

Mainstreaming of Climate Risks and Opportunities in the Financial Sector

# A Brief Legal Opinion: Minimum Benchmarks for Reporting of Companies on (Climate) Risks under European Law

## An Analysis Of Italian, French And German Law

Roda Verheyen, Joseph Breham, Clémentine Bacri, Yann Queinnec,  
Emiliano Pellegrino

on behalf of Germanwatch



Mainstreaming of Climate Risks and Opportunities in the Financial Sector

# A Brief Legal Opinion: Minimum Benchmarks for Reporting of Companies on (Climate) Risks under European Law

## An Analysis Of Italian, French And German Law

Roda Verheyen, Joseph Breham, Clémentine Bacri, Yann Queinnec,  
Emiliano Pellegrino

on behalf of Germanwatch

## Imprint

### Lead Author / Analysis and German Law:

Dr. Roda Verheyen  
Attorney at Günther ~ Heidel ~ Wollenteit ~ Hack ~ Goldmann,  
www.rae-guenther.de

### Co-Authors:

French Law:  
Joseph Braham, Clémentine Bacri, Yann Queinnec  
Attorneys at Association Sherpa  
contact@asso-sherpa.org

Italian Law:  
Emiliano Pellegrino  
Attorney at law  
emiliano.pellegrino@portule.com

### Editors:

Kristin Gerber, Christoph Bals, Miriam Brenck

### Publisher:

Germanwatch e.V.

Office Bonn

Dr. Werner-Schuster-Haus

Kaiserstr. 201

D-53113 Bonn

Phone +49 (0)228/60492-0, Fax -19

Office Berlin

Voßstr. 1

D-10117 Berlin

Phone +49 (0)30/288 8356-, Fax -1

Internet: <http://www.germanwatch.org>

E-mail: [info@germanwatch.org](mailto:info@germanwatch.org)

March 2008

Purchase order number: 08-4-02

**ISBN 978-3-939846-32-1**

This publication can be downloaded at:

**<http://www.germanwatch.org/corp/autoeu08.htm>**

With financial support from the Federal Ministry of Education and Research, grant no. 01LS05027.  
Responsibility for the contents of this publication rests with the authors.

# Contents

|  |           |
|--|-----------|
| <b>List of tables</b> .....  | <b>7</b>  |
| <b>List of abbreviations</b> .....   | <b>7</b>  |
| <b>Executive Summary</b> .....   | <b>8</b>  |
| <b>Introduction</b> .....  | <b>10</b> |
| <b>Part One: EC Law</b> .....  | <b>13</b> |
| <b>1 Existing EC legislation pertinent to company annual accounts, annual reports and accounting</b> .....   | <b>13</b> |
| <b>2 What is the annual report?</b> .....  | <b>16</b> |
| 2.1 Legal text .....   | 16        |
| 2.2 Interpretation .....   | 17        |
| <b>3 Content of the annual report with respect to climate / regulation risks</b> <b>18</b>   |           |
| <b>4 Conclusion</b> .....  | <b>20</b> |
| <b>Part Two: Analysis of Italian, French and German law</b> .....  | <b>21</b> |
| <b>1 French Law</b> .....  | <b>23</b> |
| 1.1 How has the reporting obligation on companies set out in Directive 78/660, both subject to the normal accounts and consolidated accounts (=group), been transposed in France?..... | 23        |
| 1.2 What are the main principles and what are the legal standards? Does the obligation differentiate between financial and non-financial indicators?.....                              | 23        |
| 1.2.1 Financial indicators .....   | 23        |
| 1.2.2 Non-financial indicators .....   | 24        |
| 1.2.2.1 Risks - Information and Management.....  | 26        |
| 1.2.2.2 Who has to report on non-financial indicators? .....   | 26        |
| 1.3 Has there been a similar obligation in French law before the EC Modernisation Directive (2003)?.....   | 27        |
| 1.4 How does French law go beyond or lag behind EC standards? .....  | 27        |
| 1.5 Who can enforce these reporting obligations under French law? Can investors go to court for inappropriate reporting on certain risks?.....   | 27        |
| 1.5.1 Financial indicators .....   | 27        |
| 1.5.2 Non-financial indicators .....   | 28        |
| 1.5.3 Other legal recourses .....  | 29        |
| 1.5.3.1 Civil law recourses.....   | 29        |
| 1.5.3.2 Criminal law recourses.....  | 29        |

---

|              |  |           |
|--------------|--|-----------|
| 1.6          | Comments by the Authors .....  | 30        |
| <b>2</b>     | <b>Italian Law .....</b>   | <b>31</b> |
| 2.1          | How has the reporting obligation on companies set out in Directive 78/660, both subject to the normal accounts and consolidated accounts (=group), been transposed in Italy? ..... | 31        |
| 2.2          | What are the main principles and what are the legal standards? Does the obligation differentiate between financial and non-financial indicators? .....                             | 31        |
| 2.3          | Has there been a similar obligation in Italian Law before the EC Modernisation Directive (2003)? .....   | 35        |
| 2.4          | How does Italian law go beyond or lag behind EC standards? .....   | 36        |
| 2.5          | Who can enforce these reporting obligations under Italian Law? Can investors go to court for inappropriate reporting on certain risks? .....                                       | 37        |
| <b>3</b>     | <b>German Law .....</b>  | <b>38</b> |
|              | <b>Part Three: The Legal Requirements and the Practice.....</b>  | <b>41</b> |
| <b>Annex</b> | <b>.....</b>   | <b>43</b> |
| <b>1</b>     | <b>Terms of Reference for the short legal analysis of transposition of EC legislation with respect to annual reports in Italy and France .....</b>                                 | <b>43</b> |
| <b>2</b>     | <b>Relevant translated French law.....</b>   | <b>44</b> |
| <b>3</b>     | <b>Relevant non-translated French law.....</b>   | <b>47</b> |
| <b>4</b>     | <b>German Commercial Code of 1964, Handels-gesetzbuch (HGB) .....</b>  | <b>49</b> |
| <b>5</b>     | <b>European Laws, Titles.....</b>  | <b>51</b> |

## List of tables

|  |    |
|--|----|
| Chart 1: "Annual Report" - International translations .....  | 12 |
| Chart 2: Most relevant Directives for company reporting (EC Law and national German, French and Italian law) ..... | 21 |

## List of abbreviations

|                 |  |
|-----------------|--|
| Art.            | Article  |
| CO <sub>2</sub> | Carbon Dioxide   |
| EC law          | European Community/ European Union Law                                 |
| EU              | European Union   |
| HGB             | Code of Commerce (German: Handelsgesetzbuch)                           |
| IAS             | International Accounting Standards                                     |
| IASB            | International Accounting Standards Board                               |
| IFRS            | International Financial Reporting Standards                            |
| KPI             | Key Performance Indicators   |
| NRE             | New Economic Regulations (French: Nouvelles regulations économiques)   |
| P.              | Page   |
| Para.           | Paragraph  |
| ROE             | Return on Equity before Tax  |
| ROI             | Return on Investment   |
| ROS             | Return on Sales  |
| SAS             | Simplified companies by shares (French: Sociétés par action simplifié) |

## Executive Summary

The European Union has set clear standards for company reporting since the 1970s for the benefit of shareholders and investors alike. The aim of this study is to analyse the complex obligations that exist to report on climate change and oil price risks, in particular for automobile companies. Given that the listed European companies are concentrated in Germany, Italy and France, the analysis focuses on European Community (EC) law and the domestic law in those Member States.

Considering the progress made both with respect to climate science and economic impact research, it can be assumed that a causal relationship exists between climate change, climate regulation risks or oil price trends on the one side, and value development and risk management of the pertinent companies on the other. This has been underlined by several studies targeting the financial markets. These days, automobile companies are reported under pressure due to high oil/ fuel prices and the resulting lack of consumer interest in new cars. Moreover, surveys have shown the importance of certain key performance indicators such as “sales-weighted average fleet consumption” of automobile companies for investors and analysts.

Based on this assumption, this study describes the main legal instruments and provisions applicable, and mainly focuses on the annual report pursuant to Article 46 of Directive 78/660 as amended by the so-called Modernisation Directive (Directive 2003/51/EC) about minimum legal requirements for annual accounts of companies, and its parallels in domestic law.

This annual report (*Lagebericht* (German), *rapport de gestion* (French), *relazione sulla gestione* (Italian)) must – under EC legislation alone – fulfil the following minimum requirements:

- With respect to the past and the present business year, the report must represent a "fair review of the development and performance of the company's business and of its position".
- With respect to future business, the annual report must describe the "principal risks and uncertainties" the company faces.
- With respect to both past, present and future performance, and "to the extent necessary for an understanding of the company's development, performance or position", the report must include financial and non-financial key performance indicators relevant to the particular business.
- The annual report shall include information relating to environmental and employee matters "to the extent necessary for an understanding of the company's development, performance or position".
- The annual report must serve the interests of investors as a whole, not merely stakeholders.



- Comparability of companies' annual reports is a main criterion, which means that reporting should be done in a way that allows drawing parallels or noting differences between various companies.
- Key Performance Indicators must therefore be used to allow comparisons by the investor.
- Information should be reliable for the investor, i.e. of a type, which is usable when making investment decisions. This includes both prose and figures, while figures are naturally more "applicable" on financial markets.
- Environmental data and information on related issues should be disclosed in a manner that makes it possible to incorporate them into the general financial aspects of reporting.
- The information contained in the annual report should be "transparent". This is only possible if the methods for deriving the data and the conclusions are made transparent as well.

In some respects, national law stipulates further reporting duties, such as German law the duty to also report on "opportunities".

An evaluation of the annual reports 2006 of all major European automobile companies conducted by *Hesse (2007)* in conjunction with this legal study shows that there is a clear gap between implementation and these legal requirements on the European and domestic (Italian, French and German) level. The information provided in the annual reports 2006 is not sufficient for analysts and investors to evaluate the financial and non-financial risks and opportunities caused by climate change and oil price risks on the automobile industry sector.

It must be noted that the evaluation analysed the annual reports for 2006 – i.e. the status of reports published in 2007, four years after the enactment of the Modernisation Directive and two years after it had to be transposed into national law (the deadline was 1<sup>st</sup> January 2005 (Art. 5 of Directive 2003/51)). It should also be noted that the general duty to report about risks with financial implications, existed in national legislation well before the Modernisation Directive.

## Introduction

There is scientific consensus about the existence and cause of climate change, as well as about the fact that emissions of greenhouse gases must be significantly reduced in order to avoid dangerous climate change. Global climate change will be one of the biggest challenges for economy and society in the 21<sup>st</sup> century. The Stern Review<sup>1</sup> has even called it the biggest market failure in history. The financial sector is increasingly conscious of this challenge and legal reporting duties can assist investors and analysis to help make climate risks transparent.

Today the consequences of global climate change can be increasingly modelled in regional resolution with more realistic results. Climate damages are estimated to amount up to 200 billions US \$ till 2050<sup>2</sup>, assuming insufficient climate protection policies. Several economic studies on climate change and climate regulation predict significant, actual or potential depreciation on the macro-, as well as on the micro-economic level (economies, financial markets, single businesses). Also, the rising oil price (independent of climate change) represents a considerable risk for certain branches of the economy, e.g. the automobile sector.<sup>3</sup>

It can be assumed that a causal relationship exists between climate change, climate regulation risks or oil price trends on the one side, and value development and risk management of the pertinent companies on the other. This has been shown by studies targeting the financial markets. For example, there is a clear financial interest by investors to receive information about averaged fleet consumption of car companies.<sup>4</sup>

Sectors that have been identified to bear the highest risks and opportunities regarding climate change impacts include utilities and the energy sector in general and the transport sector including the automobile industry. The transport sector with its large contribution to anthropogenic CO<sub>2</sub> emissions is affected by climate change, especially with respect to future climate change regulations and mitigation policies. As observed in recent years, the industry is also affected by rising oil prices, as they will affect sales of high consumption cars as well as of efficient cars. While the transport sector has been largely untouched by climate protection measures so far, political declarations of the past years, as well as the newly released EU plans to reach EU climate protection targets (30% reduction of greenhouse gas emissions compared to 1990 by 2020)<sup>5</sup> show a high likelihood, that this will

---

<sup>1</sup> Nicholas Stern, *The Economics of Climate Change*, 2007, xviii.

<sup>2</sup> See the various estimates, summarised in IPCC, *Climate Change 2007 – Impacts, Adaptation and Vulnerability*, (WG II), 2007, para. 20.6.

<sup>3</sup> See only *Handelsblatt*, 18.3.2008: „Kostenschock in den USA: Treibstoffpreise schlagen direkt auf Konzerne durch“, p. 12, which reports that the rising oil prices (near to 4\$ per gallon) can result in a 4 Billion \$ loss for business among the US automobile industry in 2008.

<sup>4</sup> Hesse, A., Deloitte (ed.): *Added value, long term. Non-financial sustainability key performance indicators on their way into financial reports of German companies*, Duesseldorf, Munich 2006. DVFA (ed): *Financial Papers. KPIs for ESG. Key Performance Indicators for Environmental, Social and Governance Issues. A Guideline for Corporates on how to report on ESG and a benchmark for investment professionals on how to integrate ESG into Financial Analysis*. No.08/08\_e Dreieich 2008, p. 30. Standard & Poor's (ed): *Proposed EU clampdown on CO<sub>2</sub> emissions threatens profitability of Europe's automakers*, 2007.

