

FEDIL Position paper Transposition of the Corporate Sustainability Reporting Directive into Luxembourg Law



FEDIL – The Voice of Luxembourg’s Industry

Luxembourg, 15 September 2023

FEDIL POSITION PAPER

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I. Introduction

Founded in 1918, FEDIL – The Voice of Luxembourg’s Industry (hereinafter “FEDIL”), is a multi-sector business federation, giving a voice to nearly 700 industrial members, service providers and construction companies and fostering economic activity in Luxembourg. Today, FEDIL represents 95% of Luxembourg’s industrial production, 75% of Luxembourg’s private research activity, 25% of national employment and 35% of national GDP. To perform its duties, FEDIL is registered in the Chamber of Deputies’ transparency register.

Furthermore, FEDIL is a founding member of the European employers' association BusinessEurope and has a representative office in Brussels to ensure that its member companies’ voice is heard in European policymaking. To this end, FEDIL is registered in the EU Transparency Register (number 286194516022-33).

The Corporate Sustainability Reporting Directive (CSRD), published in the Official Journal of the European Union on 16 December 2022, amends several existing directives and regulations, including the Accounting Directive, Transparency Directive, Audit Directive, and Audit Regulation. It enhances and strengthens sustainability reporting requirements for companies previously addressed in the Non-Financial Reporting Directive (NFRD), encompassing the range of companies involved, the information to be disclosed, and its verification. The CSRD’s aim is to empower investors to direct their funds towards sustainable investments, integrate sustainability into risk management, and foster long-term transparency.

The CSRD came into effect on 5 January 2023. FEDIL closely monitors its implementation and transposition into Luxembourg law on behalf of its members. This position paper highlights the key elements regarding the CSRD implementation. Additionally, it outlines FEDIL’s considerations on the options that the Luxembourg legislator should consider when transposing this directive.

II. Key elements on CSRD implementation

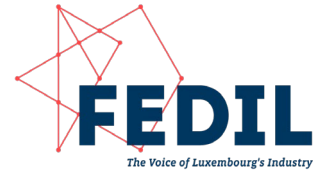
FEDIL members are committed to integrating sustainability into their business strategies and operations. However, achieving this requires an appropriate, proportionate, and workable reporting framework that balances administrative burdens and requirements with the benefits of sustainability. Flexibility is crucial to enable companies to tailor their reporting to their unique circumstances and stakeholders while ensuring sustainability and preserving their global competitiveness and economic contributions.

Implementing the new sustainability reporting framework presents significant challenges for companies. Non-listed companies will encounter non-financial reporting for the first time. For those already complying with the previous NFRD, CSRD represents a new departure due to the increased level of detailed information required and the corresponding resource allocation. Companies must prepare by identifying their obligations, considering concurrent regulations like the Taxonomy regulation, financial reporting, the upcoming Corporate Sustainability Due Diligence Directive, and others, and budgeting for associated costs.

It's worth noting that many companies might still lack the auditing expertise necessary for CSRD implementation, which might be especially true for SMEs and startups. While CSRD positively offers

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a three-year transitional period for SMEs and startups, meeting CSRD's information demands within this timeframe may still be highly challenging, risking discontinued partnerships. To address this, public authorities should provide ongoing support and guidance beyond CSRD's scope, ensuring smaller enterprises are not left behind in the journey towards corporate sustainability.

Companies must also remain vigilant and informed about evolving reporting standards and ongoing standardization efforts at the international level, particularly by the International Sustainability Standardization Board and the IFRS Foundation. Alignment with these standards is essential to avoid dual reporting for companies.

Additionally, given Luxembourg's small size and limited number of businesses, companies in the country may face higher scrutiny from enforcement authorities compared to larger countries, creating an uneven playing field and negatively impacting their competitiveness at the EU level.

Considering these challenges and the absence of finalized standards and national legislation at the time of writing, FEDIL believes that the following elements are essential for an efficient compliance exercise for its member companies:

1. Continuous support and guidance from public authorities are crucial for all companies, with special consideration for the challenging position of SMEs and startups. This support should encompass various aspects, including reporting requirements, consolidation criteria, subsidiary inclusion, and regulations for non-EU headquartered companies.
2. Given the international nature of many companies, harmonising rules within the EU internal market as well as aligning European Sustainability Reporting Standards (ESRS) with those of the International Sustainability Standards Board (ISSB) and other international standards is essential. This alignment will assist companies in meeting their reporting obligations while ensuring a level playing field for EU companies within the internal market and between EU and non-EU companies.
3. Proportionality is key to the success of sustainability reporting standards. Therefore, limiting “always mandatory” disclosures to what the CSRD strictly mandates is crucial. Materiality assessments should be at the core of sustainability reporting, with companies aligning their disclosures accordingly.
4. Lastly, in a broader sense, maintaining the competitiveness of Luxembourg companies requires a balanced approach that considers both administrative burdens and benefits. It is essential that the Luxembourg legislator provides and ensures a certain level of flexibility in its CSRD reporting rules. Additionally, the control, enforcement, and sanctioning regime should be applied with proportionality. This approach will enable companies to comply with the rules while accommodating their diverse characteristics and safeguarding their competitiveness. This is particularly important in comparison to larger Member States where scrutiny of companies is likely to be less frequent and less severe.

