

Current developments in sustainability reporting

Sustainability and corresponding reporting – an omnipresent topic of interest to scientists and practitioners alike. Various stakeholders, including legislators, are voicing their interests. Boards of directors have a responsibility to monitor these developments as well and to examine in detail their relevance for the company. Doing so is an integral part of diligent corporate governance, which involves meticulous management of opportunities and risks and should include being prepared for regulatory requirements.

Developments in the EU

Sustainability reporting developments in Switzerland are strongly influenced by EU regulations, which we will therefore examine first.

From the NFRD to the CSRD – first reports in accordance with the ESRS from 2025

The European Union (EU) enacted the Non-Financial Reporting Directive (NFRD) in December 2014 with a view to increasing the relevance, consistency and comparability of information disclosed by companies.¹ As a result, certain large companies and groups were also required to disclose information on sustainability issues from the financial year 2017 onwards.² The NFRD is relevant for Switzerland insofar as the provisions on “transparency on non-financial matters” (Art. 964a et seq. of the Swiss Code of Obligations (CO); see below) are aligned with it.³

¹ Recital 21 / Art. 5 Directive 2014/95/EU.

² Art. 1 para. 1 / Art. 1 para. 3 / Art. 4 para. 1 Directive 2014/95/EU.

³ Federal Office of Justice (2022). Bericht Entwürfe Nachhaltigkeitspflichten EU und geltendes Recht Schweiz. [Report on draft EU sustainability requirements and applicable Swiss law]. <https://www.news.admin.ch/news/message/attachments/81650.pdf> (retrieved on 18.5.2024). p. 6.





However, it quickly became apparent that the NFRD was not sufficient to meet the information requirements of users of sustainability information.⁴ As a result, the reporting obligations were revised and a new directive on sustainability reporting came into force on 5 January 2023: the Corporate Sustainability Reporting Directive (CSRD).⁵ The CSRD significantly expands the scope of application for companies (to include certain third-country companies) and requires assurance on the published information, which has to be prepared in accordance with specially developed “European Sustainability Reporting Standards” (ESRS).⁶ A first set of ESRS standards was published as a delegated regulation in the Official Journal of the EU on 22 December 2023.⁷ Reporting obligations under the CSRD will be introduced in phases, with the first companies having to publish reports for the 2024 financial year (i.e. in the 2025 reporting year).⁸

Corporate Sustainability Due Diligence Directive – an EU supply chain directive is on the horizon

Besides the reporting obligations outlined above, companies are also subject to the due diligence obligations adopted by the European Parliament on 24 April 2024, i.e. the Corporate Sustainability Due Diligence Directive (CSDDD or CS3D). The scope of the directive includes EU companies and parent companies with more than 1,000 employees that generate global revenue of more than EUR 450 million, as well as franchise companies with global turnover of more than EUR 80 million that generate royalties of more than EUR 22.5 million. The regulations also apply to companies, parent companies and franchise companies from third countries (such as Switzerland) that exceed the same turnover thresholds in the EU. The proposed regulations will oblige companies and their upstream and downstream partners to prevent, mitigate or remedy the negative impact of their activities on human rights and the environment.⁹ Having been approved by the Council of the EU on 24 May 2024, the directive will be published in the Official Journal of the EU once it has been signed and will enter into force 20 days later. The regulations will be introduced in phases, with the first companies having to comply with the provisions three years after the directive comes into force.¹⁰

⁴ European Commission (2021). Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0189&from=EN> (retrieved on 18.5.2024). p. 2–3

⁵ Art. 7 Directive (EU) 2022/2464.

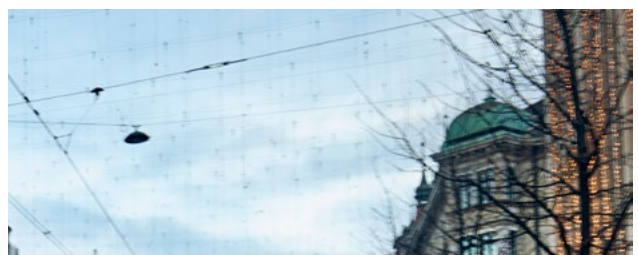
⁶ European Commission (no date). Corporate sustainability reporting. https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (retrieved on 18.5.2024).