<sup>5</sup> *Package of Implementation for the EU's objective on climate change and renewable energy for 2020*, 23.01.2008, SEC (2008) 85/3

not last anymore. German automotive companies fear a loss of competitiveness due to the latest announcement of the EU commission for a climate protection legislation.<sup>6</sup> The commission calculated that the price of a new car will increase on average by 1300 € if the restrictions become effective. While this will highly depend on the type of car<sup>7</sup>, the assessment highlights what has been assumed for years: Production changes in the automobile sector will be necessary and they might not come for free.

This brief legal opinion is based on the assumption that the above mentioned causal relationship regarding climate risks and business performance exists, yet acknowledges that climate risks or opportunities do not represent the only, or even the dominant, factors of influence for the value development of a given company.

On the basis of the same assumption, a comprehensive study conducted for Germanwatch (in German language)<sup>8</sup> analysed the legal requirements for automobile companies/groups to report on climate and oil price risks under German company and accounting law<sup>9</sup> in detail (in the following referred to as: Verheyen, 2008). Yet, to be able to compare reporting standards in the European automobile sector as a whole, an additional assessment of the law in France and Italy was deemed beneficial.<sup>10</sup>

This brief opinion is – in its **first part** – intended to summarise the legal requirements for company annual accounts and annual reports with respect to climate change risks derived from EC law only (“EC Law”). To focus on the subject of this study, the following chart summarises the terminology used in various languages and legal systems and the reader is reminded that the term “annual report” used in this study might not mean the same in German, French or Italian language.

---

<sup>6</sup> December 19th 2007 the EU Commission proposed climate protection restrictions for cars to reduce the emissions of CO<sub>2</sub>. The Commission wants to reduce the CO<sub>2</sub> emissions of new cars to an average of 120 grams per kilometre until 2012.

<sup>7</sup> The average price increase for a Porsche will be much higher - between 10.000€ and 17.000€ per car, whilst French and Italian cars will be considerably cheaper. The automobile company PSA with their brands Peugeot and Citroën will be faced with a rise of prices of approximately 300 to 1000€ per car to fulfil the new emission standards. Companies that will fail to reduce their fleet consumption will be fined for every gram exceeding the limit starting 2012. (Handelsblatt, 2007-12-20; Ends Europe Daily, 2007-12-19 and Times Online, 2007-12-20, all based on EU data)

<sup>8</sup> Verheyen, Informations- und Berichtspflichten der deutschen börsennotierten Automobilkonzerne im Hinblick auf die durch den globalen Klimawandel und eine weitere Ölpreissteigerung hervorgerufenen Risiken, Germanwatch 2008.

<sup>9</sup> German company and accounting law: “*Bilanzrecht*”.

<sup>10</sup> In a separate study for Germanwatch conducted in conjunction with this study, Axel Hesse has analysed and compared the annual climate related reporting of the seven biggest European automobile companies at the stock market, as those have also the biggest influence on purchase decisions and emissions reductions in the EU. The companies analysed were: BMW, DaimlerChrysler, Porsche, Volkswagen; PSA Peugeot Citroën, Renault and Fiat. see: Hesse. Climate change risk reporting in the annual reports 2006 of the European automobile industry. Bonn 2007.

**Chart 1: "Annual Report" - International translations**

| <b>EC Law</b><br>(British English) | <b>German</b>     | <b>French</b>      | <b>Italian</b>           |
|------------------------------------|-------------------|--------------------|--------------------------|
| annual report*                     | Lagebericht**     | rapport de gestion | relazione sulla gestione |
| annual accounts                    | Jahresabschluss** | comptes annuels    | conti annuali            |

\* This terminology is used in the following study.

\*\* In Germany "Lagebericht" and "Jahresabschluss" both are parts of the "Jahresbericht".

The **second part** ("Comparison") of this document is comprised of two legal opinions from France and Italy, looking at the transposition of these rules into national law, and contains a summary of the requirements identified for the German system in the main study (Verheyen, 2008). This brief legal opinion only looks at reporting requirements for automobile companies/groups in the strict sense and is therefore not as wide in scope as the main study about the German company and accounting law.

The **third part** compares the legal requirements identified in the first part with an evaluation of the European Automobile Company's Annual Reports carried out by *Hesse*<sup>11</sup> that tries to ascertain the level of compliance. The main conclusion from this exercise is that there are large reporting gaps which should be highlighted and discussed with the industry as well as accounting experts.

---

<sup>11</sup> Hesse: Climate Change Risk Reporting in Annual Reports 2006 of the European Automobile Industry. Bonn 2007. Key indicators used in this survey were:

1. Sustainable Development - Key Performance Indicator (SD-KPI 1): Fleet consumption
2. SD-KPI 2: Energy and greenhouse gas intensity of the production
3. Statements of the companies in the section Risk Management including legal proceedings
4. Reporting about lobbying activities regarding reductions in fuel consumption and/or further measures in climate change policies / regulations at EU level, in other important markets or at a global level

## Part One: EC Law

Determining a legal standard for company reporting on risks, especially climate risks, simply on the basis of EC Law is not an easy task, as most of the legislation in this field takes the form of Directives, which are meant to offer a framework for the Member States to be incorporated into their existing company law and other statutes. Yet, just looking at the various EC instruments it is possible to define *a minimum standard* according to which companies in all 27 Member States must report to inform investors and shareholders.

This section does not lay down a minimum benchmark by way of comparing the various laws applicable in all of the 27 Member States, but looks only at the EU's legal instruments itself.

### 1 Existing EC legislation pertinent to company annual accounts, annual reports and accounting

Already in 1978 the EU (then established only as EEC) aimed at establishing "minimum equivalent legal requirements", as the main objective of the Directive 78/660/EEC on the annual accounts of certain types of companies.<sup>12</sup> In 1983 this Directive was followed by the Directive 83/349 on consolidated accounts, which obliged member states to ensure that companies controlling subsidiary undertakings "draw up consolidated accounts and a consolidated annual report".

In essence, this means that regarding the automobile sector in most cases, two types of reports will be issued: Those for the parent or subsidiary company and those for the group. The rules regulating the annual accounts and annual reports for groups follow those for individual companies. Therefore, this study will focus on the rules as set out in Directive 78/660.

As shown in chart 1 above "annual accounts" are the basic accounts of a company, in German "*Jahresabschluss*", in French "*comptes annuels*" and in Italian "*conti annuali*".

Directive 78/660 still forms the basis for most of the EU's rules in this field - with Directives 86/635/EEC (banks and other financial institutions) and 91/674/EEC (insurance companies) covering specific sectors.

---

<sup>12</sup> Official Journal (OJ) L 222, p.11 (1978), preamble, para. 3. This Directive has been amended by the following Directives: Seventh Council Directive 83/349/EEC, of 13 June 1983 OJ L 193 1 of 18.7.1983, Council Directive 84/569/EEC, of 27 November 1984 OJ L 314 28 of 4.12.1984, Eleventh Council Directive 89/666/EEC, of 21 December 1989 OJ L 395 36 of 30.12.1989, Council Directive 90/604/EEC, of 8 November 1990 OJ L 317 57 16.11.1990, Council Directive 90/605/EEC, of 8 November 1990 OJ L 317 60 16.11.1990, Council Directive 94/8/EC of 21 March 1994 OJ L 82 33 25.3.1994, Council Directive 1999/60/EC of 17 June 1999 OJ L 162 65 26.6.1999, Directive 2001/65/EC of the European Parliament and of the Council of 27 September 2001, OJ L 283 28 27.10.2001, Council Directive 2003/38/EC of 13 May 2003 OJ L 120 22 15.5.2003, Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 OJ L 178 16 17.7.2003, Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 OJ L 157 87 9.6.2006, Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 OJ L 224 1 16.8.2006, Council Directive 2006/99/EC of 20 November 2006 L 363 137 20.12.2006 as well as by several Acts of Accession.

For this study, the provisions of Directive 78/660 as amended are decisive, as the European automobile companies fall within the scope of this Directive (both in terms of the individual companies and the groups). Historically, this type of company law legislation aimed at making the balance sheets of companies of all member states comparable to increase accessibility of financial markets across borders.

Article 2.3 contains the basic rule of company accounting:

"The annual accounts shall give a true and fair view of the company's assets, liabilities, financial position and profit or loss."

Article 2.4 adds explicitly:

"Where the application of the provision of this Directive would not be sufficient to give a true and fair view within the meaning of paragraph 3, additional information must be given."

Section 9 of Directive 78/660 as amended (Art. 46 ff.) concerns annual reports. This section was subject to a major amendment through the so-called Modernisation Directive 2003/51/EC. The main substantive provisions are the following:

**Art. 46**

1. (a) The annual report shall include at least a fair review of the development and performance of the company's business and of its position, together with a description of the principal risks and uncertainties that it faces. The review shall be a balanced and comprehensive analysis of the development and performance of the company's business and of its position, consistent with the size and complexity of the business;

(b) To the extent necessary for an understanding of the company's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters;

....

2. The report shall also give an indication of:

- (a) any important events that have occurred since the end of the financial year;
- (b) the company's likely future development;
- (c) activities in the field of research and development;

...

This addition was made in identical form to the provisions on the consolidated report, Directive 83/349/EC, Art. 36.

It must be noted that the term "annual report" is different from "annual accounts". In German language, the term "annual report" has been translated to "Lagebericht" (Status Report). In German practice "annual report" (Lagebericht) and "annual account" (Jahresabschluss) are part of the "annual report" (Jahresbericht) - according to § 264 HGB, the German Company Code.

In French language, the term "annual report" has been translated to "rapport de gestion" (gestion ~ administration). The Italian use the same term: "relazione sulla gestione".

In the following analysis, the term "annual report" will be used as applicable in Article 46 in the English language version.

Article 50b of Directive 78/660 as amended by Directive 2006/46<sup>13</sup> attaches liability of the company's management explicitly to both the annual accounts and the annual report:

"Members of the administrative management and supervisory bodies of the company have collectively the duty to ensure that the annual accounts, the annual report ... are drawn up and published in accordance with the requirements of this Directive and, where applicable, in accordance with the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002. ..."

The Directive also foresees that the annual reports, together with the annual accounts shall be audited by auditors corresponding to the mandatory legal requirements as set out by EC law<sup>14</sup>

"The statutory auditors shall also express an opinion concerning the consistency or otherwise of the annual report with the annual accounts for the same financial year." (Article 51.1)

Please note: This particular provision is to be transposed by 5<sup>th</sup> September 2008 and thus not yet part of the *acquis*<sup>15</sup>.

The auditor's report is to give an "audit opinion"

"concerning the consistency or otherwise of the annual report with the annual accounts for the same year" (Art.51a).1 e))

This means that while the annual report must be audited, the auditors are not required to state the consistency of the annual report with the legal requirements, but only with the annual accounts. This is an important difference regarding the responsibility of auditors with respect to the incorporation of risk-related information into the annual reports.

Regulation EC/1606/2002 on the application of international accounting standards<sup>16</sup> has introduced European-wide accounting standard-setting and application. According to its Article 4, groups of companies that are obliged to prepare consolidated accounts - as of 1 January 2005 - are bound to use the International Financial Reporting Standards (IFRS) set by the International Accounting Standards Board (IASB) - as far as they are available and adopted by the European Commission, according to the procedure set out in Art. 6 of this regulation.

It should be noted, however, that such IFRS do not exist to this date (January 2008) for the annual report.<sup>17</sup> Some countries, such as Germany and France, do have national standards, which are still used by both companies and groups for their annual reports.

---

<sup>13</sup> Note 12. This Directive was a result of the 2003 Action Plan to modernise company law and focused on attaching personal liability to the reporting obligations and introduced corporate governance statement duties.

<sup>14</sup> Directive 84/253/EC on the approval of persons responsible for carrying out the statutory audits of accounting documents, OJ L 126, p. 20 (1984).

<sup>15</sup> *Acquis communautaire* connotes the entirety of EC law at a certain point in time.

<sup>16</sup> Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, OJ L 243, 1 (2002).

<sup>17</sup> A project "Management Commentary" exists with the IASB, which will at least partially cover the requirements of annual reports, see <http://www.iasb.org>. The format for an initial document is still unclear (Status January 2008). What is evident though, is that the Commentary will only partially cover the requirements for annual reports.



## 2 What is the annual report?

### 2.1 Legal text

From the text of Article 46 as amended by the Modernisation Directive one can deduce the following characteristics of the annual report:

- Companies must submit an additional report to the traditional annual accounts, the latter mostly comprising the balance sheet, the profit and loss account and other accounting information.
- This report must include additional information relevant to the investor and also comprising forward looking information, representing a "fair review of the performance and position of the company".
- It is part of the financial reporting of a company or group<sup>18</sup>.

It must be added that the annual report is a mandatory report, i.e. it does not cover information a company may or may not disclose at its discretion.

