

REGULATORY INTELLIGENCE

COUNTRY UPDATE-France: ESG reporting

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Environmental, social and governance (ESG) reporting has become a major regulatory issue in Europe. Non-financial disclosure is seen as playing a key role in helping the financial sector address climate change and sustainability. It is also being used to assess and improve problems such as poor workplace diversity and gender pay gaps.

This article provides an outline of EU legislation followed by an overview of ESG law in France, by [Jean-Nicolas Clément](#), [Didier Martin](#) and [Sophie Scemla](#), partners, and [Benjamin Krief](#), counsel, at [Gide Loyrette Nouel](#).

Principal EU ESG reporting legislation

The [Non-Financial Reporting Directive 2014/95](#) (NFRD) came into effect in 2018. It requires public interest entities with 500 or more employees to disclose in their annual report their impact on, and policies relating to, matters including environmental, social, employee and human rights concerns. That report should also describe an entity's diversity policy for its administrative, managerial and supervisory bodies, the policy's objectives and its results.

The revised [Shareholder Rights Directive 2017/828](#) (SRD II) came into force in 2017. It requires asset managers and institutional investors to have a policy on how they monitor investee companies on non-financial performance and risk, including their social and environmental impact.

The [December 2019 European Green Deal](#) proposed three measures to strengthen the basis for sustainable investment by improving corporate reporting of environmental issues.

NFRD is to be revised, with draft EU legislation expected during 2021.

The [Sustainability-related Financial Disclosures Regulation 2019/2088](#) (SFDR) came into force on March 10, 2021. It imposes new transparency requirements on 'financial market participants' at product and manager level. Firms must publish their policies on integrating sustainability risks in investment decisions and the principal adverse consequences of those decisions.

The [Taxonomy Regulation 2020/852](#) came into force in July 2020 and applies in practice from January 2022. It standardises definitions and processes to be used when determining whether an activity is environmentally sustainable for disclosures under SFDR and NFRD.

ESG in France**1. What national legislation enacted the NFRD in France and did any aspects of it exceed the requirements set by the NFRD?**

The [EU non-financial reporting directive](#) (NFRD) was implemented in France in 2017 by the ordinance n° 2017-1180 of July 19, 2017. The majority of the relevant provisions can now be found in articles L. 225-102-1 and R. 225-104 and subsequent of the French Commercial Code (Code de commerce) which set forth the conditions under which certain French companies must include in their annual management report a non-financial performance statement (déclaration de performance extra-financière or DPEF). Some provisions can also be found in codes applying to certain types of companies, such as financial institutions or insurance companies, pursuant to which such companies must comply with provisions of article L225-102-1 of the French Commercial Code. French law exceeds to a certain extent the requirements set by the NFRD, which is due to the fact that, prior to the implementation of the NFRD, certain French companies already had to publish non-financial information pursuant to a law dated July 12, 2010, which on certain aspects went further than the NFRD. In particular:



- Non-listed French companies, with more than 500 employees and a turnover or assets in excess of 100 million euros, must comply with the provisions of the above mentioned provisions of the French Commercial Code;
- French law provides that, for companies with more than 500 employees and a turnover or assets in excess of 100 million euros, the information contained in the DPEF must be verified by an accredited independent third-party organization (organisme tiers indépendant or OTI), which issues an opinion transmitted to the shareholders at the same time as the annual management report.

2. Which national authority or authorities oversee ESG reporting?

Pursuant to Article L. 823-10 of the French Commercial Code, the statutory auditors must verify that the DPEF is included in the management report. As mentioned in question 1. above, for companies above a certain size, an accredited independent third party organization must audit the content of the DPEF. It must provide a reasoned opinion on the compliance and sincerity of the content of the DPEF and must describe the diligence implemented to carry out the task.

Companies, the securities of which are listed on regulated markets or on Euronext Growth, must file their management report, including the DPEF, with the commercial register. Non-listed companies are exempt from filing the annual management report except if they draw up consolidated accounts and the group's annual management report that they are also required to draw up is included in their annual management report. There is no control by the commercial register court over the presence of the DPEF in the management report or over its content.

