EU LEGISLATION ON SUSTAINABILITY DISCLOSURES – FROM A VAGUE GENERAL DECLARATION TO A SECTORIAL DUTY

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Abstract

Pursuant to the EU law, sustainability and shared values are projected in the Corporate Social Responsibility ("CSR") of businesses. Directive 2013/34/EU on annual financial statements and Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR) should be the key EU legislation measures for CSR reporting supporting sustainability and competitiveness of EU businesses during current challenges, such as the COVID-19 pandemic and the war in the Ukraine. What kind of duties, and unto whom are they really set? A legislative and academic research will be performed and a battery of methodologic instruments shall be employed. These instruments include predominantly a quantitative and especially qualitative content analysis boosted by a law comparison and, complementarily, a literature review to set the theoretical and academic background. Upon such a foundation, a pioneering multi-disciplinary contextual and evolutionary interpretation, dominated by a teleological and purposive approach, brings rather surprising answers and sheds new light on the EU law perception of sustainability disclosure in the context of CSR and CSR reporting, perhaps even of the sustainability and shared values, in our challenging times.

Key words: Corporate Social Responsibility (CSR), Directive 2013/34, Regulation 2019/2088, reporting, sustainability

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Introduction

The growing importance of sustainability and shared values has been projected via the multi-stakeholder model into the Corporate Social Responsibility ("CSR") of businesses. For almost three decades, the EU law has engaged in the setting of a pro-sustainability framework. These endeavors resulted in the update of Directive 2013/34/EU on annual financial statements, including a non-financial, aka CSR, statement in the management report ("Directive 2013/34"),

and in the enactment of the Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector, aka the SFDR ("Regulation 2019/2088"). They are the key EU legislation measures for CSR reporting, but what kind of a duty and upon whom are they set?

To answer these two burning questions, a concise theoretical background with a literature review needs to be presented (1.) along with the indication of the employed data and methods (2.). Upon such a foundation, a pioneering multi-disciplinary contextual and evolutionary exploration and interpretation of Directive 2013/34 and Regulation 2019/2088 is done (3). This enables answering both critical questions – to identify (i) the key parameters of the duty and (ii) the subjects of such a duty. Further, it sheds new light on the EU law perception of the sustainability disclosure in the context of CSR and CSR reporting, perhaps even of the sustainability and shared values, in our challenging times. The conclusion section opens doors for further research towards a more effectively and efficiently sustainable EU and EU law.

1 Theoretical background and literature review

The concept of sustainability has Biblical roots and is related to Aristotle´s idea of the distribution of awards according to merits as embedded in a geometrical model of public law distributive justice and an arithmetical model of corrective, aka rectificatory, private justice (MacGregor Pelikánová et al., 2021). Its millennial evolution is marked by the Hanseatic League endeavors towards the *Nachhaltigkeit* which led to the publication of the influential books *Sylvicultura Oeconomica* by the German Colberist, Hans Carl von Carlowitz, in the 18th century and *Einfachste den höchsten Ertrag und die Nachhaltigkeit ganz sicher stellende Forstwirthschafts-Methode* by Emil André in the 19th century in Prague (MacGregor Pelikánová & Hála, 2021). Consequently, sustainability has moved from the local and temporal dimension to a global *universal perpetuitas* (MacGregor Pelikánová & Hála, 2021) and opens the doors for the modern era of sustainability which has been strongly marked by United Nations (UN) endeavors. The list of these endeavors includes e.g. the 1948 Declaration of Human Rights with its Art. 29 "Everyone has duties to the community" and a line of special fundamental semi-legislative documents, such as A/42/427 Brundtland Report 'Our Common Future—A global Agenda for Change' identifying three fundamental sustainability pillars (social, economic and environmental) in 1987 and the 2030 Agenda for Sustainable Development with its 17 Sustainable Development Goals ("SDGs") in 2015 and the impetus for the multi-stakeholder model and cross-sector partnership (Van Tulder, 2017). Conceptually, sustainability primarily targets states and their governments (Griffiths, 2018), and secondarily businesses induced by

the synergetic effect and/or legal framework to engage in the multi-stakeholder sustainability model (MacGregor Pelikánová et al. 2021). It reflects the well-recognized need of each and every society to establish a set of orders under the auspices of certain values (Washburn et al., 2018) and to maintain and protect them. Currently, these values are an integral part of the multi-stakeholder sustainability model, are labelled as shared values and visualized with the help of the, well-known, Carroll´s pyramid with the required economic and legal layers along with the expected ethical and desired philanthropic layer (Carroll, 2016). The establishment and recognition of shared value policies and principles linked to the eternal search for "good" and sustainability should benefit by a multi-spectral support across the society (MacGregor Pelikánová et al., 2021) while facilitating the move of the political and economic setting to "*a more sophisticated form of capitalism*" (Porter & Kramer, 2019, pp. 323–346).

