported. This change could lead companies to prepare less detailed

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[15] Directive (EU) 2022/2464, 37.

[16] "If companies are required to prepare a non-financial statement, this statement must include, regarding environmental issues, detailed information on the current and foreseeable effects of the company's activities on the environment, and, where relevant, health and safety, the use of renewable and/or non-renewable energy, greenhouse gas emissions, water use, and air pollution" in European Parliament and Council of the European Union. Directive 2014/95/EU, (7). "There is clear evidence that many companies do not provide significant information on all important sustainability-related topics, particularly climate-related information, such as total greenhouse gas emissions and factors affecting biodiversity. The report also noted as significant problems the limited comparability and reliability of sustainability information. Moreover, many companies from which users need sustainability information are not required to present it. Therefore, there is no doubt that a robust and accessible reporting framework, accompanied by effective audit practices, is needed to ensure the reliability of the data and to prevent greenwashing and double counting" in Directive 2022/2464 , (13).

analyses in this area, and over time, we will see how verifiers react to these situations, and we will be able to assess the effectiveness of their oversight.

2.3. Breakdown by Sectors and Associated Requirements

Directive 2464/2022 acknowledges the inherent diversity across various sectors affected by its provisions, emphasizing the need to tailor sustainability reports to reflect each sector's specificity. This customization allows for a more detailed assessment of associated risks and effects, enhancing their comparability and utility to stakeholders.

The directive explicitly highlights the relevance of this information for various interested parties, particularly regarding comparability across different market sectors and within each industry. This comparability is crucial for investors seeking to better understand companies' sustainability positions and performance and for a more accurate evaluation of companies' development, outcomes, and status. Transparency in these areas is essential to bridge the gap between companies' books and market values, taking into account sustainable elements.[17] The directive suggests that sustainability disclosure regulations should detail both universal information applicable to all entities and information particularly relevant to each company's operational scope. This approach is vital in sectors with high sustainability risks or significant environmental impacts.[18] The European Commission has committed to considering the extent of risks and impacts in each sector through specific delegated acts, as providing detailed and tailored information is deemed essential for progress towards a more sustainable future, recognizing that the diversity of risks and opportunities requires a response tailored to each sector's unique circumstances.[19]

The recently enacted delegated regulation, which complements the CSRD, specifies in the European Sustainability Reporting Standards (ESRS) 2, section 40, an obligation for companies to disclose essential

17 Ibid., (9).

18 "Las comparaciones entre empresas del mismo sector son especialmente valiosas para los inversores y otros usuarios de la información sobre sostenibilidad. Por consiguiente, las normas de presentación de información sobre sostenibilidad deben especificar tanto la información que deben divulgar las empresas de todos los sectores como la información que deben divulgar las empresas en función de su sector de actividad", ibid., (53).

19 Ibid., Article 29b-1.

information on how sustainability issues influence their overall strategy. Section b) requires a detailed breakdown of total revenues as presented in the financial statements, segmented by the significant sectors identified in the ESRS.

This mandate adds significant depth by requiring entities to segment their income by relevant sectors. This effort to clarify how sectoral operations impact and are impacted by sustainability significantly enhances transparency. Companies are encouraged to align this income segmentation with what is reported under the International Financial Reporting Standard (IFRS) 8 on Operating Segments, thus promoting greater cohesion and understanding of the information.[20] However, the application of this guideline has raised doubts among corporations, which have sought advice from EFRAG on the precise definition of "significant sectors." The confusion stems from the European Commission's lack of explicit sector classification in the ESRS. Given this uncertainty, EFRAG has indicated that, in the absence of a delegated act clarifying this point by the European Commission, companies appear not to be obligated to comply with the stipulations in section b) of ESRS 2, paragraph 40.[21] Although EFRAG clarifies that its guidance is unofficial, it assumes no responsibility for the content or consequences of following its advice.[22]