Pursuant to Article L. 451-1-2 of the French Monetary and Financial Code, which transposes article 4 of the Transparency Directive n° 2004/109/EC (as amended), French issuers, the securities of which are admitted to trading on a regulated market and, under certain conditions, issuers having their registered office outside of France but the securities of which are admitted to trading on a French regulated market, must publish and file with the French Financial Markets Authority (AMF) their annual financial report (rapport financier annuel) within four months following the end of their financial year. The annual financial report includes the management report which includes the DPEF. The AMF is qualified to control that this publication and filing obligation is respected. In the event of failure to comply with this obligation, the managers of the issuers concerned may be subject to financial penalties pronounced by the AMF's Sanctions Commission.

In practice, the annual financial report is frequently included in the universal registration document (URD) prepared annually by the issuers. The AMF is qualified to review the content of the URD in accordance with Article 9 of the Prospectus Regulation (EU) n° 2017/1129. For this purpose, the AMF may scrutinize the consistency and comprehensibility of the ESG information contained in the URD that would be material to investment decisions, notably the social and environmental risks presented in the DPEF section (AMF, Position-Recommendation - DOC-2021-02). As part of its a posteriori review of the URD, the AMF regularly submits questions and/or comments to issuers, including in relation to the DPEF section, requesting them to respond and to indicate how these comments will be taken into account in the preparation of the next URD.

Along with these legal and regulatory aspects, the supervision is also conducted through the regular issuance of reporting establishing best market practices. Thus, regularly (once every three years since 2010 and most recently in November 2019), the AMF publishes a report on the social, societal and environmental corporate responsibility of listed companies. To guide issuers in drafting their DPEF, the AMF reviews the DPEF published by a sample of listed companies and formulates guidelines. The MEDEF (main French employers' organization) which has published a guide for drafting the DPEF, also reviews each year the DPEF of a sample of French listed companies and publishes a report. The purpose of these annual reviews is to analyse the choices made in presenting the DPEF, to share best practices and to identify ways of improving non-financial information.

3. Does any existing national legislation require firms to disclose the environmental/ sustainability impact of their activities, or of companies in which they invest?

Some companies are obligated to disclose the environmental/ sustainability impact of their activities, or of companies in which they invest. These obligations may be described as follows: (i) a reporting obligation, which takes the form of a non-financial performance declaration; (ii) the obligation to implement a compliance plan (plan de vigilance); or else (iii) a recent obligation for financial market participants to include information on climate change and biodiversity risks in a sustainability risk policy.

(i) Reporting obligation

This obligation was first introduced by Article 116 of Law n° 2001-420 dated May 15, 2001, on New Economic Regulations (NRE Law), which required listed companies to indicate in their management report how they take into account the environmental and social consequences of their activity. It was then specified and extended by various subsequent laws, decrees and orders.

In particular, Article 225 of Law n° 2010-788 dated July 12, 2010, on the national commitment to the environment (said Law Grenelle 2) extended the reporting system by extending (i) the scope of the system to unlisted companies the total assets or sales and number of employees of which exceed certain thresholds set by decree, and (ii) information to be included in the management report. It also provided for the verification of the information by an independent third party.

Then, the Law n° 2015-992 dated August 17, 2015 related to the energy transition for green growth extended the scope of environmental reporting in order to guide investors and companies towards the energy transition.



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The French reporting system was then significantly modified by Ordinance n° 2017-1180 dated July 19, 2017, which implemented the EU Directive 2014/95/EU of October 22, 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (as mentioned in question 1 above). This Ordinance notably replaced the existing reporting system by a non-financial performance declaration.

As a reminder, the rules related to the non-financial performance declaration are currently mainly included in Article L. 225-102-1 of the French Commercial Code. This declaration must be included in the management report of listed and unlisted companies when the total balance sheet or turnover and the number of employees exceed thresholds set by decree in Conseil d'Etat (i.e. 100 million for total balance sheet, 100 million for turnover and 500 for the average number of permanent employees during the year). Companies with consolidated accounts are required to publish a consolidated declaration of non-financial performance as soon as all the companies included in the consolidation exceed the said thresholds.