- With respect to the past business year and the present situation, the report must represent a "fair review of the development and performance of the company's business and of its position".
- With respect to future business, the report must describe the "principal risks and uncertainties" the company faces.

The latter two requirements raise the questions of what could be deemed "principal risks and uncertainties" and whether this term is open to an objective judgement.

- With respect to both past, present and future performance, and "to the extent necessary for an understanding of the company's development, performance or position", the report must include financial indicators and non-financial key performance indicators (KPI) relevant to the particular business.

"Key performance indicators" (KPI)<sup>19</sup> are factors that can measure the development, performance or position of the company effectively. The Directive does not give a definition of this term, nor does it list any KPIs, neither financial nor non-financial. Several KPIs have been suggested by experts, which are pertinent in this context such as "CO<sub>2</sub> emissions over the life cycle of products", "average fleet CO<sub>2</sub> consumption", and "CO<sub>2</sub> emissions during the production process".<sup>20</sup>

- "To the extent necessary for an understanding of the company's development, performance or position", the annual report shall include information relating to environmental and employee matters. This review (German: "Analyse", French: "l'analyse", Italian: "l'analisi") could be in form of a written analysis, but also in form of a financial projection or table.

---

<sup>18</sup> See para. 9 of the Preamble of the Modernisation Directive, 2003/51 which states: ... "The annual report and the consolidated annual report are important elements of financial reporting."

<sup>19</sup> German: Leistungsindikatoren, French: indicateurs clés de performance, Italian: indicatori finanziari fondamentali

<sup>20</sup> See Deloitte (2006): Nachhaltig mehr Wert, Der Informationsbedarf von Investoren, pp. 7 f. as well as DVFA (2007): DVFA Financial Papers No. 08/07\_e. Key Performance Indicators (KPIs) for Extra-/Non-Financial Reporting, pp. 5, 7 and 11.



## 2.2 Interpretation

This rather coarse definition concerning the content of the annual report can be concretised by looking into the purposes of the EC legislation.

The Modernisation Directive was partially a result of the EU Commission's recommendation regarding the consideration of environmental aspects in company accounting and reporting (2001/453/EC). The EU Commission stated that

"there is a justified need to facilitate further harmonisation on what to disclose in the annual accounts and annual reports of enterprises in the European Union as far as environmental matters are concerned. The quantity, transparency and comparability of environmental data flowing through annual accounts and annual reports of companies must also be increased."<sup>21</sup>

The underlying reasons for the legislation, both the IAS Regulation and the Modernisation Directive is summarised in the Communication of June 2000<sup>22</sup>:

"Among the priority objectives mentioned in the Lisbon European Council Conclusions is the need to enhance the comparability of companies' financial statements to benefit companies and investors. To achieve this objective, the Union requires common financial reporting standards – standards that are transparent, fully understood, properly audited and effectively enforced."

Another major objective relating to the importance of information in the interest of the investor is set out in this Communication:

"Sound financial reporting remains at the heart of the Commission's approach. Relevant, timely, reliable and comparable information about the performance and financial position of an enterprise continues to be of central importance in safeguarding the interests of investors, creditors and other stakeholders to ensure a level playing field between competitors."

The Modernisation Directive 2003/51 itself states that the annual report, being an important part of the financial reporting, should not "be restricted to the financial aspects of the company's business" and hints to the evolving nature of this "area of financial reporting".

From these objectives it is possible to deduce that

- the annual report must serve the interests of investors generally, not merely shareholders.
- comparability of companies' reports is a main criterion. This means that reporting should be done in a way, which allows drawing parallels or noting differences between various companies.
- KPIs must therefore be used to allow investors such comparisons.
- information should be presented in a form that is reliable for the investor, i.e. applicable in investment decisions. This includes both prose and figures, while figures are naturally more "applicable" in the financial sector.
- environmental data and information on such issues should be displayed in a manner, which makes it possible to incorporate them into the general financial aspects of reporting.

---

<sup>21</sup> Of 30.05.2001, OJ L 156 p. 33 (2001), para 10.

<sup>22</sup> COM(2000) 359 final: EU Financial Reporting Strategy: the way forward

- the information enclosed in the report should be "transparent". This is only possible if the methods for deriving the data and conclusions are made transparent themselves.

### 3 Content of the annual report with respect to climate / regulation risks

This section is set into the wider context of financial markets, automobile companies and climate change risks. This includes in particular regulatory risks, which result from political and legal measures taken by national or European lawmakers, responding to the problem of high consumption cars that are fuelling high oil prices (demand) and global climate change.

In the context of this analysis and Article 46 of Directive 78/660, the Questions are

1. whether the annual report as prescribed by EC legislation must treat issues of climate risks at all.
2. whether the EC legislation prescribes a particular way in which these risks have to be taken into account.

Ad 1)

The annual report is designed as a mandatory report to present a "true and fair view" of the company. In different official translations the new Article 46.1a) about the content and purpose of the report reads as follows:

"shall include at least a fair review of the development and performance of the company's business and of its position" (UK version)<sup>23</sup>

"exposé fidèle sur l'évolution des affaires, les résultats et la situation de la société" (France),

"den Geschäftsverlauf, das Geschäftsergebnis und die Lage der Gesellschaft so dar[stellen], daß ein den tatsächlichen Verhältnissen entsprechendes Bild vermittelt wird" (Germany)

In conjunction with the requirement to include an analysis of the "principal risks and uncertainties" companies are facing, (Art. 46. 1a) it is clear that **risks such as regulatory risks - as a response to climate change - are *per se* included**. So the question is not whether the report has to include such information at all, but whether the **risks regarding climate change and oil price development are deemed "principal"**. The Directive does not give an answer who is in charge to make this decision. Yet, given the fact that the Directive prescribes liability to the company's management for ensuring that the report has been drawn up "in accordance with the requirements of this Directive" (see above), this question must be answerable by courts of the member states and is thus to be determined in an objective manner.

---

<sup>23</sup> The Italian version is not used here as the author does not speak/understand Italian and the Italian version would therefore not add to the understanding of the provision

In times where the European Union is seriously considering binding fleet consumption regulations, it is well possible to state that this kind of regulation will determine business policy in key areas for a long time, resulting in binding standards for product development etc. Naturally, this will be debatable from a micro-economic point of view, but simply judging from the extent of political pressure exercised by automobile companies to prevent this type of regulation, it seems doubtful whether companies could argue that this type of risk is not "principal". Omitting such risks would also hardly satisfy the paramount objective of financial reporting as a whole, to present "a true and fair view" of the company's position.

As an interim summary therefore, it is arguable that, on the basis of EC legislation alone, climate risks (regulatory and others) must be reported in the context of the annual reports.

Ad 2)

But does EC law also prescribe how this has to be done?

With respect to whether KPIs such as "average fleet consumption" or other related indicators must be included according to Art 46.1.b), the same reasoning as above applies. Certainly, the **legislation does not prescribe one KPI. The decision, which indicators will be used depends on the sector and the related type of risk as well as the investors' information needs.** However, given that KPIs have been introduced as an obligatory part of the annual report, there is a strong case for arguing that KPIs could also cover climate risks.

But is it mandatory that the risks faced by the company e.g. due to regulatory changes are displayed in a quantitative manner?

Just on the basis of the legislation alone, this question cannot clearly be answered in the affirmative. Yet, given that the whole purpose of the legislation is the usability of the information and the financial reporting for investors in the EU, it seems to be clear that any inclusion of risk analysis with respect to climate risks must be usable also. This means that an investor must be able to use the information provided for investment decisions. The investor must be able to decide whether a particular risk is worth buying or selling stocks or changing investment from one stock or investment fund to the other and vice versa. This means that the information must be presented in a manner that clarifies the risk for the particular company.

Taking the example of the average fleet consumption regulation, it would not be sufficient to simply state in the annual report that this measure could be taken. The risk should be broken down instead to what might be jeopardized (which models, which production policy), and financial implications of various policy scenarios should be sketched.

In this context it is also important to point out that EC legislation does not refer to a particular time period in which the risks are relevant or could develop into concrete financial losses. This means that the time horizon is purely determined by the pertinent risk and the investor's need for information. Given that many investment decisions are not short term (months to 2 years) but rather mid-to long-term, an argument can well be made that **risks should be considered over a longer time period in the annual report.**

## 4 Conclusion

**Summing up, the annual report pursuant to Article 46 of Directive 78/660 must fulfil the following minimum requirements:**

- With respect to the past business year and the present, the report must represent a "fair review of the development and performance of the company's business and of its position".
- With respect to future business, the report must describe the "principal risks and uncertainties" the company faces.
- With respect to both past, present and future performance, and "to the extent necessary for an understanding of the company's development, performance or position", the report must include financial indicators and non-financial key performance indicators relevant to the particular business.
- The review shall include information related to environmental and employee matters "to the extent necessary for an understanding of the company's development, performance or position".
- The annual report must serve the interests of investors in general, not merely stakeholders.
- Comparability of companies' reports is a main criterion, which means that reporting should be done in a way, which allows drawing parallels or noting differences between various companies.
- KPIs must therefore be used to allow investors such comparisons.
- Information should be reliable for investors, i.e. of a type, which is usable when making investment decisions. This includes both prose and figures, while figures are naturally more "applicable" in the financial sector.
- Environmental data and information on such issues should be displayed in a manner that makes it possible to incorporate them into the general financial aspects of reporting.
- The information contained in the report should be "transparent". This is only possible if the methods for deriving the data and conclusions are made transparent themselves.

## Part Two: Analysis of Italian, French and German law

The following chart contains a summary of the main European legal instruments for company reporting and their main transposition acts into national law.

**Chart 2: Most relevant Directives for company reporting (EC Law and national German, French and Italian law)**

| EC Law Directive                   | keyword regarding the regulations in this directive   | included in / transposed into German Law | included in / transposed into French Law  | included in / transposed into Italian Law |
|------------------------------------|---|--|---|---|
| Directive 78/660/EEC               | minimum legal requirements for annual accounts of companies   | §§ 264 ff. HGB                           | Law no. 83-353 <sup>24</sup><br>Decree no. 83-1020 <sup>25</sup>  | Decree no. 127-1991                       |
| Directive 83/349/EEC               | minimum legal requirements for annual accounts of groups  | §§ 264 f. HGB                            | Law no. 85-11 <sup>26</sup><br>Decree no. 86-221 <sup>27</sup>  | Decree no. 127-1991                       |
| Directive 86/635/EEC               | special requirements for banks and other financial institutions                                     | §§ 264 ff. HGB                           | Edict from 20 March 1990 <sup>28</sup>  | Decree no. 87-1992                        |
| Directive 91/674/EEC               | special requirements for insurance companies  | §§ 264 ff. HGB                           | Decree no. 94-481 <sup>29</sup><br>Decree no. 94-482 <sup>30</sup><br>Edict from 20 June 1994 <sup>31</sup>         | Decree no. 173-1997                       |
| Regulation EC/1606/2002            | application of IFRS for groups of companies as of Jan. 1 <sup>st</sup> 2005                         | §§ 264 ff. HGB                           | Ordonnance 2004-1382 <sup>32</sup> ; articles L. 233-1 du Code de Commerce et suivants modifiés                     | Decree no. 38-2005                        |
| Modernisation Directive 2003/51/EC | major revision of requirements on the annual report, explicit inclusion of non-financial indicators | §§ 264 ff. HGB                           | Decree n. 2005-50 <sup>33</sup> ;<br>Decree no. 2005-1757 <sup>34</sup> ;<br>Ordonnance no. 2004-1382 <sup>35</sup> | Decree no. 32-2007                        |

<sup>24</sup> Loi n°83-353 du 30 avril 1983 relative à la mise en harmonie des obligations comptables des commerçants et de certaines sociétés avec l'ivème directive adoptée par le conseil des communautés européennes le 25-07-1978

<sup>25</sup> Décret n°83-1020 du 29 novembre 1983 pris en application de la loi 83353 du 30-04-1983, relatif aux obligations comptables des commerçants et de certaines sociétés

<sup>26</sup> loi n°85-11 du 3 janvier 1985 relative aux comptes consolidés de certaines sociétés commerciales et entreprises publiques

<sup>27</sup> Décret n°86-221 du 17 février 1986 pris pour l'application de la loi 8511 du 03-01-1985 relative aux comptes consolidés de certaines sociétés commerciales et entreprises publiques et portant dispositions diverses relatives à l'établissement des comptes annuels

<sup>28</sup> Arrêté du 20 mars 1990 portant homologation de règlements du Comité de la réglementation bancaire

<sup>29</sup> Décret no 94-481 du 8 juin 1994 portant transposition de la directive (C.E.E.) no 91-674 du 19 décembre 1991 concernant les comptes annuels et les comptes consolidés des entreprises d'assurance et adaptation des règles comptables applicables aux entreprises d'assurance

<sup>30</sup> Décret no. 94-482 du 8 juin 1994 modifiant le code des assurances en vue de la transposition de la directive (C.E.E.) no 91-674 du 19 décembre 1991 concernant les comptes sociaux et comptes consolidés des entreprises d'assurance

<sup>31</sup> Arrêté du 20 juin 1994 modifiant le code des assurances en vue de la transposition de la directive no 91-674/C.E.E. du 19 décembre 1991 concernant les comptes sociaux et comptes consolidés des entreprises d'assurance

<sup>32</sup> Ordonnance du 20 décembre 2004.