These measures can collectively contribute to the successful implementation of sustainability reporting standards while supporting the competitiveness of Luxembourg companies in the broader European and global context.

III. Options exercise for Luxembourg

a) Exclusion of commercially sensitive information

Provision(s) referred in the text:

Article 1 – Amendments to Directive 2013/34/EU (Accounting Directive)

Article 19a Sustainability Reporting, point 3 last subparagraph (new)

Article 29a Consolidated Sustainability Reporting, point 3 last subparagraph (new).

The new Article 19a on Sustainability Reporting sets out strengthened requirements for sustainability reporting by undertakings in scope of the CSRD. The new Article 29a introduces significantly enhanced requirements for consolidated sustainability reporting by undertakings falling within the scope of the Directive. According to both articles, the information to be reported should be clearly identifiable within the undertaking's management report (i.e., the directors' report).

Article 19a and 29a lay down an option for Member States to permit undertakings to exclude commercially sensitive information from the sustainability reporting under certain circumstances.

FEDIL considers that the exercise of this option is particularly important for them and invite the legislator to make use of it.

Excluding commercially sensitive information from sustainability reporting provides a safeguard for businesses against potential competitive disadvantages. By keeping proprietary data and trade secrets confidential, companies can maintain their unique selling points and market advantages. This encourages more businesses to participate in sustainability reporting initiatives without fear of jeopardizing their competitiveness, ultimately leading to a broader and more comprehensive representation of sustainability practices across various industries.

b) Accepted language

Provision(s) referred in the text:

Article 1 – Amendments to Directive 2013/34/EU (Accounting Directive).

Article 19a Sustainability Reporting, point 9 subparagraph three (new)

Article 29a Consolidated Sustainability Reporting, point 8 subparagraph (new).

Point 9 of Article 19a and point 8 of Article 29a outline exceptions to sustainability reporting for subsidiary undertakings if the parent company in the EU includes information about the subsidiary in the consolidated management report prepared under Article 29 and 29a, or if the parent company is in a third country equivalent consolidated sustainability report.

Member States have the flexibility to require that the parent undertaking's consolidated management report or, where applicable, the consolidated sustainability report is published in a language that that Member State accepts, and that any necessary translation into such language is provided.

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Considering that many companies based in Luxembourg commonly operate in English, it would be advantageous for Luxembourg companies to have flexibility to publish their reports in English too.

FEDIL therefore considers that Luxembourg should approve English as a language for these reports.

By doing so, Luxembourg would signal its openness to language preferences of its business community, reducing administrative burdens and translation costs for companies and reducing divergences with other countries that allow this.

c) Statutory auditors checks

Article 1 – Amendments to Directive 2013/34/EU (Accounting Directive)

Article 34(3) General Requirement Auditing (amended), point 3 (new)

CSRD require sustainability reporting to be checked by statutory auditors. Companies will need to seek “limited” assurance of the sustainability information. The Commission will adopt limited assurance standards by October 2026 and reasonable assurance (a more demanding assurance process) standards by October 2028.

Article 34 of the Accounting Directive sets out the general requirement for the statutory audit of financial statements of undertakings. It is amended to provide for the assurance (audit) of sustainability reporting by undertakings.

This option allows Member States to permit undertakings to engage separate statutory auditors/audit firms to carry out the statutory audit of financial statements and the assurance of the sustainability reporting.

FEDIL considers that Luxembourg should exercise this option as it would give more flexibility to companies and help them be more efficient and reduce compliance costs. By engaging separate auditors for each type of audit, companies can ensure that they receive the most relevant and accurate assessments in both areas, given that sustainability reporting involves assessing a broad range of non-financial factors, such as environmental, social, and governance (ESG) performance.

d) Statutory auditors checks

Provision(s) referred in the text:

Article 1 – Amendments to Directive 2013/34/EU (Accounting Directive)

Article 34(3) General Requirement Auditing (amended),

points 4 and 5 Independent Assurance Services Provider (new)

This option allows Member States to introduce a new category of Independent Assurance Services Provider (IASP) to provide for the assurance of sustainability reporting by undertakings.