The declaration must notably include information on the impact on climate change of the company's activity and the use of the goods and services it produces, its social commitments to sustainable development, the circular economy, the fight against food waste, the fight against food insecurity, respect for animal welfare and for responsible, fair and sustainable food, collective agreements concluded within the company and their impact on the company's economic performance as well as on employees' working conditions, actions aimed at combating discrimination and promoting diversity, and measures taken in favour of disabled persons. For companies subject to the duty of care, the declaration may refer, where appropriate, to the information mentioned in the compliance plan (plan de vigilance, see below).

The statutory auditors are responsible for certifying that the declaration is included, as the case may be, in the management report or in the group management report. The content of the report must be verified by an independent third party, which gives a reasoned opinion. The declaration must be made freely available to the public and easily accessible on the company's website within eight months of the end of the fiscal year and for a period of five years.

(ii) Duty of care and compliance plan (plan de vigilance)

The Law n° 2017-399 dated March 27, 2017 on the duty of care of parent companies and ordering companies created the obligation to draw up and effectively implement a compliance plan for any company that employs, at the close of two consecutive fiscal years, at least five thousand employees within its own company and in its direct or indirect subsidiaries the registered office of which is located on French territory, or at least ten thousand employees within its own company and in its direct or indirect subsidiaries the registered office of which is located on French territory or abroad.

The plan includes reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of individuals and the environment, resulting from the activities of the company and those of the companies it controls within the meaning of II of Article L. 233-16 of the French Commercial Code, directly or indirectly, as well as from the activities of subcontractors or suppliers with which it has an established business relationship, when these activities are linked to this relationship (Article L 225-102-4 of the French Commercial Code).

(iii) Recent obligation for financial market participants to include information on climate change and biodiversity risks in a sustainability risk policy

As of March 10, 2021, the law requires financial market participants to include information on climate change and biodiversity risks in a sustainability risk policy. This obligation results from Article 29 of the Law n° 2019-1147 dated November 8, 2019 on Energy and Climate, which amended Article L. 533-22-1 of the French Monetary and Financial Code by changing the non-financial reporting system for investors.

Portfolio management companies have now to make available to their subscribers and to the public a document outlining their policy on the inclusion in their investment strategy of environmental, social and governance quality criteria and the means implemented to contribute to the energy and ecological transition, as well as a strategy for implementing this policy. They must specify the criteria and methodologies used, as well as the manner in which they are applied. They must also indicate how the voting rights attached to the financial instruments resulting from these choices are exercised. If they choose not to publish certain information, they have to justify the reasons.

These provisions are also applicable to other actors (e.g. credit institutions).

4. Does any national legislation regulate whether an activity or investment can be classified as sustainable/ environmentally friendly?

Yes, one may notably mention the following labels:

- The "socially responsible investment" label, or "SRI" label (in French "ISR") created by a Decree n° 2016-10 dated January 8, 2016 which certifies that an investment product or service complies with a set of standards. The criteria aim to qualify an investment that reconciles economic performance with social and environmental impact by financing companies and public entities that contribute to sustainable development, regardless of their sector of activity. The label's specifications have been subject to several improvements, aimed at strengthening transparency and monitoring of ESG performance, broadening the scope of the label by making professional



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funds, mandates, as well as the real estate investment sector eligible. The new SRI label guidelines published on July 23, 2020 came into effect on October 23, 2020.

- The "France finance verte" label, or "Greenfin" label which may benefit investment funds which comply with criteria relating in particular to their direct or indirect contribution to financing the energy and ecological transition and to the quality and transparency of their environmental characteristics. These criteria, which may differ according to the category of investment fund and their possible thematic preponderance, are defined by a reference framework (Article D. 128-2 of the French Environmental Code).

5. Does any national law or regulatory guidance cover workplace diversity, for example, the representation of women on a firm's management or supervisory body?

The Labour code never refers to the word "diversity" but clearly prohibits an employer from implementing any discriminatory measure notably based on the employee's race, gender, sexual orientation, age or state of health and several provisions aim at ensuring workplace diversity.