<sup>33</sup> Décret no. 2005-50 du 26 janvier 2005 relatif aux provisions et modifiant le code des assurances en sa partie réglementaire

<sup>34</sup> Décret no. 2005-1757 du 30 décembre 2005 modifiant le décret n° 67-236 du 23 mars 1967 sur les sociétés commerciales et le décret n° 83-1020 du 29 novembre 1983 relatif aux obligations comptables des commerçants et de certaines sociétés

<sup>35</sup> Ordonnance no. 2004-1382 du 20 décembre 2004 portant adaptation de dispositions législatives relatives à la comptabilité des entreprises aux dispositions communautaires dans le domaine de la réglementation comptable

In this part, the national transposition acts and pertinent provisions are described and analysed to see whether they establish a national standard, which corresponds to the European standard set out in the first part of this study.

As a basis for the analysis of French and Italian law, a list of questions has been conveyed to French and Italian lawyers. The questions are based on the EU standard analysed in the first part of this study and are set out in the following analyses of French and Italian law. They are attached in Annex 1.

The German law analysis is in essence a summary of the relevant parts of the main study by *Verheyen* (2008, in German language).

# 1 French Law

Chapter written by Joseph Breham, Clémentine Bacri and Yann Queinnec.

## 1.1 How has the reporting obligation on companies set out in Directive 78/660, both subject to the normal accounts and consolidated accounts (=group), been transposed in France?

See Annex 2 and 3 for relevant French laws. Annex 2 comprises translated relevant French laws. These laws are used in the following analysis.

Annex 3 comprises non-translated relevant laws. These laws are not used in the following analysis.

## 1.2 What are the main principles and what are the legal standards? Does the obligation differentiate between financial and non-financial indicators?

The reporting obligation varies substantially, depending on the financial or non-financial indicators.

### 1.2.1 Financial indicators

The obligation to make an annual report (French: *rapport de gestion*) falls on every physical or legal person as soon as this person is qualified as a trader<sup>36</sup>. This obligation concerns the movement of assets. At least once a year, the existence of assets and liabilities (*éléments composant l'actif et le passif*) must be checked in an inventory.

Concerning financial indicators, the obligations set out in the Directive 78/660 have been fully transposed into French law. The Decree n°83-1020 gives all details on the information that must be included in the reports.

The 1983's French Accounting Law (in transposition of the 4th European Directive) developed eight fundamental accounting and reporting principles, in order to ensure a fair representation of assets, financial situation and results of the undertaking:

- business running continuity (*continuité d'exploitation*)
- accounting period independency (*indépendance des exercices*)
- prudence
- consistent methods (*permanence des méthodes*)
- historical cost (*coût historique*)
- correspondence between the accounting period's opening balance sheet, and the last accounting period's closing balance sheet

---

<sup>36</sup> Under French law (art. 121-1 commercial code): Traders are those who carry out commercial instruments and who make this their usual profession. This definition includes companies such as automotive companies

- relative importance (*l'importance relative*)
- non-compensation (*la non compensation*).

Another principle is used, but not formally identified: the joining (*le rattachement*) to incomes and expenses, which is different from the principle on accounting period independency and might be in "contradiction" with the prudence principle.

The notion of the "economical reality's" predominance over the "judicial appearance" should also be mentioned: This concept is based on the International Accounting Regulations and especially the 7th European Directive.

These principles and the obligation to apply them in the annual report only concern financial indicators. There is no obligation on all traders to make a report on non-financial indicators<sup>37</sup>. Nevertheless, some traders are required to - automobile companies are among them.

The consolidated report (annual report concerning the group) must contain the same information. The perimeter for the group depends on the method used. Since 2005, companies listed on the stock exchange must use the IFRS.

The IFRS will not be further discussed in this chapter.

### 1.2.2 Non-financial indicators

Two kinds of non-financial indicators must be included in the annual report (*rapport de gestion*):

#### I) New Economic Regulation (NRE) Indicators of non-financial performance

**Article 116** of the NRE law No. 2001-420<sup>38</sup> - on **social and environmental impacts**<sup>39</sup> - specifies that information must be included in the annual report. A *Conseil d'Etat* decree<sup>40</sup>, regarding the way the company deals with social and environmental consequences, shows, which kind of information is required:

- 1) Consumption of water resources, of raw materials and energy and a description, of the relevant measures taken to increase energy efficiency and the use of renewable energies, conditions of soil use, air - water - soil pollution emissions that could affect the environment dramatically,
- 2) Measures taken to limit the damage to biological balance, to the natural environment, protected animals and vegetation;
- 3) Assessment or certification of actions taken in terms of environmental protection;
- 4) Necessary actions taken to ensure the conformity of the company's activity with the legal provisions in that field;

<sup>37</sup> cf. article 120-1 of the "*Plan Comptable general*": defines book-keeping as a system to organise financial information

<sup>38</sup> This article has been integrated in the French commercial code under article L 225-100 and following. See Annex 2.

<sup>39</sup> see Annex 2: *Nouvelles regulations économiques*, New economic regulations

<sup>40</sup> Decree no. 2002-221 of February 20th, 2002 relative to the implementation of the article L. 225-102-1 of the Code of commerce and modifying the decree no. 67-236 of March, 23rd 1967 on company law



- 5) Expenditures made to prevent negative consequences of the company's activity for the environment;
- 6) The existence of internal departments within the company in charge of environmental management issues, training and information of employees on these issues. These are departments that are dedicated to the reduction of environmental risks as well as organisational facilities. They have been put in place to deal with pollution accidents that could have consequences beyond the company's site;
- 7) Amount of provisions and guarantees allocated for environmental risks, unless this information is likely to cause a serious disadvantage to the company in an ongoing lawsuit<sup>41</sup>;
- 8) Amount of compensation for environmental damages paid during the fiscal year, in execution of a court order and measures taken to repair these environmental damages.

Regarding the group, the Decree no.2002-221 indicates that the consolidated report must contain all elements on the objectives the company assigns to its foreign subsidiaries on above paragraphs 1° to 6°. The perimeter of the group has been defined neither in the Decree nor in the law. Together with the lack of definition of information needed such as “air - water - soil pollution emissions” it implies a relative inefficacy.

## II) Other indicators of non-financial performance

### Commercial code L225-100 §3 in fine:

The annual report is to contain an objective and exhaustive analysis of the company's business development, results and financial position, and in particular its borrowings relative to the volume and complexity of the business<sup>42</sup>.

However, companies were already to respect this obligation before the two ordinances in 2004 (see Annex 2).

The two ordinances<sup>43</sup> complete the information required in the annual report by indicators of non-financial performance. They directly transpose the obligation set by the Directive 2003/51/CEE into the French commercial code. These obligations are not imposed on every trader, but only on companies, whose shares are on a regulated stock market. The information required is:

"To the extent necessary for an understanding of the company's business development, results or position, and independently of the key performance indicators of a financial nature, which must be included in the report by virtue of other provisions of the present code, the analysis includes, where appropriate, the key performance indicators of a non-financial nature, which relate to the company's specific business, such as information pertaining to environmental issues and personnel matters."

<sup>41</sup> Le montant des provisions et garanties pour risques en matière d'environnement, sauf si cette information est de nature à causer un préjudice sérieux à la société dans un litige en cours

<sup>42</sup> see: Commercial Code L225-100 §3

<sup>43</sup> see: Ordonnance 2004-604 and Ordonnance 2004-1382

### 1.2.2.1 Risks - Information and Management

#### **Main risks and uncertainty (Article L 225-100 §4 Commercial Code):**

The two ordinances are direct transpositions of the 2003 Directive:

"The report also includes a description of the main risks and uncertainties the company faces."

#### **Financial risk management (Article L 225-100 §6 Commercial Code):**

Moreover, the annual report must include statements<sup>44</sup> on the use of financial instruments by the company, when relevant for the appreciation of its assets and liabilities, its financial situation and its loss and profits. These indications focus on the objectives and the policy of the company regarding the management of the financial risks. They are also affected by the price, liquidity, credit and cash risks of the company.

### 1.2.2.2 Who has to report on non-financial indicators?

Not all the companies have to report those elements. When limited partnership, limited partnership by shares, limited company and limited liability company are requested to fill an annual report (*rapport de gestion*), the *société par action simplifiée* (SAS) (i.e. simplified company by shares) are not.

Regarding individuals specifically not every tradesman is requested to publish an annual report. Physical persons, even when qualified as traders, do not have to report on non-financial indicators.

#### **For information of Article L 225-100 §3 in fine**

Concerning key performance indicators of a non-financial nature, which relate to the company's specific business, such as information pertaining to environmental issues and personnel matters.

Size thresholds for companies have been set concerning non-financial indicators<sup>45</sup>. Companies that do not meet two of the following criteria do not need to report on these indicators:

- Balance sheet: 14 600 000 €
- Turn over: 29 200 000 €
- Average workforce: 250

However, these thresholds do not apply for companies whose securities are admitted in the stock exchange. Those are automatically subjected to these obligations.

---

<sup>44</sup> Le rapport comporte en outre des indications sur l'utilisation des instruments financiers par l'entreprise, lorsque cela est pertinent pour l'évaluation de son actif, de son passif, de sa situation financière et de ses pertes ou profits. Ces indications portent sur les objectifs et la politique de la société en matière de gestion des risques financiers, y compris sa politique concernant la couverture de chaque catégorie principale de transactions prévues pour lesquelles il est fait usage de la comptabilité de couverture. Elles portent également sur l'exposition de la société aux risques de prix, de crédit, de liquidité et de trésorerie.

<sup>45</sup> see: art. L225-100 §3 in fine

**For information of Article L225-100 §3 to 6<sup>46</sup>**

Size thresholds have been set concerning non-financial indicators as well. Companies that do not meet two of the following criteria do not need to report on these indicators:

- Balance sheet: 3 650 000 €
- Turn over: 7 300 000 €
- Average manning: 50

**For NRE information**

Only companies with securities admitted on the stock exchange<sup>47</sup> are subject to this obligation of information on social and environmental impact.

Practically, automobile companies are to report on all of these elements.

**1.3 Has there been a similar obligation in French law before the EC Modernisation Directive (2003)?**

The new economic regulation law has been effective before the EC Modernisation Directive in 2003. See above and below for more details.

**1.4 How does French law go beyond or lag behind EC standards?**

Regarding financial indicators in the annual report and the annual consolidated report French laws fully transpose the fourth Directive. It goes neither beyond its obligations nor lag behind them.

Regarding non-financial indicators in the annual report, French law fully transposes the EC Directive as well. The NRE law obligations even go a bit beyond the scope of the EC standards. (On the binding effects of these obligation see below 2.1.5)

Regarding non-financial indicators in the consolidated annual report, French law is quite vague (see above 2.1.2.2). Companies must only report on the objectives they assigned to their foreign subsidiaries regarding point 1 to 6 of the article 3 of Decree n°2002-221.

**1.5 Who can enforce these reporting obligations under French law? Can investors go to court for inappropriate reporting on certain risks?****1.5.1 Financial indicators**

Regarding financial indicators, a set of penal sanctions have been enacted to apprehend unfair presentation of results.

---

<sup>46</sup> For details see Annex 1

<sup>47</sup> In France this are around 700 companies.

**Articles L241-3-3 and L243-6** state that managers, chairmen, directors or managing directors have to report every financial year to the members or shareholders, on annual accounts providing a fair representation of the results of the operations for the financial year, financial situation and assets on the expiration of this period. If not doing so, in order to hide the company's true situation, they shall be punished by a prison sentence of five years and a fine of 375,000€. The legal entity can potentially be fined up to 1,875,000€. These penal sanctions do not deprive victims to request damages.

There exists a large case law based on this notion of fair presentation of accounts. It should also be noted the role of the financial market authorities (COB and AMF), which have to ensure that information to the public is accurate (exacte, précise et sincère).<sup>48</sup>

## 1.5.2 Non-financial indicators

### Article L225-102

"Where the Annual Report does not contain the information necessary, any interested party may make an interlocutory application to the Presiding Judge of the Court for an order to the effect that the board of directors or the management, as the case may be, must disclose the said information, subject to a daily penalty if it fails to do so."

"Where the application is granted, any penalty and the expenses of the proceedings shall be payable by the directors or members of the management, as the case may be."

**This provision of article L225-102 seems to make the reporting on non-financial indicators mandatory.**

Unfortunately:

- This article only applies to the requirement included in the NRE law.
- The Decree 2002-221 defines the non-financial indicators that must be in the report in such a broad way ("absence of a general framework concerning the criteria...") that most companies do not fully respect these obligations.
- Moreover, there is no definition of the perimeter of the group in the Decree or in the law. This lack of definition implies that most of the companies do not meet the requirements of the Decree.

In order to assure a better efficiency, it would be quite interesting to define the group in a way that is similar to the IFRS.