⁷ Delegated regulation (EU) 2023/2772.

⁸ Art. 5 Directive (EU) 2022/2464.

⁹ European Parliament (2024). Due diligence: MEPs adopt rules for firms on human rights and environment. https://www.europarl.europa.eu/pdfs/news/expert/2024/4/press_release/20240419IPR20585/20240419IPR20585_en.pdf (retrieved on 18.5.2024). in conjunction with European Parliament (2024). Corporate Sustainability Due Diligence (texts adopted). https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.pdf (retrieved on 18.5.2024). p. 114 et seq.

¹⁰ Council of the European Union (2024). Corporate sustainability due diligence: Council gives its final approval. <https://www.consilium.europa.eu/de/press/press-releases/2024/05/24/corporate-sustainability-due-diligence-council-gives-its-final-approval/> (retrieved on 27.5.2024).





Developments in Switzerland

While sustainability reporting has been widespread among the largest Swiss companies for a number of years, the majority of companies across sectors currently refrain from publishing such information.¹¹ What are the most important developments in Switzerland in this context?

Transparency on non-financial matters – first reports in 2024

In the past, reporting was voluntary. Recently, however, certain large Swiss companies have been required by law to report publicly on sustainability issues (see Art. 964a et seq. CO). Public interest entities (publicly traded companies and certain institutions supervised by FINMA) with at least 500 full-time equivalent positions and a balance sheet total of at least CHF 20 million or sales revenue of at least CHF 40 million fall within the scope of the law (Art. 964a CO in conjunction with Art. 2 lit. c AOA). Reporting must be carried out for the first time in 2024 for the 2023 financial year (see transitional provision to the amendment of 19 June 2020, CO).

The introduction of the law also placed new duties on the board of directors (BoD). For example, the report on non-financial matters must now also be approved and signed by the company's supreme management or governing body, which in the case of a company limited by shares is the BoD. The BoD is therefore responsible for reviewing the content of the report and guarantees its accuracy to the general meeting, which must also approve the report (Art. 964c para. 1 CO).¹² The BoD is also responsible for ensuring that the report is published electronically

immediately after its approval by the BoD and the general meeting and remains publicly accessible for at least ten years (Art. 964c para. 2 CO).¹³

No sooner have the provisions regarding "transparency on non-financial matters" come into force than the question arises again for Switzerland: quo vadis? As explained at the beginning, the provisions in Switzerland essentially correspond to the EU's NFRD.¹⁴ However, EU law has evolved in the meantime, with the CSRD coming into force at the beginning of 2023 and currently being implemented in the member states. Due to the close economic ties, both large and small Swiss companies are directly or indirectly affected by the CSRD. The Federal Council is therefore of the opinion that Swiss law should be adapted to international developments. For this reason, the Federal Council is currently having a consultation draft prepared. It will be completed by July 2024 at the latest and covers the following key points: Lowering the threshold for the reporting obligation to 250 employees and introducing an audit requirement.¹⁵ The detailed proposal is eagerly awaited.

¹¹ KPMG (2022). Big shifts, small steps. <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2023/04/big-shifts-small-steps.pdf> (retrieved on 18.5.2024). p. 78. / Nagel-Jungo, G., Huber, J.M., Buchs, A., Camenisch, J., Bumann, C. & Leu, R. (2023). Nachhaltigkeit: Wo steht der Schweizer Mittelstand? [Sustainability: Where do Swiss SMEs stand?]. https://www.zhaw.ch/storage/sml/institute-zentren/ifi/Unterlagen/mazars_studie_csr_reporting_ger.pdf (retrieved on 18.5.2024). p. 19.

¹² Oser, D. & Mattle, K. (2024). Art. 964c. In: Watter, R. & Vogt, H. U. (Hrsg.), Basler Kommentar Obligationenrecht II (6. Auflage). Helbing Lichtenhahn. N 1/3.

¹³ Oser, D. & Mattle, K. (2024). Art. 964c. In: Watter, R. & Vogt, H. U. (Hrsg.), Basler Kommentar Obligationenrecht II (6. Auflage). Helbing Lichtenhahn. N 10.