Concerning diversity in general, a national multi-industry agreement provides that failing the conclusion of an industry-wide or company agreement organizing a dialogue between the employer and employee representatives on diversity, equal opportunities and treatment, once a year, the employer must update the works council (comité social et économique) regarding diversity in the workplace. This agreement is mandatory for all employers belonging to one of the branches of activity represented by the signatory employers' organizations.

Regarding professional equality between women and men, French law notably provides for:

- the organization of mandatory periodic negotiations at the industry-level: trade union organizations bound by an industry-wide collective bargaining agreement or by professional agreements must negotiate on salary, professional classifications, measures to ensure professional equality between men and women and measures to remedy the inequalities observed, in particular concerning access to employment, training, professional promotion and working and employment conditions.
- the conclusion of a company agreement or the implementation of an action plan at the company-level: in companies where one or more trade union sections of representative trade unions have been formed, the employer must initiate at least once every 4 years, negotiations of a company agreement on professional equality between women and men, including measures to eliminate pay gaps and life quality at work. In case of failure of these negotiations, the employer must implement an action plan on gender equality which sets objectives and measures to achieve them. Failing to comply with this requirement, the company may face a penalty equal to up to 1% of its total French payroll for the non-compliant period.
- the consultation of the works council on professional equality: professional equality is one of the mandatory subjects on which the works council must be consulted as part of its annual consultation on the company's social policy, working conditions and employment.
- the publication of an index relating to pay gaps: each year before March 1, in companies employing more than 50 employees, the employer must calculate and publish an index relating to gender equality on its website, if one exists, or bring it to the employees' attention by any means. If the company's overall result is less than 75/100, corrective measures must be adopted.
- balanced representation of women and men for corporate governance: medium and large companies must respect a minimum quota of 40% of members of each sex in boards of directors (conseils d'administration) and supervisory boards (conseils de surveillance). Moreover, a bill was introduced in March 2021 to implement legal quota in governing bodies which proposes that, in companies employing more than 1,000 employees, among the 10% of the positions with the highest responsibilities, 30% be occupied by women within 5 years and 40% within 8 years. This bill was adopted by the National Assembly but still needs to be reviewed and adopted by the Senate.

Regarding disability in the workplace, French labour law provides that measures implemented in favour of disabled employees and aimed at promoting equal treatment do not constitute discrimination. For example, companies of at least 20 employees are required to employ disabled persons in the proportion of 6% of their total workforce

6. Does any national legislation require firms to report on gender or other diversity pay gaps?

In France, the employer must comply with the principle of equal pay for equal work and therefore provide the same remuneration to employees performing the same work or work of equal value. This principle is a specific application of the broader principle of equal treatment and applies not only to women and men but generally to all employees in the same situation.

As mentioned above, companies employing more than 50 employees are required to annually calculate their gender pay equity score for their employees in France based on specific indicators and using a specified calculation methodology. The index is calculated based on a number of points out of 100, from four to five indicators depending on the company's workforce (less or more than 250 employees). These indicators are as follows: (i) gender pay gap based on the average remuneration of women and men by age group and equivalent job category, (ii) gender gap regarding individual pay increases not related to promotions, (iii) gender gap between the number of promotions between women and men, (iv) percentage of female employees who received a pay increase in the year following their return from maternity leave and (v) the disparity between women and men amongst the top 10 highest-paid employees.

The company's results must be published on an annual basis by March 1 on its website, if one exists, in a visible and legible way, or be brought to the employees' attention by any means. The results can be consulted on the company's website at least until the publication, the following year, of the results obtained for the current year. The obligation to publish only concerns the company's overall index



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score and not the indicators themselves. The information must also be submitted to the Minister of Labor and to the Economic and Social Database (BDES), where it is available to employee representatives and French labour authorities.