---

<sup>48</sup> Article L621-1 of the Monetary and Financial Code  
(Order No. 2000-1223 of 14 December 2000, Official Journal of 16 December 2000)  
(Act No. 2003-706 of 1 August 2003 Article 1, Article 2, Official Journal of 2 August 2003)  
The Financial Markets Authority, an independent public authority having legal personality, deals with protection of the savings invested in financial instruments and all other investments which give rise to public offerings, the information provided to investors, and the proper functioning of the financial instruments markets. It lends its support to the regulation of those markets at a European and an international level.

### 1.5.3 Other legal recourses

Other legal recourse might be used by investors. These methods are based on common French civil and penal law. They have not been used yet, as far as the authors know.

#### 1.5.3.1 Civil law recourses

The shares bought by an investor on a company are bought through a contract; therefore contractual liability can be used.

In order to have a legally binding contract, two wills must meet; both wills must fall on the same issue. If it is not the case, there is no assentation. That is why under French law, both parties have an obligation of information, even though the professional (in this case the company, whose shares are bought) has a stronger obligation of information.

If the company does not provide a full report on the risks, the investor does not possess all the information available.

If the investor does not possess all the information, then he can not give a valid assentation. Therefore, it is legally possible for the investor to ask for the void of the contract.

Practically, regarding automobile companies, if a company does not make full report regarding pollution (for example CO<sub>2</sub> emission during a car life-cycle) the investor can not assess the litigation risks. Therefore, the lack of informed assentation could void the contract.

#### 1.5.3.2 Criminal law recourses

The report on non-financial indicators is public. Therefore, in certain cases, it could be considered misleading advertising<sup>49</sup>. Based on article L 121-1 of the French consumer

---

<sup>49</sup> Article L. 121-1 code de la consommation

I. - Une pratique commerciale est trompeuse si elle est commise dans l'une des circonstances suivantes :

1° Lorsqu'elle crée une confusion avec un autre bien ou service, une marque, un nom commercial, ou un autre signe distinctif d'un concurrent;

2° Lorsqu'elle repose sur des allégations, indications ou présentations fausses ou de nature à induire en erreur et portant sur l'un ou plusieurs des éléments suivants :

a) L'existence, la disponibilité ou la nature du bien ou du service;

b) Les caractéristiques essentielles du bien ou du service, à savoir : ses qualités substantielles, sa composition, ses accessoires, son origine, sa quantité, son mode et sa date de fabrication, les conditions de son utilisation et son aptitude à l'usage, ses propriétés et les résultats attendus de son utilisation, ainsi que les résultats et les principales caractéristiques des tests et contrôles effectués sur le bien ou le service;

c) Le prix ou le mode de calcul du prix, le caractère promotionnel du prix et les conditions de vente, de paiement et de livraison du bien ou du service;

d) Le service après-vente, la nécessité d'un service, d'une pièce détachée, d'un remplacement ou d'une réparation;

e) La portée des engagements de l'annonceur, la nature, le procédé ou le motif de la vente ou de la prestation de services;

f) L'identité, les qualités, les aptitudes et les droits du professionnel;

g) Le traitement des réclamations et les droits du consommateur;

3° Lorsque la personne pour le compte de laquelle elle est mise en oeuvre n'est pas clairement identifiable.

II. - Une pratique commerciale est également trompeuse si, compte tenu des limites propres au moyen de communication utilisé, elle omet, dissimule ou fournit de façon inintelligible, ambiguë ou à contretemps une information substantielle ou lorsqu'elle n'indique pas sa véritable intention commerciale dès lors que celle-ci ne ressort pas déjà du contexte.

Dans toute communication commerciale destinée au consommateur mentionnant le prix et les caractéristiques du bien ou du service proposé, sont considérées comme substantielles les informations suivantes :

code, an advertisement is a communication made to the public. The report on non-financial indicators can be considered as a publication available to the public. Therefore, it can be considered as an advertisement.

If, this advertisement meets the requirement of art. L121-1 of the code de la consommation, then it could be challenged into courts by investors that have bought shares, because of the incomplete and / or false information contained in the report.

## 1.6 Comments by the Authors

The authors of this national analysis have not been able to find any company sentenced for non-compliance with its non-financial reporting obligation. It should be noted that this rather relative efficiency of reporting obligation has been identified by Sherpa as a flaw in French Company Law. In this regard, Sherpa has made proposals<sup>50</sup> of reform within the "Grenelle de l'environnement"<sup>51</sup> to make this reporting obligation compulsory. These proposals have been accepted by the French coalition of NGOs "*Alliance pour la planète*" and are integrated in the current process of negotiation.

---

1° Les caractéristiques principales du bien ou du service ;

2° L'adresse et l'identité du professionnel ;

3° Le prix toutes taxes comprises et les frais de livraison à la charge du consommateur, ou leur mode de calcul, s'ils ne peuvent être établis à l'avance ;

4° Les modalités de paiement, de livraison, d'exécution et de traitement des réclamations des consommateurs, dès lors qu'elles sont différentes de celles habituellement pratiquées dans le domaine d'activité professionnelle concerné ;

5° L'existence d'un droit de rétractation, si ce dernier est prévu par la loi.

III. - Le I est applicable aux pratiques qui visent les professionnels.

<sup>50</sup> These proposals are available, in French on <http://www.asso-sherpa.org/propositions%20SHERPA%20-%20GRENELLE%20Groupe%205-2.pdf>

Others proposals on the same topic are also available, in English on

<http://www.asso-sherpa.org/Sherpa-ECCJ%20Paper%20Redefining%20the%20Corporation%20120907.pdf>

<sup>51</sup> "Grenelle de l'environnement" is an important multi-stakeholder negotiation concerning environmental issues currently taking place in France.

## 2 Italian Law

Chapter written by Emiliano Pellegrino.

### 2.1 How has the reporting obligation on companies set out in Directive 78/660, both subject to the normal accounts and consolidated accounts (=group), been transposed in Italy?

The Italian Government, lawfully authorized by the Italian Parliament with the *Law no. 62 of April 18, 2005*<sup>52</sup>, adopted the *Legislative Decree no. 32 of February 2, 2007*<sup>53</sup> (hereinafter referred to as "**Decree no. 32/2007**"), in the field covered by the European Community Directive 2003/51/EC of the European Parliament and of the Council of June 18, 2003, amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the issue of annual accounts and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings.

The aforementioned Decree no. 32/2007 has actually amended the provisions of the Italian Law concerning annual report, statutory auditing report and consolidated accounts. The Italian legislation on annual accounts and consolidated accounts, prior to the implementation in Italian Law of the Directive 2003/51/EC, was already in compliance with Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC. Therefore the following comments only refer to the new provisions introduced in Italian Law by the Directive 2003/51/EC with reference to the annual report and its compulsory content.

### 2.2 What are the main principles and what are the legal standards? Does the obligation differentiate between financial and non-financial indicators?

#### Annual Report ("Relazione sulla Gestione")

1. The Annual report is regulated by the following provisions of the Italian Law:

- article 2428 of the Italian Civil Code with reference to companies limited by shares;
- article 40 of the Legislative Decree no. 127 of April 9, 1991 with reference to entities subject to consolidated balance sheet;
- article 3 of the Legislative Decree no. 87 of January 27, 1992 with reference to banks and other financial institutions, and
- articles 94 and 100 of the Legislative Decree no. 209 of September 7, 2005 with reference to insurance undertakings.

---

<sup>52</sup> The so-called "*2004 Community Legislation Implementation Law*" establishing provisions for the fulfilment of obligations deriving from Italy's membership of the European Communities, and in particular articles 1, 2 and Annex B.

<sup>53</sup> Published in *Gazzetta Ufficiale della Repubblica*, no. 73 of March 28, 2007.

The Decree no. 32/2007 amended all of the aforementioned provisions by introducing the obligation of indicating additional information in the annual report.

2. Article 1, § 1, of the Decree no. 32/2007 amended article 2428 of the Italian Civil Code regulating the content of the **annual report** of the companies limited by shares<sup>54</sup>.

As amended, the current 1<sup>st</sup> paragraph of article 2428 stipulates that the annual report shall include:

“a fair, true and complete analysis of the company’s position and of the development and performance of its business management, [...] as well as a description of the principal risks and uncertainties that it faces”<sup>55</sup>.

The current version of the provision strengthens in its comment the value and the importance of the annual report since company directors have now to arrange a detailed and objective description of the company’s position and of the development and performance of the company’s business management. They have to explain the reasons for their performance results reported in the balance sheet in the relevant financial year. Therefore, the annual report has a stronger informative aim in order to give the reader the opportunity to appropriately evaluate the company on the basis of clear and precise information, as highlighted by some authors<sup>56</sup>.

Regarding the current obligation to include also a description of the principal risks and uncertainties that the company faces within the annual report, it is surely worth considering that this information is normally not deducible from the balance sheet and therefore it is not informing the readers about risks related to the operations carried out by the company as well as the solvency of debtors, company policies, market price competition, variation in price and in demand and so forth. To this regard, some authors<sup>57</sup> pointed out that company directors shall highlight any fact and situation that might question the operating capacity of the company (the so-called *going concern*).

Finally, Decree no. 32/2007 introduced a new paragraph in the original text of article 2428 of the Italian Civil Code. This paragraph provides that the aforementioned analysis:

<sup>54</sup> It has to be highlighted that article 2428 had already been recently amended by article 3 of the Legislative Decree no. 394 of December 2003, adopted by the Italian Government to implement Directives 2001/65/EEC (in force as from the 1st of January 2005). The said article has introduced, in the text of article 2428, the paragraph 6-bis, stating that the annual report has to contain targets and policies of the company on financial risk management and financial backing policy for the main categories of covered operations and the exposition of the company to the price risk, credit risk, liquid assets risk and cash flow risk. This amendment represents a clear answer of the legislator to the frequent use of derivative financial tools by means of which it is possible to arrange operations out of balance sheet that have to be reported in special accounts without prejudicing the balance sheet data. To this respect, regarding the information to be reported in aforementioned special accounts, company directors shall understand when the use of financial tools is prominent from a quantitative and qualitative point of view. Similar, article 40 of the Legislative Decree no. 127 of April 9, 1991 and article 3 of Legislative Decree no. 87 of January 27, 1992 have been amended.

<sup>55</sup> See the current Italian text of article 2428, 1<sup>st</sup> paragraph, taken from the original: « Il bilancio deve essere corredato da una relazione [...] contenente un'analisi fedele, equilibrata ed esauriente della situazione della società e dell'andamento e del risultato della gestione [...], nonché una descrizione dei principali rischi e incertezze cui la società è esposta ».

<sup>56</sup> See Quatraro, *La riforma del diritto societario*, edited by Lo Cascio, Vol. 6, Milano, 2003, pag. 314 and Salaria, *Caratteri generali del bilancio e principi di redazione*, in *Le società*, no. /1991, pag. 1611.

<sup>57</sup> See Cavalluzzo and Di Marzio, *Revisori "fotografi" dell'impresa; controlli europei. La direttiva 51 raccorda bilancio e relazione di gestione*, in *Ilsole24ore*, 6 febbraio 2006.



“is consistent with the size and the complexity of the company’s business and contains, to the extent necessary for an understanding of the company’s development, performance and position, both financial and, where appropriate, non-financial key performance indicators, relevant to the specific business of the company, including information relating to environmental and employee matters. The analysis also contains, if appropriate, references to the amounts reported in the balance sheet and some further clarifications on the same”<sup>58</sup>.

According to this provision, the body of the company’s government shall enrich the content of the annual report with both financial and non-financial indicators necessary for a better comprehension of the company’s development, performance and position. To this respect, some authors<sup>59</sup> underline that the annual report shall indicate important data such as for instance, the leverage, the locking up financial cover rate, or the ROI (*Return on Investment*), ROS (*Return on Sales*) and ROE (*Return on Equity before Tax*).

In addition, the annual report shall also provide the reader with further information that is not solely financial information but directly related to the company’s core business: such as for instance, market data, data related to the performance of the company in connection with the market trend etc..

The annual report shall also include information related to environmental and employee matters. As a consequence, by the wording of article 2428 of the Italian Civil Code, it seems that the annual report shall also inform on the measures adopted by the company to properly and efficiently organize the working environment and the human resources as a key factor for the success of the company. Concerning environmental protection, companies should communicate, for instance, any disposal of waste and recycling initiatives or campaigns carried out.

Finally, the annual report shall include references to the amounts reported in the balance sheet and further clarifications. The analysis shall not be an abstract representation but an analytical report supported by direct references to the amounts reported in the balance sheet.

3. Article 1, § 2 of the Decree no. 32/2007 has also amended<sup>60</sup>, Art. 40 of the *Legislative Decree no. 127 of April 9, 1991*<sup>61</sup> adopted by the Italian Government in order to implement Directives 78/660/EEC and 83/349/EEC on annual and consolidated accounts (hereinafter referred to as "**Decree no. 127/1991**").

<sup>58</sup> See the current Italian text of article 2428, 2<sup>nd</sup> paragraph, taken from the original: « *L'analisi di cui al primo comma è coerente con l'entità e la complessità degli affari della società e contiene, nella misura necessaria alla comprensione della situazione della società e dell'andamento e del risultato della sua gestione, gli indicatori di risultato finanziari e, se del caso, quelli non finanziari pertinenti all'attività specifica della società, comprese le informazioni attinenti all'ambiente e al personale. L'analisi contiene, ove opportuno, riferimenti agli importi riportati nel bilancio e chiarimenti aggiuntivi su di essi* ».