The EU has followed this trend and the resulting law framework on sustainability and CSR entails both mandatory and facultative measures, policies and hard and soft law instruments (MacGregor Pelikánová & MacGregor, 2019). However, the path to achieve this was long. The first explicit positive law provision in this respect occurred three decade ago, in the 1997 Treaty of Amsterdam, which was prepared to facilitate the enlargement of the EU and to increase democratic aspects (Bär & Kraemer,1998). To put it differently, the first half of the modern European integration ignored sustainability. Namely, the foundation community treaties from the 1950's did not include any mention in this respect, instead they presented as their objective "*a harmonious development of economic activities, a continuous and balanced expansion*", see Art. 2 TEEC. This lack of a reference to the environment and/or sustainable development became an issue two decades later when various environmental groups began to voice their critical opinion in this context in the 1970's (Bär & Kraemer,1998). It took two more decades to incorporate sustainable development in the primary EU law via the 1997 Treaty of Amsterdam, which amended the 1992 Maastricht Treaty on EU by, among else, replacing the original Art. 2 with the following wording: "*Article 2. The Community shall have as its task, by establishing a common market and an economic and monetary union … to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment...*" In 2000, the Lisbon European Council set for the EU a new strategic goal for 2010 – "*to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion*." Even more importantly, as a part of the strategies to be mobilized to this effect, the European Council made "*a special appeal to companies' corporate sense of social responsibility regarding best practices on lifelong learning, work organisation, equal*

opportunities, social inclusion and sustainable development." In sum, sustainability and CSR made their entry into the positive EU law and policy framework in the context of the EU fears regarding global competition and the role played by others, such as the USA (De Schutter, 2008). Well, the EU did not become the world competition leader in 2010, nor yet even in 2020 as planned by the famous EU Strategy 2020 (MacGregor Pelikánová et al., 2021). Nevertheless, despite many failures and often unexpected obstacles and objections (De Schutter, 2008), the secondary EU law has been expanded to include a direct sustainability, even CSR, "legislation," motivated by the (probably) correct assumption that CSR *per se* should not be ordered from above, but its disclosure should be! This translates into two pivotal secondary EU law instruments – one is general and attracts attention from the academic press as well as the laic media (Directive 2013/34), another is specialized and gets basically no coverage at all (Regulation 2019/2088). These two are the true pillars of the EU legislation on sustainability disclosures and fundamental instruments to identify (i) the key parameters of this duty and (ii) the subjects of such a duty.

2 Data and methods

The explored data and employed methods are determined by the two key critical questions – what kind of a duty regarding the sustainability disclosure is set by the EU law vis-a-vis European businesses and exactly who are the addressees of this duty. To put it differently, (i) what are the key parameters of such a duty and (ii) who has such a duty?

To address these two questions, two sets of data are to be collected. First off, "conceptual background data", about underlying foundations and trends as presented by the academic literature about sustainability and CSR. Secondly, it is "legislative data", including bills, enactments and updates of EU law instruments about sustainability and its disclosure by businesses. The "conceptual background data" is available at reputable academic databases, such as WoS and Scopus. The legislative data is available on the prima EU law e-platform, eur-lex. For each set of data, proper methods for explorations and analyses, such as methods of legal modeling and methods of systemic interpretation, need to be employed, along with established interpretation instruments, such as the EU law vehicles to address the "spirit" as established by the powerful case law. The conceptual background data can be explored through a thematic analysis (involving both induction and deduction) pointing to categories and key words for the legislative data assessment. In contrast, the legislative data demands a content analysis (Kuckartz, 2014) which might entail both quantitative aspects presented by automatic