This circumstance reveals a temporary regulatory vacuum and a disconnect between legislation and its implementation. It highlights an urgent need for precise instructions that allow entities to properly adhere to

[20] IFRS 8 requires companies to report financial information in a segmented manner, which allows users of the financial statements to evaluate the performance of different parts of the company and better understand how these segments contribute to the overall performance. This level of detail helps investors, analysts, and other stakeholders to obtain a clearer view of the company's operations and its sustainability across different sectors of activity. The mention of the need to harmonize income segmentation with what is reported under IFRS 8 indicates that entities must strive to integrate these guidelines with their existing accounting practices to ensure consistency and clarity in the disclosed financial information. This cohesion is crucial for users who seek to understand not only financial performance but also how the company's sustainability practices affect or enhance this performance in specific sectors. Cf. Instituto de Contabilidad y Auditoría de Cuentas (ICAC), "Norma Internacional de Información Financiera 8, Segmentos Operativos," accessed July 30, 2024, https://www.icac.gob.es/node/717.

[21] Commission Delegated Regulation (EU) 2023/2772, (40, b), ESRS 2).

[22] EFRAG, "ESRS Implementation Q&A Platform, Explanations 1/2024".

their reporting obligations. This situation underscores the imperative need for the European Commission, with support from bodies like EFRAG, to develop and publish a comprehensive list of ESRS sectors, ensuring that companies can meet reporting requirements effectively and contribute to the ultimate goal of promoting sustainable practices. This challenge can be interpreted as a result of hasty decisions to minimize compliance requirements and European legislators' significant lack of diligence. The rush to cut demand criteria not only complicates this process for companies but also highlights haste that is counterproductive to the business ecosystem, showing a lack of foresight and care in policymaking that significantly impacts sustainability management.

2.4. Guidance on Entity-Specific Information

Within the ESRS framework, as already pointed out, certain disclosure requirements are classified into three categories: cross-sectional, thematic, and sector-specific. However, the regulation acknowledges that certain incidents, risks, or opportunities may not be detailed with the necessary depth. In such cases, companies are expected to take the initiative to supplement the reports with entity-specific information. This additional information seems essential for stakeholders to gain a clear and complete understanding of how sustainability issues affect the company, covering any gaps that may exist in the cross-sectional and thematic guidelines.[23]

As more detailed sector-specific standards are formulated and adopted, the obligation for companies to disclose specific information about their entity is expected to decrease. The reason is that these sector-specific standards (still under development) are designed to provide more comprehensive coverage, thereby minimizing potential gaps.[24] However, it is essential to note that the CSRD does not establish a specific classification for addressing this type of information, merely allowing its inclusion

[23] European Commission, Commission Delegated Regulation (EU) 2023/2772, 10.1.

[24] Directive (EU) 2022/2464, (33). The second mention of the need to provide specific information serves as a reminder that the Commission must detail it in relation to the forthcoming sectoral regulations, which were expected to be published by June 30, 2024. However, on April 29, 2024, the Council announced that the adoption of these regulations is expected to be postponed by 2 years, until June 30, 2026.

without providing further details.[25] On the other hand, the delegated regulation introduces a transitional provision regarding entity-specific information. This raises questions among those subject to these rules due to its "relatively new" character, as it was not explicitly delved into in the original directive.

The recommended strategy to address possible unspecified areas of relevance is to rely on established reporting frameworks or standards, such as the sectoral guidelines of IFRS (formerly known as SASB Standards) and the GRI Sector Standards. These resources provide crucial guidance for identifying and effectively communicating relevant information. However, it is striking that, in contrast to earlier versions proposed by EFRAG, the number of references to established norms that promote standardization has decreased. Moreover, there is no in-depth focus on specific criteria for standardizing the indicators in reporting externalities. This situation appears to be at odds with the fundamental objectives of Directive 2464/2022, which are focused on ensuring transparency and comparability.