<sup>59</sup> See Patimo, *Indici di performance nella relazione sulla gestione con l'avvenuto adeguamento alla linee europee*, in Guida normativa, n. 14/2007, pag. 50.

<sup>60</sup> In the same form as specified above under § 2. Therefore, considerations and comments previously made for art. 2428 of the Italian Civil Code are valid also for art. 40 of Decree no. 127/1991.

<sup>61</sup> Published in *Gazzetta Ufficiale della Repubblica*, no. 90, Supplemento ordinario of April 17, 1991.

In addition, it has to be underlined that article 1, § 2 of the Decree no. 32/2007 introduced a new paragraph (no. 2 – *bis*) in the text of the Decree no. 127/1991, which now provides also that:

“the consolidated annual report and the annual report provided by article 2428 of the Civil Code can be materially provided by a single document, emphasizing, where appropriate, those questions relevant for the group of the companies included in the consolidation”<sup>62</sup>.

4. Article 1, §3 of the Decree no. 32/2007 also amended<sup>63</sup>, art. 3 of the *Legislative Decree no. 87 of January 27, 1992*<sup>64</sup> adopted by the Italian Government to implement Directives 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 89/117/EEC on the obligations of branches established in a member state of credit institutions and financial institutions having their head offices outside that member state regarding the publication of annual accounting documents (hereinafter referred to as "**Decree no. 87/1992**").

5. Article 1, §4 of the Decree no. 32/2007 has also amended, in the same form as specified under §2 and §3 above, article 94 of the *Legislative Decree no. 209 of September 7, 2005*<sup>65</sup> adopted by the Italian Government in order to implement Directive 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings (hereinafter referred to as "**Decree no. 209/2005**").

Regarding these types of companies, Article 1, §4, b), of the Decree no. 32/2007 introduced the paragraph named *e-bis*) in the text of the Decree no. 209/2005, now provides that the annual report:

“has to contain objectives and policies of financial risk management and financial backing policy for the main categories of covered operations and the exposition of the company to the price risk, credit risk, liquid assets risk and cash flow risk”<sup>66</sup>.

6. Article 1, §5 of the Decree no. 32/2007 also amended, in the same form as specified above under §2, §3 and §5, article 100 of the above said Decree no. 209/2005 concerning the consolidated annual report for insurance undertakings controlling subsidiaries<sup>67</sup>.

---

<sup>62</sup> See the current Italian text of article 40, § 2 – *bis*, of Decree no. 127/1991 taken from the original: «*La relazione di cui al comma 1 e la relazione di cui all'articolo 2428 del codice civile possono essere presentate in un unico documento, dando maggiore rilievo, ove opportuno, alle questioni che sono rilevanti per il complesso delle imprese incluse nel consolidamento*».

<sup>63</sup> In the same form as specified under §2 and §3 above. Therefore, considerations and comments previously made for art. 2428 of the Italian Civil Code and art. 40 of Decree no. 127/1991 are valid also for art. 3 of Decree no. 87/1992.

<sup>64</sup> Published in *Gazzetta Ufficiale della Repubblica*, no. 37 of February 14, 1992.

<sup>65</sup> Published in *Gazzetta Ufficiale della Repubblica*, no. 239 of October 13, 2005 - Supplemento Ordinario no. 163.

<sup>66</sup> See the current official Italian text of article 94, §1, *e-bis*), of Decree no. 209/2005 taken from the original: *e-bis*) «*gli obiettivi e le politiche di gestione del rischio finanziario e la politica di copertura per principali categorie di operazioni coperte e l'esposizione dell'impresa ai rischi di prezzo, di credito, di liquidità e di variazione dei flussi*». See also note no. 3 above and relevant comments and considerations therein.

<sup>67</sup> Therefore, considerations and comments previously made for art. 2428 of the Italian Civil Code, art. 40 of Decree no. 127/1991, art. 3 of Decree no. 87/1992 and art. 94 of Decree no. 94/2005 are valid also for art. 100 of the latter.

**Characteristics of the annual report according to the amendments introduced by Decree no. 32/2007 (implementation of Directive 2003/51/EC):**

From the aforementioned legislation, as amended by Decree no. 32/2007, the following characteristics of the annual report can be summarized:

- Companies, both subject to normal accounts and consolidated accounts, must submit, jointly with the balance sheet, an additional annual report and other accounting information. (But this obligation is not fairly new.)
- The annual report, in any case, is not part of the balance sheet, so it shouldn't be used to make up errors and omissions of the balance sheet.
- The annual report shall include additional financial and non-financial information aimed at providing "a fair, true and complete analysis of the company's position and of the development and performance of the company's business management".
- With respect to future business, the annual report must also describe "the principal risks and uncertainties that the company faces".
- The annual report is part of the financial reporting of a company or group.
- It is (and was) a mandatory report.
- With respect to past, present and future performance, and "to the extent necessary for an understanding of the company's development, performance and position" the annual report shall include, both financial and, where appropriate, non-financial key performance indicators, relevant to the specific business of the company" and
- "To the extent necessary for an understanding of the company's development, performance and position", the report shall include information relating to environmental and employee matters.
- The analysis also contains, if appropriate, direct references to the amounts reported in the balance sheet and further clarifications.
- Compared to the past it seems that the current legislation on annual reports strengthens the value and meaning of the latter in order to allow the reader of the financial reporting and accounts to get a complete and truthful acknowledgement about the company or group.

**2.3 Has there been a similar obligation in Italian Law before the EC Modernisation Directive (2003)?**

As mentioned above, Directive 2003/51/EC introduced some new provisions aiming at enriching the content of the annual report. Before the implementation of the aforementioned Directive in Italian Law, companies, both subject to normal accounts and consolidated accounts, had to arrange an annual report that included only financial information. Moreover, the annual report had an ancillary nature with respect to the balance sheet, and was drafted in a "conversional style".

On the contrary, the annual report is currently more analytical.

Nevertheless, the annual report has always had a mandatory nature seeing that companies were (and are) obliged to file the annual report, together with the balance sheet and other reports, before the competent Chamber of Commerce.

In addition, there were different opinions on whether or not errors, omissions or shortage in the content of the annual report could affect the validity of the balance sheet. On the other hand, there are some cases in which judges stated that defects or mistakes in the annual report do affect the validity of the resolution of approval of the balance sheet<sup>68</sup>.

Article 2428, §3, provided also that quoted companies must submit a half semester report according to C.O.N.S.O.B.<sup>69</sup> regulations.

In any case, as discussed<sup>70</sup> above, before the implementation of the Directive 2003/51/EC, Legislative Decree no. 394/2003 had introduced in the text of article 2428 a specific obligation for those companies using financial instruments to be considered for a financial evaluation of the company and its turnover. In fact, in this case, the company's directors shall give detailed and complete information in the annual report on the targets and policies of the company with respect to financial risk management and financial backing policy for the main categories of covered operations and the exposition of the company to the price risk, credit risk, liquid assets risk and cash flow risk.

## 2.4 How does Italian law go beyond or lag behind EC standards?

At the moment, Italian legislation complies with the EC standards / requirements introduced by the Modernisation Directive. According to its provisions, the Directive 2003/51/EC should have been implemented in Italian law by January 1<sup>st</sup> 2005. Although the Italian Parliament authorized the Italian Government to implement the Directive 2003/51/EC in 2005, the latter adopted the relevant decree not before February 2<sup>nd</sup> 2007. Therefore, the provisions of the Modernisation Directive became applicable in Italian law very recently, and as a consequence companies shall comply with the new provisions as from the 2008 financial year according to Art. 4 of the Decree no. 32/2007<sup>71</sup>. On the other hand, some authors<sup>72</sup> think that new provisions on annual reports should be applied as from the balance sheet submitted at the 31<sup>st</sup> of December 2006. That is mainly because Directive 2003/51/EC contains compulsory provisions, which should have been implemented in Italian law as from January 1<sup>st</sup> 2005.

---

<sup>68</sup> See Cass., 16.12.1982, n. 6942, in Mass. Foro it., 1982, Trib. Milano, 5.03.1979, in Giur. Comm., 1980, II, p. 108.

<sup>69</sup> C.O.N.S.O.B. (*Commissione Nazionale per le Società e la Borsa*) is the Italian Authority controlling Stock Exchange and Companies (for further information see [www.consob.it](http://www.consob.it)).

<sup>70</sup> See note no. 3 above.

<sup>71</sup> New provisions should be applied to annual reports to be submitted in 2009, with reference to the 2008 financial year.

<sup>72</sup> See Giuseppe Verna, *Novità in tema di bilanci e delle relazioni che lo corredano*, in *Le società*, marzo 2007, no. 3, p. 265.

In such a situation, it may be appropriate to ask the courts to interpret the internal law in compliance with the relevant EC law. At the moment, there are no cases or judgements to be pointed out to this regard.

## **2.5 Who can enforce these reporting obligations under Italian Law? Can investors go to court for inappropriate reporting on certain risks?**

In terms of enforceability of reporting obligations under Italian Law, the following should be considered:

As mentioned above, defects, omissions or shortage in the content of the annual report could affect the validity of the balance sheet. The Civil Court where the company has its registered office is competent for the settlement of these matters. Company shareholders, directors and statutory auditors are normally entitled to file an action for failure of compliance.

Depending on the type of companies (quoted or non-quoted) shareholders must hold a qualified number of shares to formally impugn the validity of the resolution approving the balance sheet (1 per thousand if quoted, 5% if non-quoted). By-Law could reduce or exclude this minimum.

On the other hand, shareholders having no right to contest the validity of the balance sheet can, in any case, file an action asking for damages if the resolution of the meeting affects their interests. The right to impugn the validity of the resolution or to ask for damages is subject to a short term.

Moreover, what about a company which does not comply with the obligation to report certain risks according to the current legislation?

In this case, we may assume that the potential investor (like any other shareholder not actually involved in the company) would not be able to properly assess how the real value of the company and this situation could limit and influence its choice of investment.

At the moment, there are no elements to state if a potential investor is entitled to go to Court for non compliance but, depending upon the specific case, an action for damage could be a solution to explore, if fully grounded.

### 3 German Law

On the basis of an extensive analysis<sup>73</sup> of existing statutory rules it can be summarised that domestic law, in particular the German Code of Commerce<sup>74</sup>, contains detailed duties concerning disclosure of information about climate risks, mirrored by the right of shareholders and other investors to disclose such risks for the purposes of their investment decisions. According to § 264 HGB publicly traded companies, and in particular their management<sup>75</sup> must develop and publish consolidated accounts and an annual report (*Lagebericht*). § 289 HGB (annual report) and § 315 HGB (group annual report) contain concrete obligations for assessing and disclosing risks and opportunities by way of forecast reporting for the benefit of shareholder, but also any other interested party. These provisions fully transpose Article 46 of Directive 78/660 into national law.

The obligations concerning the disclosure of risks and uncertainties in the annual report encompass risks and opportunities due to climate change or climate change regulations as well. The annual report has to present a fair review of the development and performance of the company's business and of its position – it must provide a so-called "true and fair view" of the position of the company, which must correspond to reality. (§ 289 para. 1).

The purpose and objective of recent EC and German legislation (Accounts Amendment Law<sup>76</sup>, 2004), which also amends §§ 289 and 315 HGB, are to improve the information content of annual reports, as well as their comparability. Ecological and social aspects, as non-financial aspects of the business activity, must now be included in a more transparent manner than before. However, even before the Modernisation Directive, risks pertaining to climate change were to be included in the annual report, given that they in fact constitute financial risks.

In line with most of the recent EC legislation in the field of regulation of capital markets, these new amendments are aimed at strengthening investor protection by improving transparency and also – in the case of the German legislation transposing EC law – improving conditions for international financial markets operating in Germany. The desired effect for shareholders is to obtain information for their investment decisions that is comparable to the information that the management of the respective company holds for the purposes of its operational decisions.

This purpose and objective of the applicable legislation guides the legal interpretation of the relevant provisions.

With respect to reporting about past activities, § 289 para. 1, 3<sup>rd</sup> sentence contains the duty to report using KPIs that are of primary importance to the business performance ("*für die Geschäftstätigkeit bedeutsamsten*"). The new para. 3 of § 289 HGB (as well as § 315) contains the express duty to incorporate non-financial indicators in the annual report.

---

<sup>73</sup> Verheyen (2008): Informations- und Berichtspflichten der deutschen börsennotierten Automobilkonzerne im Hinblick auf die durch den globalen Klimawandel und eine weitere Ölpreissteigerung hervorgerufenen Risiken. Legal opinion. Germanwatch (ed.). Bonn, Germany.

<sup>74</sup> In German language: HGB=Handelsgesetzbuch.

<sup>75</sup> board (*Vorstand*)

<sup>76</sup> *Bilanzrechtsreformgesetz*

This means that the board must disclose and discuss environmental and social aspects necessary for an understanding of the company's development, performance and position in the past year, i.e. also any aspects related to climate change or climate change regulation that have been "of relevance" ("*von Bedeutung*") to the business.