¹⁴ Federal Office of Justice (2019). Transparenz bezüglich nichtfinanzieller Belange und Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit. <https://www.parlament.ch/centers/documents/de/bericht-kinderarbeit-bj-2019-11-19-d.pdf> (retrieved on 18.5.2024). p. 7.

¹⁵ Federal Council (2023). Berichterstattung zur nachhaltigen Unternehmensführung: Bundesrat beschliesst Eckwerte. <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-97782.html> (retrieved on 18.5.2024).

Ordinance on Climate Disclosures – entry into force as of 1 January 2024

In addition to the above-mentioned legal obligations in Switzerland, the “Ordinance on Climate Disclosures” came into force at the beginning of this year (Art. 6 Ordinance on Climate Disclosures). The provisions, in the form of an implementing ordinance, are intended to take account of the high priority given to climate change mitigation and, in this sense, to set out in more detail the reporting obligations under the Swiss Code of Obligations with regard to climate issues.¹⁶ Essentially, the ordinance provides for the implementation of the “Recommendations of the Task Force on Climate-related Financial Disclosures” (TCFD).¹⁷

Swiss GAAP FER – the Swiss standard setter takes on sustainability

Interest in transparent communication on sustainability issues has generally increased. At the same time, however, SMEs are confronted with various challenges if they wish to embed the topic of sustainability in their culture and business models. For this reason, the Swiss standard setter Swiss GAAP FER has decided to develop a practice-oriented guide.¹⁸ The guidelines should enable SMEs to implement a holistic sustainability management – including sustainability reporting – in seven steps. The guidelines are currently being developed and a first draft is available.¹⁹ The fact that the Swiss GAAP FER organization, which was founded for the development of accounting standards, is focusing on guidelines for sustainability management and will only address actual reporting in a second step clearly shows that the endeavor is not about creating a glossy brochure on sustainability issues, but about sustainable business per se. Reporting on this is simply the logical next step.

Swiss Stock Exchange SIX Swiss Exchange – changes to the recognized standards for sustainability reporting

Issuers listed on the SIX Swiss Exchange can notify SIX Exchange Regulation that they prepare a sustainability report by opting in. However, opting in requires the sustainability report to be published on the company’s website within eight months of the closing date of the financial statements and to remain accessible for five years. The report must also be prepared in accordance with a standard approved by SIX Exchange Regulation, which updated its list of recognized standards in December 2023.²⁰

What does this mean for members of the board of directors?

According to Art. 716a CO, the BoD is explicitly responsible for the overall management of the company (which includes the definition and implementation of the strategy). It can be inferred from the duty of loyalty and due diligence pursuant to Art. 717 CO that the BoD has a duty to protect the company, its creditors and shareholders from financial losses arising from strategic, operational and compliance risks. Section 9 of the Swiss Code of Best Practice for Corporate Governance published by *economiesuisse* emphasizes that the BoD must determine the “sustainable interests of the company” as part of its duties. In its decisions, in addition to the interests of shareholders, it should also take account of the interests of employees, business partners, customers, society and the environment. If the expectation of the majority of stakeholders (including the legislator) is that responsible, sustainable business should be practiced, no Swiss company limited by shares can escape this, not even as an SME. This means that boards of directors must deal with sustainable business models in general. The second step is to document sustainability efforts, which can be achieved through a sustainability report.

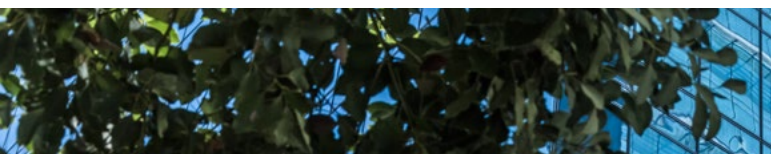
¹⁶ Federal Department of Finance (2022). Verordnung über die Berichterstattung über Klimabelange – Erläuterungen. [Ordinance on Climate Disclosures – explanations]. <https://www.news.admin.ch/news/message/attachments/73998.pdf> (retrieved on 18.5.2024). p. 2.