word counts (frequency and concentration of pre-set key words) and qualitative aspects presented by a *sui generis* analysis (the manual outcome of a simplified Delphi with Likert-style scoring, automatically verified via artificial intelligence instruments such as LIWC). This content analysis uses as informal constants categories and key words identified by the thematic analysis of the conceptual background data and emphasizes the law comparison mechanism. A multi-disciplinary contextual and evolutionary exploration and interpretation of Directive 2013/34 and Regulation 2019/2088 is done while focusing on a teleological and purposive interpretation approach and paying particular attention to the comparative juxtaposition of the evolving (pre)legislative wording. The formal dogmatic approach is to be applied. Regarding terminology, logic and used logic processes and procedures, such as analysis, synthesis, abstraction, generalization, comparison, separation and classification will be explored in an open-minded manner. The semi-proposition must be compared while maintaining standards and requirements of the methodology of comparative law (Eberle, 2011). This holistic, critical and comparative processing is trend indicative and allows for answering both questions.

3 Directive 2013/34 v. Regulation 2019/2088 – what by whom?

Do European businesses have to provide information about their CSR? Well, some of them have to inform about something similar and is this somehow legally binding, or not? Since such a tenor is neither academically robust not legally appropriate, an interpretation and analysis of both of these instruments is absolutely necessary.

3.1 Directive 2013/34 – Large public-interest entities with a minimal CSR disclosure

In 2014, the Directive 2013/34 was amended by Directive 2014/95/EU as regards the disclosure of non-financial and diversity information by certain large undertakings and groups. Pursuant to this amendment, i.e. the updated version of Directive 2013/34, public-interest entities with over 500 employees must disclose information about how they address five challenging categories: (i) environmental protection, (ii) social responsibility and treatment of employees, (iii) respect for human rights, (iv) anti-corruption and bribery and (v) diversity on company boards (age, sex, background) (MacGregor Pelikánová & MacGregor, 2019). This means a legal duty for large public-interest entities to include a non-financial statement linked to the CSR in their management report. The understanding and interpretation of such a duty is far from being a straight road, Table 1, below, demonstrates an inherent obscurity and ambiguity.

Tab. 1: Directive 2013/34

Directive 2013/34	Wording - literate interpretation

Art. 2 Definitions	(1) 'public-interest entities' means undertakings … which are: (a) governed by the law of a Member State and whose transferable securities are admitted to trading on a regulated market…; (b) credit institutions...; (c) insurance undertakings … or (d) designated by Member States as public-interest entities...
Art. 19a Non-financial statement	(1) Large undertakings which are public-interest entities exceeding on their balance sheet … 500 employees … shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, at the minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including … (e) non-financial key performance indicators relevant to the particular business …. (5) Member States shall ensure that the statutory auditor or audit firm checks whether the non-financial statement has been provided.

Source: Own processing by the Authors based on data from EurLex and Curia

The case law does not cover the definition of the duty and its addressees. National transpositions entail from one national legislative measure (Germany, Denmark, Ireland) to 71 national measures (Czech Republic). The foundation to answer both questions remains the wording of Directive 2013/34. Both the literate and teleological approaches identify the carrier of the duty – stock exchange, credit, and insurance companies plus public interest entities designed by EU member states with more than 500 employees. Similarly, they do not diverge regarding the interpretation of the enforcement provision, which clearly points to states and auditors, i.e. Directive 2013/34 is rather declaratory and delegating. The duty is positive (to do) and its content is rather general and abstract – (any) information about "environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters." It can be argued that, despite the attention given to Directive 2013/34, it remains a vague and declaratory instrument with a positive duty which does not have the ambition to join EU Directives attempting to cross the Rubicon and enter in the field of Regulations. What about Regulation 2019/2088?

3.2 Regulation 2019/2088 – Financial market participants and advisers not trading off environmental and social objectives

In 2019 came Regulation 2019/2088 and, despite some academic discourses about the potential vertical and even horizontal (in)direct applicability of Directives, one cannot over-emphasize the strength and arguably invading massive legislative effect of Regulations. Without the need of any transposition, Regulation 2019/2088 applies from 10th March 2021 (Art. 20) on the territory of the entire EU and financial market participants and advisers have to follow rules on transparency regarding the integration of sustainability risks, adverse sustainability impacts in their processes and sustainability-related information about their financial products (Art. 1). The addressees of this duty are defined in a detailed manner (Art. 2), while the pivotal principle of doing no significant harm (Art. 2a) lacks clarity, see Table 2.