It is crucial to consider the comparability among companies within the same sector to ensure the utility and relevance of the specific information provided. This involves a balance between giving unique entity details and maintaining consistency with general reporting parameters, ensuring that the information is both relevant and comparable. Despite requests for specific examples from companies about what might constitute this additional information, EFRAG's response highlights the situational nature of these requirements, indicating that future sector-specific standards, still under development, promise to address these sector-specific sustainability issues with greater precision.[26]

We believe that this not only complicates the reporting process for companies but could also dilute the effectiveness of the CSRD.

[25] Virginia Martínez Torres, "Desentrañando la CSRD: balance de expectativas y realidades en el ámbito Financiero y Tributario," *Quincena Fiscal*, no. 1–2 (2024).

[26] EFRAG, "ESRS Implementation Q&A Paltform, Explanations 1/2024".

3. Challenges and Particularities of Transitional Measures

3.1. Special Provisions for Companies with Fewer than 750 Employees

The implementation of the CSRD was initially set for January 5, 2023, with the first sustainability statements expected in 2024, following this timeline: from January 1, 2024, companies with more than 500 employees, previously subject to the NFRD, will be required to present their reports in 2025; from January 1, 2025, large companies not previously subject to the NFRD, but with more than 250 employees and/or revenues over 40 million euros and/or total assets over 20 million euros, will be required to present their reports in 2026; the process will begin on January 1, 2026 for small and non-complex credit institutions, as well as for listed SMEs, which will have the option to voluntarily exclude themselves until 2028.[27]

However, Appendix C of the ESRS 1 presents an apparent contradiction by allowing companies with fewer than 750 employees to omit emissions, pollution, water, biodiversity, and resource use data. This exemption appears misaligned with the previous requirements of the NFRD, under which companies were already required to include this information in their sustainability reports. For example, the thematic standard ESRS E1–6, detailing gross greenhouse gas (GHG) emissions for scopes 1, 2, and 3, as well as total GHG emissions, allows companies or groups with an average of fewer than 750 employees at the end of the fiscal year to omit information on scope 3 emissions and total GHG emissions in the first year of sustainability reporting. Notably, this also contradicts what is stipulated in the CSRD, which considers it essential to disclose detailed information on various categories of scope 3 emissions.[28]

Similarly, the ESRS E4 covers all disclosure requirements related to biodiversity and ecosystems. It allows companies or groups that do not exceed 750 employees at the end of the fiscal year to exclude this information for the first two years of preparing their sustainability report. The CSRD highlighted the importance of this information, criticizing its omission

27 Ibid., 64–5.
28 Ibid., 47.

and demanding its inclusion within a coherent and accessible framework,[29] which was also a requirement under the NFRD.

Appendix C of the NEIS 1 also introduces provisions allowing companies, regardless of size, to omit certain essential information in their early years of sustainability reporting:

- NEIS E1–9: addresses anticipated financial effects of significant physical and transition climate risks and related opportunities. In the first year, companies may omit the required information and, for the first three years, may opt to provide qualitative rather than quantitative information if the latter cannot be prepared.
- NEIS E2–6: covers anticipated financial effects of incidents, risks, and pollution-related opportunities. In the first year, this information may be omitted. For the first three years, qualitative data may be provided instead of quantitative, except for certain details on expenses and significant cases.
- NEIS E3–5: refers to the anticipated financial effects of incidents, risks, and opportunities related to water and marine resources. The information required by NEIS E3–5 may be omitted in the first year. Companies may comply in the first three years by providing only qualitative information.
- NEIS E4–6: addresses the anticipated financial effects of incidents, risks, and opportunities related to biodiversity and ecosystems. In the first year of reporting, the required information may be omitted. Companies may opt to disclose only qualitative information for the first three years.
- NEIS E5–6: focuses on the financial effects of incidents related to the use of resources and the circular economy. Companies may omit this information during the first year, opting to present qualitative data for the first three years.