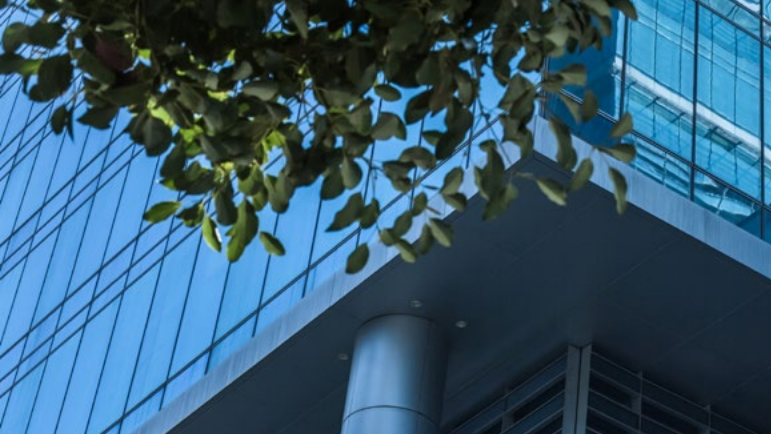
¹⁷ Federal Council (2022). Federal Council brings ordinance on mandatory climate disclosures for large companies into force as of 1 January 2024. <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-91859.html> (retrieved on 18.5.2024).

¹⁸ Swiss GAAP FER (no date). Leitfaden zur Nachhaltigkeit. [Sustainability Guide]. <https://www.fer.ch/projekte/leitfaden-zur-nachhaltigkeit/> (retrieved on 18.5.2024).

¹⁹ Swiss GAAP FER (2023). Diskussionspapier – Nachhaltigkeit in der FER (inkl. Entwurf FER-Leitfaden zur Umsetzung). [Discussion paper – Sustainability in Swiss GAAP FER (incl. draft FER guidelines for implementation)]. <https://www.fer.ch/content/uploads/2023/12/FER-Nachhaltigkeit-Diskussionspapier-de.pdf> (retrieved on 18.5.2024). p. 1 et seq.

²⁰ SIX Group AG (no date). Sustainability Reporting. <https://www.six-group.com/en/products-services/the-swiss-stock-exchange/market-data/shares/sustainability-reporting.html> (retrieved on 18.5.2024). in conjunction with SIX Exchange Regulation AG (2023). International standards / guidelines on sustainability reporting recognized by SIX Exchange Regulation AG. <https://www.ser-ag.com/dam/downloads/publication/obligations/guidelines/standards-sustainability-en.pdf> (retrieved on 18.5.2024).





According to Art. 716a CO, the BoD is responsible for organizing the accounting and preparing the annual report. Due to the supplementary provisions in the CO, corporate reporting for public interest entities also includes non-financial reporting as described above. There is no question that the BoD of such companies must therefore be aware of the latest regulatory provisions and their dynamic development, as this is also an “inalienable duty” of the BoD for which it can be held accountable.

Currently, the legal requirements for sustainability reporting apply to public interest entities, respectively large companies. However, there are at least two compelling reasons why companies that do not fall under these regulations should not simply ignore the issue of sustainability and reporting:

- Managers have the task of securing a company’s long-term existence and creating value. At a time when stakeholders are demanding responsible action, both are only possible by incorporating the issue of sustainability.
- Large companies that are affected by regulatory requirements and government institutions are beginning to demand sustainability reporting from their suppliers. This reporting should confirm that the company also measures sustainability parameters and thus integrates them into corporate management. If companies do not comply, sooner or later they will find their sales channel disappearing.

It should also be mentioned that the dynamic nature of sustainability reporting means that even smaller companies can suddenly be directly affected by the regulations. In this respect, it is advisable to address the topic in order to be prepared for this eventuality in good time.

Running a company successfully means managing risks but also recognizing opportunities. Various companies have already clearly positioned themselves on the topic of sustainability and gained a competitive advantage as a result. Boards should therefore also be guided by these opportunities in order to secure added value for their company in the long term.

Authors:

Prof. Dr. Gabriela Nagel-Jungo
Director of Institute & Board Member
ZHAW School of Management and Law
Institute for Financial Management

Andreas Buchs
Senior Lecturer and Project Manager
ZHAW School of Management and Law
Institute for Financial Management

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