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IASPs must be subject to equivalent requirements to statutory auditors in respect of this assurance work including in respect of training, education, quality assurance and investigations and sanctions. In due course Member States that exercise the option to introduce IASPs must also exercise the option to permit separate statutory auditors/audit firms to carry out the audit of financial statements and assurance of sustainability reporting.

Member states that exercise the option to introduce IASPs must also in due course provide for home/host model of oversight of IASPs with other Member States.

For similar reasons expressed in subparagraph c) above, **FEDIL considers that Luxembourg should exercise this option.**

e) Information from subsidiaries and branches on net turnover in the EU

Article 1 – Amendments to Directive 2013/34/EU (Accounting Directive)

Article 40a Sustainability Reports concerning third-country undertakings (New),

Point 1 last subparagraph (new)

New Article 40a concerns sustainability reports for third-country undertakings. The option therein established underpins the requirement for sustainability reports by large subsidiaries and branches operating in the EU (turnover > €40 million) of non-EU companies (turnover in the EU > €150 million). It permits Member States to require subsidiary undertakings and branches to send information about net turnover generated in the Member State and in the EU.

The first and third subparagraphs refer to specific conditions and criteria that trigger the requirement for these subsidiaries and branches to prepare sustainability reports.

FEDIL considers that Luxembourg should not exercise this option, as this would create additional burdens on companies, requiring them to collect and report specific financial data on their net turnover. This could result in unnecessary administrative charges and compliance costs, particularly for subsidiaries and branches of non-EU companies that may already have reporting obligations in their home countries.

f) Application of national standards

Provisions(s) referred in the text:

Article 3 Amendments to Directive 2006/43/EC the Audit Directive

Article 26a Assurance Standards for sustainability reporting, point 2 (new).

New Article 26a sets out the requirement for the audit of sustainability reporting to be done in accordance with assurance standards which will be developed by the EU Commission.

This option permits Member States to apply national standards in the event that the Commission has not adopted a standard on the same subject matter.

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FEDIL considers that Luxembourg should not exercise this option and wait for the EU-level standards to prevent fragmentation and promote a coherent internal market within the EU. Waiting for the EU Commission to establish uniform assurance standards will contribute to a consistent and cohesive approach to sustainability reporting and auditing, benefitting companies and investors operating across the EU.

On the contrary, if Luxembourg decides to apply national standards there is a risk of fragmentation of the internal market due to the lack of harmonization or uniformity in these standards. Developing and implementing own rules and standards will create inconsistencies and discrepancies in the compliance and auditing process, leading to great difficulties for Luxembourg companies operating across different EU countries. Companies facing varying compliance requirements, will incur additional costs and complexities in conducting sustainability reporting and audits, hindering cross-border trade and investment and the whole functioning of the EU internal market, with a negative impact in the objectives of the sustainability requirements.

g) Investigations and Sanctions

Provision(s) referred in the text:

Article 3 Amendments to Directive 2006/43/EC the Audit Directive

Article 30 Systems of Investigations and Sanctions (amended), point 2 second subparagraph (existing).

The amendments to Article 30, which governs systems of investigations and sanctions for breaches of statutory audit rules, allow for the extension of investigation and sanctions systems to assurance of sustainability reporting.

This option allows Member States not to provide for an administrative sanction regime where criminal law already applies.

FEDIL considers that Luxembourg should also lay down rules for administrative sanctions for infringements which are already subject to national criminal law, as provided by the transposition of Directive 2014/56/UE.¹

Therefore, **Luxembourg should not exercise this option.**

A double sanctioning system, namely where auditors could be subject to either administrative sanctions or criminal penalties for the same infringement, would allow for more flexibility to adapt the sanction to the factual situation and, consequently, allowing that less serious infringements are more proportionally sanctioned under the administrative regime.

¹ Loi du 23 juillet 2016 relative à la profession de l'audit portant transposition de la directive 2014/56/UE du Parlement européen et du Conseil du 16 avril 2014 modifiant la directive 2006/43/CE concernant les contrôles légaux des comptes annuels et des comptes consolidés; mise en œuvre du règlement (UE) n° 537/2014 du Parlement européen et du Conseil du 16 avril 2014 relatif aux exigences spécifiques applicables au contrôle légal des comptes des entités d'intérêt public et abrogeant la décision 2005/909/CE de la Commission; modification de la loi modifiée du 13 juillet 2005 relative aux institutions de retraite professionnelle sous forme de sepcav et assep; modification de la loi modifiée du 10 août 1915 concernant les sociétés commerciales; abrogation de la loi modifiée du 18 décembre 2009 relative à la profession de l'audit.