Tab. 2: Regulation 2019/2088

Regulation	Wording
Art. 2 (1) financial market participant	'financial market participant' means: (a) an insurance undertaking which makes available an insurance based investment product (IBIP); (b) an investment firm which provides portfolio management; (c) an institution for occupational retirement provision (IORP); (d) a manufacturer of a pension product; (e) an alternative investment fund manager (AIFM); (f) a pan-European personal pension product (PEPP)…
Art. 2 (11) financial adviser	'financial adviser' means: (a) an insurance intermediary which provides insurance advice with regard to IBIPs; (b) an insurance undertaking which provides insurance advice with regard to IBIPs; (c) a credit institution which provides investment advice;
Art. 2 (17) sustainable investment	'sustainable investment' means an investment … investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, …
Art. 2a Principle of do no significant harm	The European Supervisory Authorities … develop … regulatory technical standards to specify the details of the content and presentation … the principle of 'do no significant harm' s ….

Source: Own processing by the Authors based on data from EurLex and Curia

Due to the time span of proceedings, the case law could not yet develop. National transpositions are irrelevant, because it is a Regulation and not a mere Directive. Both the

literate and teleological approaches identify clearly the carrier of the duty – financial market participants and financial advisers. Enforcement provisions are omitted and the only hints are the reference to the European Supervisory Authorities aka ESA (Art. 2a) and the evaluation of the entire Regulation 2019/2088 by the Commission by 30th December 2022 (Art. 19). At the very heart of the disclosure duty is the prohibition of tradeoffs by sustainable investment (Art. 2(17)) and the principle of doing no significant harm (Art. 2a). Regulation 2019/2088 is a sectorial instrument with a weak enforceability and with an ambiguous negative duty. The sectorial feature with a narrower circle of duty carriers and the non-aggressive enforcement could be explained in the context of the EU policies, but the choice of the negative duty is a surprise, calling for a study of the legislative evolution leading to such unambitious wording.

3.3 Sustainable disclosure – Trends in the EU legislation

Since the disclosure by national law subjects regarding sustainability has undergone an interesting legislative evolution, it is relevant to summarize its key milestones, see Table 3.

Tab. 3: Legislative evolution of the key aspect of the sustainable disclosure duty (Art. 2)

Time	Legislative Instrument	Sustainable investment
6-2014	Directive 2013/34 (original)	- (nothing)
11-2014	Directive 2013/34 (updated)	environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters,
5-2018	Proposal by Commission	Any of the following or a combination of the following
10-2018	Opinion of the Committe on Environment, ….	Products associated with strategies that aim at achieving environmental, social and governance-related impact, including any combination …. and do not significantly harm, any of the objectives of the other categories below
11-2018	Report of the Commmitte on Economic…	Products associated with strategies that aim at achieving environmental, social and governance-related performance,… These objectives must not significantly harm any of the objectives of investments…
11-2019	Regulation 2019/2088	an investment in an economic activity that contributes to an environmental objective, …, or an investment in an

		economic activity that contributes to a social objective, … or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives ….

Source: Own processing by the Authors based on data from EurLex and Curia

The legislative summary regarding the sustainable investment definition as a cornerstone for the sustainability disclosure shows the inherent ambiguity and hesitation of the EU institutions about the very content of the legal duty. Their motivation to move from a vague general duty to an unambiguous and enforceable sectorial duty is both obvious and premature.

Conclusion

For decades, the EU law has included explicit references to sustainability, and, for nearly one decade, attempts to impose a positive and enforceable legal duty regarding sustainability disclosures to national law subjects. The updated Directive 2013/34 with a semi-generally applicable duty without a true enforcement was supposed to be hardened via Regulation 2019/2088 with respect to financial sector players. The subjects of the newly defined sectorial duty are set clearly and the potential for enforcement is at hand, but not yet materialized. However, its key parameters bring more questions than answers and emphasize the chronic straggling of EU institutions – a defined content of the sustainability disclosure, free of greenwashing and sustainability parasitism, is so far a mere vision and mission of the EU law.

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