Non-financial indicators include for example water and energy consumption emissions (including CO<sub>2</sub> emissions) as well as eco-auditing measures.

Financial indicators are features and factors/circumstances, that can be used as tools to assess company performance and that directly impact the company's value.

The assessment of market development and financial market's interests shows that climate risks cannot be comprised solely by non-financial indicators, but must indeed be regarded as financial risks, and can thus be related to "hard" indicators<sup>77</sup>.

It is certainly difficult to decide, which KPIs are of such primary importance, however, with regard to climate risks for automobile companies it seems that averaged fleet consumption is the one KPI, which is of primary importance for the sector and that is easily accessible and would not overburden the annual report in any way<sup>78</sup>.

With respect reporting about the future, § 289 I 4 HGB contains the duty to develop a forecast report, which must "describe and discuss the probable development of the company with its essential risks and opportunities" – irrespective of any KPIs chosen. As climate and oil price risks are of financial importance to automobile companies, they also fall within the scope of this duty. The basic assumptions made for the forecast are to be disclosed. This duty is forward-looking and not merely related to past business.

The exact scope and extent to which this provision in § 289 I 4 HGB obliges companies to develop forecasts in their annual report is unclear or even disputed in German legal literature, which, however, is often still based on old law and does not take into account the recent EC legislation. However, the legal analysis undertaken provides us with some decisive answers:

- Generally, companies must report about those issues and facts that are of importance to a shareholder or investor, taking into account the obligation to report in an balanced manner;
- The forecast element in the annual report must contain statements regarding the future expectations of the group/company, and development trends, as well as a discussion of the factors that lead to the respective expectations (factors of influence);
- The separation of "risk report" and "forecast report", as prescribed by the German Standard Setting Institution, is not foreseen by the law, neither is it practical for the investor;

<sup>77</sup> Hard indicators are issues that have financial implications for companies.

<sup>78</sup> See also the outcome of the latest study of the German society of investment professionals DVFA (ed.): Financial Papers. KPIs for ESG. Key Performance Indicators for Environmental, Social and Governance Issues. A Guideline for Corporates on how to report on ESG and a benchmark for investment professionals on how to integrate ESG into Financial Analysis. No.08/08\_e Dreieich 2008, p. 30. See also: Hesse, A., Deloitte (ed.): Added value, long term. Non-financial sustainability key performance indicators on their way into financial reports of German companies, Duesseldorf, Munich 2006. As well as: Standard & Poor's (ed): Proposed EU clampdown on CO<sub>2</sub> emissions threatens profitability of Europe's automakers, 2007.



- The duty to report and forecast does not mean that every aspect and factor must be reported upon. Yet, factors or events that have – in the past – been worth a specific (political or legal) intervention by the management of the pertinent company/group are *per se* "essential" in the sense of the law and for the investor;
- Moreover, the question whether a specific element of risk or opportunity is "essential" can be answered objectively. For example, should infrastructure of the respective company be endangered by the impacts of climate change (increased risk of floods or storms) and thus imply higher insurance rates to be paid, this can objectively influence the value of a company in the future;
- The question of what is deemed to be "essential" is thus not at the discretion of the management/board of the company as the executor of the reporting duty. The term "essential" is, in this context, simply a non-defined legal term, which can and must be fully interpreted in case-by-case application by the courts. The strengthened duty to forecast is meant to deliver a value judgement by the management to the investor; as soon as there is a value judgement on any factor by the management, this also has to be disclosed – taking into account the duty to report in a balanced manner;
- The basic fiduciary duty in German law contains an element, which prohibits the board from making too optimistic forecasts. If certain factors are not disclosed in the annual report, because they could be seen as damaging for the company, this would infringe the legal duty in § 289 I 4 HGB;
- As soon as factors are deemed essential for the business expectations in the future, such as the possible adoption of CO<sub>2</sub> emission restriction statutes in China or the EU, or substantial oil price increases, an attempt must be made to quantify these for the benefit of the investor;
- The current literature view that, in the context of forecasts, it is sufficient to report qualitatively, i.e. in verbal and not numerical terms, seems no longer valid. The recent changes made to §§ 289 and 315 HGB suggest that investors should be able to base their investment decisions on reports such as the annual report with its forecast. Such information is only effectively processable by the financial markets if it is quantified;
- Given the purpose and objective of the recent changes, it is no longer justifiable to restrict the forecast period to 2 years (as is currently the case under German accounting standards). In reality, investment decisions are often bound by the terms of specific funds, and individual investors aim at middle- to long-term secure investments. The forecast period must therefore be oriented towards fulfilling the will of the legislators, which was to provide the investors with sufficient information to make such choices.

German law is generally consistent with the EC minimum standard and even exceeds it; in particular, because companies must also report not only about risks, but also about "opportunities".



## Part Three: The Legal Requirements and the Practice

On the basis of the legal analysis of the EC minimum standard for reporting, a parallel study was conducted for Germanwatch by *Hesse* to evaluate the standard of annual reports of all major European automobile companies.<sup>79</sup>

Annual Reports of the year 2006 were analysed – i.e. the status of reports published in 2007, four years after the enactment of the Modernisation Directive and two years after it had to be transposed into national law<sup>80</sup>. It should also be noted that the general duty to report about risks with financial implications existed in national legislation well before the Modernisation Directive.

The evaluation by *Hesse* shows that there is a gap between the legal requirements on the European and domestic (Italian, French and German) level regarding climate risks and the reporting practice. The following section summarises *Hesse*'s methods and findings:

- The annual reports of the European automobile industry were analysed with respect to whether they meet the requirements of the Directive 78/660/EEC, which regulates the minimum legal requirements for annual accounts of companies, and whether financial and non-financial key performance indicators relevant to particular businesses were included. In particular the reports were evaluated regarding the reporting standards on climate risks, climate regulation risks (fleet consumption) and oil price risks.
- Annual reports were analysed focusing on reporting on the following elements: fleet consumption (opportunities and risks of regulative measures regarding the fuel consumption of different types of vehicles and the whole company); oil price changes; energy and greenhouse gas intensity of the production; litigation risks; lobbying activities; outlook and ratings.
- With the current information provided in the annual reports 2006, **analysts and investors are not able to appropriately evaluate the performance of the company** regarding financial and non-financial risks and opportunities **caused by climate change**.
- The evaluation shows a **clear gap between the legal requirements on the European and domestic** (German, Italian and French) **level**. It seems that the legislation in France leads to more comprehensive annual reports regarding sustainable issues.
- However, **no analysed company** appropriately **fulfils the requirements** of the EC and domestic accounting law. The most important sustainable development key performance indicator for investors and analysts - the **sales-weighted average fleet consumption for 2006 - has not been disclosed** by any of the car companies.

---

<sup>79</sup> see: Hesse (2007): Climate change risk reporting in the annual reports 2006 of the European automobile industry. Germanwatch (ed.). Bonn, Germany.

<sup>80</sup> The deadline was 1<sup>st</sup> January 2005 (Art 5 of Directive 2003/51).

- The results of the study also indicate that German companies report least adequate regarding the performance indicator “fuel consumption” of different types of vehicles and “fleet consumption” of the whole company, while French companies received the best ratings in comparison.
- **A quantified risk analysis on a mid-term horizon** (more than 2 years) **hasn’t been done** by any of the European businesses. The time horizon for the formal business outlook regarding financial and non-financial risks and opportunities should be expanded from 2 years to 5 to 15 years where appropriate.
- So far there is a **lack of monetarily quantified information** regarding climate change impacts. This includes the financial and non-financial risks as well as the opportunities for companies, e.g. fuel price; shift in consumer behaviour and regulatory environment.

These results show that at least the spirit of EC legislation aimed at improving investment transparency and the quality of information provided by management has not had impacts on the important field of climate risks. The main study<sup>81</sup> conducted for Germany has, reasoned in detail, concluded that there is a certain degree of non-compliance with the reporting obligations, certainly with respect to risk reporting, but also possibly with respect to the usage of climate-related KPIs. By means of *Hesse’s* findings it is possible to argue that on the basis of EC legislation alone, automobile companies still have to improve their reporting standards greatly to comply with the law in future.

---

<sup>81</sup> See: Verheyen: Informations- und Berichtspflichten der deutschen börsennotierten Automobilkonzerne im Hinblick auf die durch den globalen Klimawandel und eine weitere Ölpreissteigerung hervorgerufenen Risiken. Bonn 2008. The legal opinion can be downloaded at: <http://www.climate-mainstreaming.net/auto08.htm>

## Annex

### 1 Terms of Reference for the short legal analysis of transposition of EC legislation with respect to annual reports in Italy and France

#### 1. Background (omitted)

#### 2. General background of EC Legislation (omitted, see Part One of this Study)

#### 3. Questions:

a) How has this obligation on companies, both subject to the normal accounts and consolidated accounts (=group), been transposed in France/Italy? What are the main principles and what are the legal standards? Does the obligation differentiate between financial and non-financial performance indicators?

Please include French/Italian text taken from the original, now applicable French/Italian laws with full title, year and reference and translate the pertinent provision (only those) into English. If applicable, include case law.

b) Has there been a similar obligation in French/Italian law before the EC Modernisation Directive (2003)?

c) How does the French/Italian law go beyond or lag behind the EC standard?

d) Who can enforce these reporting obligations under French/Italian law? Could an investor go to court for failure to report on certain risks?

(...)

End.

## 2 Relevant translated French law

*Unauthorised Translation by the Author*

**Ordonnance 2004-604 du 24 juin 2004<sup>82</sup> et Ordonnance 2004-1382 du 20 décembre 2004<sup>83</sup>:**

### Article L225-100

1. An ordinary general meeting is held at least once each year within six months of the close of the financial year, without prejudice to any extension of that time limit by a court decision.
2. The board of directors or the executive board presents its report and the annual accounts to the meeting and also, where applicable, the consolidated accounts and the management report relating thereto.
3. The said report includes an objective and exhaustive analysis of the company's business development, results and financial position, and in particular its borrowings relative to the volume and complexity of the business. To the extent necessary for an understanding of the company's business development, results or position, and independently of the key performance indicators of a financial nature, which must be included in the report by virtue of other provisions of the present code, the analysis includes, where appropriate, the key performance indicators of a non-financial nature, which relate to the company's specific business, such as information pertaining to environmental issues and personnel matters.
4. The report also includes a description of the main risks and uncertainties the company faces.
5. The analysis referred to in the third paragraph contains, where applicable, references to the figures shown in the annual accounts and additional explanations relating thereto.
6. The report also contains indications concerning the company's use of financial instruments, when this is relevant for an evaluation of its assets, its liabilities, its financial position and its profits or losses. These indications relate to the company's objectives and policy in regard to financial risk management, including its policy on the hedging of each main transaction category envisaged for which hedge accounting is used. They also relate to the company's exposure to price, credit, liquidity and cash-flow risks.
7. A summary table of the powers granted to the board of directors or the executive board by the general meeting of shareholders in connection with capital increases pursuant to Articles L. 225-129-1 and L. 225-129-2 is attached to the said report. The table shows the use made of those powers during the financial year.
8. In their report, the auditors comment on the fulfilment of the task entrusted to them by Article L. 225-235.
9. The meeting deliberates and rules on all matters relating to the annual accounts and, where applicable, the consolidated accounts, for the previous financial year.
10. It exercises the powers vested in it, inter alia, by Article L. 225-18, the fourth paragraph of Article L. 225-24, the third paragraph of Article L. 225-40, the third paragraph of Article L. 225-42 and Article L. 225-45, or, where applicable, Article L. 225-75, the fourth paragraph of Article L. 225-78, Article L. 225-83, the third paragraph of Article L. 225-88 and the third paragraph of Article L. 225-90.

<sup>82</sup> <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0400082R>

<sup>83</sup> <http://admi.net/jo/20041222/ECOX0400291R.html>

**Article L225-102**

(...)

Where the Annual Report does not contain the information referred to in the first sub-paragraph, any interested party may make an interlocutory application to the Presiding Judge of the Court for an order to the effect that the board of directors or the management, as the case may be, must disclose the said information, subject to a daily penalty if it fails to do so.

Where the application is granted, any penalty and the expenses of the proceedings shall be payable by the directors or members of the management, as the case may be.

**LOI no 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques****Article L225-102-1**

(...)

It also includes a list of information as laid down in a *Conseil d'Etat* decree concerning the manner in which the company deals with the social and environmental consequences of its business. The present paragraph does not apply to companies whose securities are not admitted to trading on a regulated market.

The provisions of the last two paragraphs of Article L225-102 apply to the information referred to in the present article.(...)