The EFRAG emphasizes the importance of reporting if the issues covered by these thematic standards have been identified as materially relevant.[30] If so, companies are required to provide, for each significant issue, a list of relevant matters, a description of how the business model and

[29] Ibid., 51.

[30] EFRAG, "ESRS Implementation Q&A Paltform, Explanations 1/2024".

strategy of the company consider these incidents, established goals and progress towards these, related policies, actions taken to address adverse incidents, and relevant parameters for these matters.
However, the waiver of mandatory reporting of financial effects, as allowed under the provisions of Appendix C of NEIS 1, could hinder the practical application of the double materiality criteria in internal financial terms. This flexibility in disclosure may lead to companies not conducting a comprehensive analysis of the financial impacts of their activities on sustainability, resulting in a lack of preparedness to identify and report material issues according to specific regulations. Consequently, the lack of a mandatory requirement to study and report on these financial impacts may result in a voluntary, albeit transitional and transitory non-reporting of thematic reports due to the widespread absence of a materiality study, which poses a significant challenge.

From our perspective, these measures are not sufficient. Although practical for small companies, the flexibility granted by the transitional provisions could dilute the expected rigor and completeness of sustainability reporting. This is worrying, especially when some of these data were already reported under the previous NFRD framework and recognized as essential in the CSRD. Without adequate compensatory measures, this reduction in content and requirements could be a step backward rather than a step towards greater transparency and corporate accountability.

It is thus paradoxical that, while seeking to broaden the scope and depth of sustainability reporting through the CSRD, exceptions are introduced in the ESRS that limit this ambition. Failure to fully acknowledge the importance of continuity in reporting on certain topics, especially those previously covered under the NFRD, could detract from the efforts of companies that have already taken significant steps towards integrating environmental sustainability into their reporting.

3.2. Greenhouse Gas Emissions: Harmonization of GHG Accounting for Subsidiaries and Holding Companies

One of the queries raised with EFRAG is whether subsidiaries of a parent company and the parent company itself should use the same criteria and methodology for calculating and reporting GHG emissions in their consolidated sustainability reports. This is important to ensure that all information

presented is consistent and comparable both within the corporate group and for external stakeholders. According to the ESRS, both the parent company and its subsidiaries must adhere to guidelines ensuring high-quality reporting. This includes being clear and consistent about the methodologies used to calculate GHG emissions, as well as any significant assumptions behind these calculations. This is specified in several sections of the ESRS, such as Appendix B of ESRS 1[31] and paragraph 77 of ESRS 2,[32] which require detailed disclosure of the methodologies used. According to the standard, although the ESRS allow for some flexibility in the methodologies used by different companies within a group, maintaining the quality standards of the information is crucial. If different methodologies are used, these differences must be clearly explained and justified in the report in order to maintain transparency. EFRAG states that this is essential to ensure that sustainability reporting is reliable and that reported GHG emissions are comparable and understandable.[33]

In our view, even if all companies report their GHG emissions in metric tones of CO2 equivalent, given that no calculation methodologies are imposed, using different methodologies to calculate these emissions can significantly affect comparability and potentially "camouflage" significant differences in the reported results. Comparability problems in reporting GHG emissions can arise due to different emission factors used by various companies, even when reporting in the same metric unit. For example, one company may use more up-to-date or regionally specific emission factors, making its emission figures appear more favorable compared to another company or subsidiary using less specific data. In addition, methodologies for calculating scope 3 emissions vary significantly, as they include all indirect emissions in a company's value chain. These variations in methodology and underlying assumptions in calculation models, such as product lifetime or process energy intensity, can result in significant discrepancies in reported data. To address these problems, adopting and following internationally recognized standards such as the GHG Protocol, which were

[31] Ibid., 30.
[32] Ibid., 55.
[33] EFRAG, "ESRS Implementation Q&A Platform, Explanations 1/2024".

advised in previous drafts issued by EFRAG[34] and which help minimize differences in methodologies.