If companies fail to publish their score on their website – or if they do not have a company website, through another method their employees can access – they can be subject to a monetary penalty of up to 1% of their total French payroll for the non-compliant period. Importantly, the law is not a disclosure-only regulation. In some cases, companies will have to take corrective actions. To be in compliance with the law, companies must have a score of at least 75/100. If a company's score is below 75, it generally then has a three-year period to become compliant. If it fails to do so, it may face a penalty of up to 1% of its total French payroll for the non-compliant period.

7. Are firms under any national legal duty to identify/ prevent risks such as modern slavery or human rights abuses?

In France, several legal regulations aim to identify and prevent risks of human rights violations, notably (i) the French Corporate Duty of Vigilance Law, entered into force on March 27, 2017, as well as (ii) the EU Global Human Rights Sanctions Regime Regulation issued on December 7, 2020. Moreover, (iii) an EU-wide Mandatory Human Rights Due Diligence Legislation should be issued within the coming months.

(i) The French Human Rights Corporate Duty of Vigilance

The French Corporate Duty of Vigilance Law applies to large French-based companies having, for a period of two consecutive financial years, at least 5,000 employees directly or employed by their subsidiaries with registered offices located within French territory, or at least 10,000 employees directly or employed by their subsidiaries with registered offices located within French territory and abroad.

Up-the-chain affiliates and sister companies are not subject to the law unless they independently meet the law's requirements.

Companies that are subject to this specific law must establish a reasonable vigilance plan to allow for risk identification and the prevention of severe violations of human rights, health and safety or environmental damage resulting from the operations of the company, its subsidiaries, subcontractors and suppliers.

Specifically, the vigilance plan must include (i) a risk mapping to identify and analyse the risks of human rights violations or environmental harms in connection with the company's operations, (ii) procedures to regularly assess risks associated with subsidiaries, subcontractors and suppliers with which the company has an established commercial relationship, (iii) actions to mitigate and prevent identified risks and collect signals of potential or actual risk, (iv) an internal whistleblowing alert system designed to collect reports on these risks, and (v) mechanisms to assess measures that have been implemented as part of the company's plan and their effectiveness.

Companies must discuss their vigilance plan with their stakeholders and report on its implementation in their annual management report.

If a company fails to create, implement or publish a vigilance plan, the law provides for a two steps enforcement mechanism. An interested person may send a written notice of non-compliance to the company, after which the company has three months to take appropriate corrective action. If the company fails to do so, an interested person may request that a court take legal action. The court may issue an injunction requiring compliance.

Furthermore, any natural or legal person may seek damages for corporate negligence for any harm suffered that could have been avoided if the company had complied with the requirements of the Vigilance Law.

(ii) The EU Global Human Rights Sanctions Regime

The Council of the European Union issued a new Regulation n° 2020/1998 on December 7, 2020 that allows for restrictive measures against any legal or natural person responsible for, associated with or involved in serious human rights violations and abuses worldwide. Sanctioned persons can be both state and non-state actors.

The regulation introduces a framework for imposing on sanctioned individuals and entities a freeze on their EU assets and an EU travel ban. Under the regulation, EU funds and economic resources belonging to, held, owned or controlled by listed persons will be frozen. EU persons also would be prohibited from making funds and economic resources available to sanctioned persons.

The EU has not yet published an initial list of sanctioned persons.

(iii) Potential Impact of EU-wide Mandatory Human Rights Due Diligence Legislation

The European Commission has promised that it will adopt a regulation on mandatory human rights due diligence in 2021. This legislative proposal is expected to, among other things, require the subject companies to carry out due diligence to identify, prevent and mitigate actual or potential human rights and environmental impacts in their operations worldwide.

The legislative proposal is also expected to seek to establish a unique standard of care. The draft Directive published by the Committee on Legal Affairs of the European Parliament on September 11, 2020 would require EU Member States to establish civil penalties, and criminal penalties in severe cases or repeated infringement, for violations of the directive (as transposed into national law).



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A companion legislative proposal would amend an existing EU regulation to provide that EU undertakings could be held accountable for their role in human rights abuses in third countries. This proposal would extend the jurisdiction of Member State courts to civil cases against EU undertakings relating to violations of human rights caused by their subsidiaries or suppliers in third countries.

[Complaints Procedure](#)

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