**Decree N° 2002-221 of February 20th, 2002 relative to the implementation of the article L. 225-102-1 of the Code of commerce and modifying the decree N° 67-236 of March, 23rd 1967 on company law**

**Art. 1.** - In the above mentioned decree of March, 23rd 1967, the following article 148-2 is being inserted, after the article 148-1:

"Art. 148-2. - By application of the fourth paragraph of the article L. 225-102-1 of the Code of Commerce, the following social information must appear in the report of the board or of the executive board:

- a) Total workforce, recruitment's with a distinction between fixed term contracts and permanent contracts and with an analysis of the possible difficulties in recruiting, of the redundancies and their motives, of overtime, of sub-contracted labour.
- b) If need be, information relating to staff reduction and employment safeguard plans, to the efforts made for staff redeployment, reemployment and subsequent accompanying measures;
  1. Organisation of working hours, their duration for full time and part time wage earning employees, absenteeism and its motives;
  2. Wages and their evolution, welfare costs, the application of the Title IV, Book IV of the code of Labour, professional equality between women and men;
  3. Industrial relations and the assessment of collective bargaining agreements;
  4. Health and safety conditions;
  5. Training;
  6. Employment and integration of disabled workers;
  7. Company benefits and social schemes;
  8. Importance of sub-contracting.

The report details how the company takes into account the territorial impact of its activities as far as employment and regional development are concerned.

It describes, if need be, the relations the company develops with associations for social integration, educational institutions, associations for the protection of the environment, consumers' associations and neighbourhood populations.

It indicates the importance of sub-contracting, how the company promotes to its subcontractors the provisions stipulated by the fundamental conventions of the International Labour Organisation and how the company makes sure its subsidiaries abide by them.

It indicates furthermore the way the foreign subsidiaries of the company take into account the impact of their activities on the regional development and neighbourhood populations.

**Art. 2.** - In the same decree is inserted an article 148-3 after the article 148-2:

"Art. 148-3. - Must appear in the same terms, in the report of the board or of the executive board, the following information on the environmental consequences of the activity of the company, relatively to its specific nature and impacts:

1. Consumption of water resources, of raw materials and energy and description, if need be, of the measures taken to increase energy efficiency and the use of renewable energies, conditions of soil use, air - water - soil pollution emissions that could affect dramatically the environment, the list of which will be determined by an order of the ministers of the Environment and of the Industry, noise and olfactory pollution and waste;
2. Measures taken to limit the damage to biological balance, to the natural environment, to the protected animal and vegetal species;
3. Assessment or certification actions taken in terms of environmental protection;
4. Actions taken, if need be, to ensure the conformity of the company's activity with the legal provisions in that field;
5. Expenditures made to prevent the consequences of the company's activity on the environment;
6. Existence within the company of internal departments in charge of environmental management issues, training and information of employees on these issues, means dedicated to the reduction of environmental risks as well as the organisation put in place to deal with pollution accidents with consequences beyond the company's sites;
7. Amount of provisions and guaranties allocated for environmental risks unless this information is likely to cause a serious prejudice to the company in an ongoing lawsuit;
8. Amount of compensation for environmental damages paid during the fiscal year in execution of a court order and measures taken to repair these environmental damages;
9. All elements on the objectives the company assigns to its foreign subsidiaries on above paragraphs 1° to 6°.

### 3 Relevant non-translated French law

#### Décret 83-1020 du 29/11/1983<sup>84</sup>

**Article 17** : « Pour l'application du 3e alinéa de l'article 10 du code de commerce relatif à l'adoption d'une présentation simplifiée des **comptes annuels** : 1° En ce qui concerne le **bilan** et le **compte** de résultat (...)

2° En ce qui concerne l'**annexe** (...) ».

**Article 3** : « Les mouvements **affectant le patrimoine** de l'entreprise sont enregistrés **opération par opération et jour par jour** pour le livre-journal. Tout enregistrement comptable précise l'origine, le contenu et l'imputation de chaque donnée ainsi que les références de la pièce justificative qui l'appuie. »

**Article 24** : (...) l'annexe doit comporter toutes les **informations** d'importance **significative** sur la situation patrimoniale et financière et sur le résultat de l'entreprise.

#### Annexe de l'Arrêté du 27/04/1982<sup>85</sup>

**Article 130-1** établissement des comptes annuels : « Le **bilan**, le **compte** de résultat et l'**annexe** qui forment un tout indissociable sont établis à la clôture de l'exercice au vu des enregistrements comptables et de l'inventaire. »

**Article 120-1** du Plan Comptable général : « La comptabilité est un système d'organisation de l'information financière permettant de saisir, classer, enregistrer des données de base chiffrées et présenter des états reflétant une **image fidèle du patrimoine**, de la situation financière et du résultat de l'entité à la date de clôture. » **Article 511-1** : « Les documents de synthèse, qui comprennent nécessairement le bilan, le compte de résultat et une annexe, mettent en évidence **tout fait pertinent**, c'est-à-dire susceptible d'avoir une **influence** sur le jugement que leurs destinataires peuvent porter sur le **patrimoine, la situation financière et le résultat** de l'entité ainsi que sur les décisions qu'ils peuvent être amenés à prendre. »

**Article L 123-14. 2** : « Lorsque l'application d'une prescription comptable ne suffit pas pour donner une image fidèle, des **informations complémentaires** doivent être fournies dans l'annexe ».

« Ce rapport financier annuel (...) comprend les **comptes annuels**, les comptes consolidés le cas échéant, un **rapport de gestion**, une déclaration des personnes physiques qui assument la responsabilité de ces documents et le rapport des commissaires aux comptes ou des contrôleurs légaux ou statutaires sur les comptes précités. ».

#### Loi 2005-842 du 26/07/2005<sup>86</sup>

**Article L.451-1-2 – I** du Code monétaire et financier : « Les émetteurs français (...) déposent auprès de l'Autorité des marchés financiers un **rapport financier annuel** dans les quatre mois qui suivent la clôture de leur exercice. »

**Article L 233-21** : « Il est fait application, le cas échéant, des dispositions prévues aux premier et deuxième alinéas de l'article L. 123-14.

**Article L 123-14.1** : « Les comptes annuels doivent être réguliers, sincères et donner une **image fidèle du patrimoine**, de la situation financière et du résultat de l'entreprise

<sup>84</sup> [http://certification.greffe-tc-paris.fr/paraphes/doc/Decret\\_n83-1020\\_29nov1983.pdf](http://certification.greffe-tc-paris.fr/paraphes/doc/Decret_n83-1020_29nov1983.pdf)

<sup>85</sup> <http://www.admi.net/jo/arr820427.html>

<sup>86</sup> [http://209.85.135.104/search?q=cache:MwiIrAUeY8J:admi.net/jo/20050727/ECOX0500034L.html+Loi+2005-842+du+26+juillet+2005&hl=fr&ct=clnk&cd=3&gl=fr&lr=lang\\_en%7Clang\\_fr](http://209.85.135.104/search?q=cache:MwiIrAUeY8J:admi.net/jo/20050727/ECOX0500034L.html+Loi+2005-842+du+26+juillet+2005&hl=fr&ct=clnk&cd=3&gl=fr&lr=lang_en%7Clang_fr)

**Loi 85-11 du 03/01/1985<sup>87</sup>**

**Article L 233-16** du code de commerce : « les sociétés commerciales établissent et publient chaque année à la diligence du conseil d'administration, du directoire, du ou des gérants, des **comptes consolidés**, ainsi qu'un **rapport sur la gestion du groupe** dès lors que (...)».

**Article L 233-21** « Les comptes consolidés doivent être réguliers et sincères et **donner une image fidèle du patrimoine**, de la situation financière ainsi que du résultat de l'ensemble constitué par les entreprises comprises dans la consolidation.

Il est fait application, le cas échéant, des dispositions prévues aux premier et deuxième alinéas de l'article L. 123-14. »

**Article L.233-20** : « Les comptes consolidés comprennent le bilan et le compte de résultat consolidés ainsi qu'une annexe : ils forment un tout indissociable

A cet effet, les entreprises comprises dans la consolidation sont tenues de faire parvenir à la société consolidante les informations nécessaires à l'établissement des comptes consolidés.

---

<sup>87</sup> <http://admi.net/jo/20050727/ECOX0500034L.html>



## 4 German Commercial Code of 1964, Handelsgesetzbuch (HGB)

*Unauthorised Translation by the Author*

Last amended by law of 16 July 2007, Bundesgesetzblatt 2007, Part I, p.1330

### § 264 Duty to prepare

(1) The legal representatives of a corporation must supplement the annual financial statements (§ 242) with notes, which together with the balance sheet and profit and loss statement comprises a whole, and must prepare a management report.

The annual financial statements and the management report shall be prepared by the legal representatives in the first three months of the fiscal year for the preceding fiscal year.

Small corporations (§ 267 Subsection 1) need not prepare the management report; they may also prepare the annual financial statements later, if that conforms to proper conduct of business, but in any event within the first six months of the fiscal year.

(2) The corporation's annual financial statements must present a factually accurate picture of the corporation's net assets, financing and results of operations according to generally accepted accounting principles. If, as a result of special circumstances, the annual financial statements do not present a factually accurate picture within the meaning of the first sentence, then supplementary information must be provided in the notes.

### Sixth Title Annual Report (*Lagebericht*)

#### § 289

(1) The annual report ("Lagebericht") shall describe the course of business including the trading results and the state of the corporation in such a way that it presents a factually accurate picture. It shall contain a balanced and comprehensive analysis of the course of business and the state of the corporation that corresponds to the range and the complexity of the business activity. The financial indicators of performance that are most important for the business activity shall be included in the analysis and be outlined in reference to the amounts and the information contained in the annual financial statements.

Furthermore, the annual report shall assess and outline the future development including its essential chances and risks; underlying assumptions shall be described. (...)

(2) The annual report shall also deal with:

1. Events of special importance that took place after the end of the fiscal year;

2.

a) The corporation's goals and methods of risk management including its methods to safeguard all important kinds of transactions that are recorded in the context of the classification of hedges as well as

b) Risks of price alteration, failure and liquidity as well as risks from fluctuations in the payment flow that the corporation is subjected to, in each case with reference to the use of financial instruments by the corporation and provided that this is relevant to the assessment of the state or the future development of the corporation;

3. The field of research and development;

4. Existing branches of the company;

5. The essential features of the company's system of remuneration for the over-all earnings mentioned in § 285 sentence 1 No. 9 to the extent that it involves a quoted stock corporation. If information is provided pursuant to § 285 1st sentence, No. 9 letter a) sentence 5 to 9, it is not necessary to provide the information in the notes to the financial statements.

(3) In the case of a large corporation (§ 267 Subsection 3), subsection 1 sentence 3 shall analogously apply for non-financial indicators of performance like environmental or labour aspects to the extent that they are significant for understanding the course or state of the business of the corporation. (...)

**Ninth Title****Annual Report of a consolidated group of companies (*Konzernlagebericht*)****§ 315**

(1) The annual report of a consolidated group of companies (consolidated annual report) shall present the course of business including the results of business and the state of the consolidated group of companies in such a way that a factually accurate picture is presented. It shall contain a balanced and comprehensive analysis of the course of business and the state of the group of companies that corresponds to the range and the complexity of the business activity. The financial indicators of performance that are most important for the business activity shall be included in the analysis and be outlined in reference to the amounts and the information contained in the annual financial statements. Sentence 3 shall analogously apply for non-financial indicators of performance like environmental or labour aspects to the extent that they are significant for understanding the course of business or the state of the consolidated group of companies. Furthermore, the consolidated management report shall assess and outline the future development including its essential chances and risks; underlying assumptions shall be described.

(2) The consolidated annual report shall also consider:

1. Events of special importance that took place after the close of the group of companies' fiscal year;

2.

a) The consolidated group of companies' goals and methods of risk management including its methods to safeguard all important kinds of transactions that are recorded in the context of the classification of hedges as well as

b) Risks of price alteration, failure and liquidity as well as risks from fluctuations in the payment flow that the group of companies is subjected to, in each case with reference to the use of financial instruments by the consolidated group of companies and provided that this is relevant to the assessment of the state or the future development;

3. The research and development field of the group of companies;

4. The essential features of the system of remuneration for the over-all earnings mentioned in § 314 Subsection 1 No. 6 to the extent that the parent company is a quoted stock corporation. If information is provided pursuant to § 314 Subsection 1 No. 6 letter a sentence 5 to 9 it is not necessary to provide the information in the notes to the consolidated financial statements.

(3) § 298 Subsection 3 on the summary of the consolidated notes and the notes shall apply analogously.

(...)

## 5 European Laws, Titles

Directive 78/660/EEC is the main directive, which has been subsequently and continuously modified and amended by others.

- Fourth Council Directive of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC)
- Council Directive of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives (90/605/EEC)
- Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies (notified under document number C (2001) 1495)
- Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards
- Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings (Text with EEA relevance)
- Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Text with EEA relevance), Official Journal L 345 , 31/12/2003 P. 0064 - 0089
- Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ L 149, 30.4.2004), Corrigendum: Official Journal L 215, 16/06/2004 P. 0003 – 0103.

# CLIMATE MAINSTREAMING

Mainstreaming of Climate Risks and Opportunities in the Financial Sector

Germanwatch

PIK Potsdam-Institute for Climate Impact Research

University of Potsdam

Wuppertal Institute for Climate, Environment and Energy GmbH

DIW German Institute for Economic Research

<http://www.climate-mainstreaming.net>

## contact

Christoph Bals, Project Coordination

[bals@germanwatch.org](mailto:bals@germanwatch.org)

+49 / (0)228 / 60492 11

Roda Verheyen, Attorney at Law

[www.rae-guenther.de](http://www.rae-guenther.de)

+49 / (0)40 / 278 49412

