



# Corporate Sustainability Reporting: Are Companies Required to Disclose Confidential Information?

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28 November 2024

## Introduction

EU Directive 2022/2464/EU on Corporate Sustainability Reporting (the **CSRD**) requires that all large companies and all listed companies (except listed micro-enterprises) report on what they see as the risks and opportunities arising from social and environmental issues, as well on the impact of their activities on people and the environment.

## Reporting requirements under the CSRD

Companies within the scope of the CSRD will be required to report annually in their management or directors' report "*information necessary to understand the company's impacts on sustainability matters, and information necessary to understand how sustainability matters affect the company's development, performance and position.*" This information must be clearly identifiable within the directors' report, through a dedicated section of the report.

The disclosed information must include, among other things, a brief description of the company's business model and strategy, including: (a) the resilience of the company's business model and strategy in relation to risks related to sustainability matters; (b) the opportunities for the company related to sustainability matters; (c) the plans of the company, including implementing actions and related financial and investment plans, to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement; (d) how the company's business model and strategy take account of the interests of the company's stakeholders and of the impacts of the company on sustainability matters; and (e) how the company's strategy has been implemented with regard to sustainability matters.

In addition, the company must provide (1) information about the existence of incentive schemes linked to sustainability matters which are offered to members of the administrative, management and supervisory bodies; (2) a description of (i) the principal actual or potential adverse impacts connected with the company's own operations and with its value chain, including its products and services, its business relationships and its supply chain and (ii) any actions taken by the company to identify and monitor those impacts and to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts, and the result of such actions; and (iii) the principal risks to the company related to sustainability matters,

including a description of the company's principal dependencies on those matters, and how the company manages those risks.

As may be seen, the foregoing information includes potentially commercially confidential or sensitive information.

## **Is there a carve out for commercially confidential or sensitive information?**

This raises the question of whether in scope companies are permitted to omit commercially confidential or sensitive information from the information they must provide in their management report under the CSRD. In this regard, Article 19a of EU Directive 2013/34, as substituted by the CSRD, provides:

*"Member States may allow information relating to impending developments or matters in the course of negotiation to be omitted in exceptional cases where, in the duly justified opinion of the members of the administrative, management and supervisory bodies, acting within the competences assigned to them by national law and having collective responsibility for that opinion, the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking, provided that such omission does not prevent a fair and balanced understanding of the undertaking's development, performance and position, and the impact of its activity."*

The Regulations that implement the CSRD in Ireland (the **CSRD Regulations**) provide in similar terms:

*"Information relating to impending developments or matters in the course of negotiation may be omitted from the sustainability reporting of an applicable company in exceptional cases where, in the duly justified opinion of the directors of the applicable company, the disclosure of such information would be seriously prejudicial to the commercial position of the applicable company, provided that such omission does not prevent a fair and balanced understanding of the applicable company's development, performance and position, and the impact of its activity."*

This is the only express carve-out for commercially confidential information to be found in the CSRD and the CSRD Regulations. As may be seen, it permits the omission of information relating to:

- Impending developments; or
- Matters in the course of negotiation

However, the omission of such information from the sustainability report:

- May only apply in "exceptional cases" where, in the duly justified opinion of the directors of the company, the disclosure of such information would be seriously prejudicial to the commercial position of the company; and
- Must not prevent a fair and balanced understanding of the company's development, performance and position, and the impact of its activity.

## **Conclusion**

The general answer to the question posed in the title to this brief article is a qualified "yes". However, the specific answer in any given case will depend on both a careful analysis of the information that a

company proposes to omit from its sustainability statement and a detailed consideration of whether the requirements for non-disclosure are satisfied in that case.

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