The permissibility in the choice of methodologies for calculating GHG emissions within the same corporate group introduces a significant challenge not only in terms of comparability between different companies (a situation already criticized over the years by the doctrine), but also within the same corporate entity. This flexibility can lead to inconsistencies in sustainability reporting between subsidiaries and the parent company, creating a patchwork of data that will make it challenging to have a clear and consistent understanding of the environmental impact of the company as a whole. Previously, the difficulty in comparability was mainly between different companies, which already presented a considerable obstacle for investors and other stakeholders seeking to assess and compare the environmental performance and sustainability of companies. Now, by allowing different methodologies within the same group, the problem is compounded, potentially diluting the effectiveness of sustainability reporting as a transparency tool. This could lead to a lack of clarity on how environmental impacts are actually managed at the corporate level, making it more difficult for stakeholders to make informed assessments and potentially affecting trust in the company.

Transparency and consistency in environmental reporting are crucial to meeting the expectations of regulators, investors, customers and society

[34] "Calculation guidance AR 39. When preparing the information for reporting GHG emissions as required by paragraph 41, the undertaking shall: (a) consider the principles, requirements and guidance provided by the GHG Protocol Corporate Standard (version 2004 or the latest one) and GRI 305 (version 2016 which is directly based on the requirements of the GHG Protocol). The undertaking may consider the requirements stipulated by ISO 14064–1:2018. If the undertaking already applies the GHG accounting methodology of ISO 14064–1: 2018, it shall nevertheless comply with the requirements of this standard (e.g., regarding reporting boundaries and the disclosure of market-based Scope 2 GHG emissions); (b) disclose the methodologies and emissions factors used to calculate or measure (c) include emissions of CO2, CH4, N2O, HFCs, PFCs, SF6, and NF3. Additional GHG may be considered when significant; (d) use the most recent Global Warming Potential (GWP) values published by the IPCC based on a 100-year time horizon to calculate CO2eq emissions of non-CO2 gases; and (e) disclose the methodologies and emissions factors used to calculate or measure GHG emissions, and provide a reference or link to any calculation tools used"; EFRAG, "DRAFT EUROPEAN SUSTAINABILITY REPORTING STANDARDS. ESRS E1 Climate change," 31–2.

at large, and any action that compromises these principles represents a step backward in efforts towards greater corporate sustainability.

4. Conclusions

Our analysis highlights the need to standardize and normalize the information collected in sustainability reports, which would improve its management, subsequent controls, and usefulness. Unfortunately, the recent trend towards reducing the stringency of sustainability reporting has been a step backward, moving us away from previous progress made under the NFRD and complicating progress towards greater corporate transparency and accountability. Although the CSRD attempted to address some challenges, the exceptions introduced by the ESRS may compromise the expected breadth and depth of sustainability reporting. These limitations risk undermining the efforts of companies that make progress in integrating environmental considerations into their reporting, discouraging continuous improvement. A sound regulatory framework and effective auditing practices are more crucial than ever.[35]

Prof. Dr Grau Ruiz underlines the importance of reliable data for effective fiscal policies promoting fair taxation and sustainable development. Opening the horizons of sustainability reporting with appropriate tools could support the environmental fiscal framework and strategic initiatives such as the Green Deal Industrial Plan.[36]

Thus, the effectiveness of these regulations will depend to a large extent on the diligence with which each member state transposes and implements these rules. The individual efforts of each country will be decisive in maintaining and enhancing transparency and comparability. The challenge is ensuring that European regulations not only respond to academic and

[35] Maria Amparo Grau Ruiz, “The Alignment of Taxation and Sustainability: might the Digital Controls of Non-Financial Information Become a Universal Panacea?,” *Review of European and Comparative Law* 50, no. 3 (2022): 3.

[36] European Commission, “Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A Green Deal Industrial Plan for the Net-Zero Age” COM/2023/62 final, accessed July 30, 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023DC0062.

market demands but also transform corporate sustainability management effectively and permanently.

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