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Vincenzo Antonini / Damiano Canapa /  
Carlotta Rinaldo (editors)

# Business Law and Shifting Paradigms

Global Challenges and New Strategies  
Towards Sustainable Businesses

*Unil*



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Vincenzo Antonini / Damiano Canapa / Carlotta Rinaldo  
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**Business Law and Shifting Paradigms**



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Global Challenges and New Strategies  
Towards Sustainable Businesses

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# Regulating CSR Through Transparency

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## I. Introduction

Markets' transparency with respect to information disclosure is fundamental to ensuring investor confidence<sup>1</sup>. It guarantees that critical information about companies, their products, and transactions they carry out is made available to all market participants in a clear and accurate manner<sup>2</sup>. This promotes informed decision-making, mitigates the risks associated with information asymmetry, and helps curb fraudulent practices<sup>3</sup>. Enhanced transparency also improves market liquidity, as investors are more inclined to participate, ultimately contributing to long-term market stability and sustainable economic growth<sup>4</sup>.

Historically, market transparency rules primarily addressed such issues as money laundering prevention. However, over time, these rules have gradually expanded, with information disclosure now forming the “*bedrock of capital markets law and regulation*”<sup>5</sup>.

Since the 1990s, corporate financial disclosure requirements have increasingly included sustainability-related information, particularly in Europe and Switzerland<sup>6</sup>. The growing emphasis on Corporate Social Responsibility (hereafter: CSR) has led to the adoption of more regulations aimed at enhancing corporate transparency in this area. This includes the reporting of so-called non-financial information, which addresses aspects of a company's activities that impact the environment and society, even when these factors are not directly tied to economic performance<sup>7</sup>.

In 2014, the European Union (EU) laid the groundwork for non-financial disclosure with the Directive (EU) 2014/95, also known as the Non Financial Reporting Directive (NFRD)<sup>8</sup> which imposed specific transparency obligations on companies. This was expanded by the Directive (EU) 2022/2464, also known as the Corporate Sustainability Reporting Directive (CSRD)<sup>9</sup>, which broadened reporting

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<sup>1</sup> KERN/DARBELLAY, p. 4.

<sup>2</sup> LOMBARDINI, N 11–13, p. 14; DARBELLAY/CABALLERO CUEVAS, p. 46.

<sup>3</sup> LOMBARDINI, N 5–6, p. 12-13.

<sup>4</sup> LOMBARDINI, N 3, p. 11; KERN/DARBELLAY, p. 4.

<sup>5</sup> DARBELLAY/CABALLERO CUEVAS, p. 45.

<sup>6</sup> JUTZI, N 798 ff.; KUNZ, p. 159.

<sup>7</sup> WEBER/BAISCH, p. 27; KERN/DARBELLAY, p. 4.

<sup>8</sup> Directive (EU) 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Text with EEA relevance), OJ L 330, 15.11.2014, p. 1.

<sup>9</sup> Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance), OJ L 332, 16.12.2022, p. 15.

obligations beyond non-financial disclosure<sup>10</sup>. Additionally, the Directive (EU) 2024/1760, also known as the Directive on the Corporate Sustainability Due Diligence Directive (CSDDD), adopted in June 2024, complements to a certain extent CSRD reporting obligations.

Switzerland, influenced by these regulations, updated its legal framework<sup>11</sup>. Effective January 1<sup>st</sup>, 2022, Art. 964a to 964c of the Swiss Code of Obligations (SCO)<sup>12</sup>, require companies to produce annual reports on non-financial matters, enhancing corporate transparency<sup>13</sup>. These provisions, modeled after the NFRD, are the subject of a preliminary draft amendment aimed at aligning Swiss law with the CSRD (Preliminary Draft)<sup>14</sup>.

While these regulations aim to increase corporate accountability, they also impose significant administrative burdens, high compliance costs and introduce new legal risks that may result in corporate liability. Moreover, there is an ongoing debate over whether these obligations are the most effective tools for achieving sustainability goals<sup>15</sup>.

To reduce the potential negative impact of these regulations on European competitiveness, and in line with the recommendations of the Draghi Report<sup>16</sup>, the European Commission proposed two directives<sup>17</sup> published on 26<sup>th</sup> February 2025 (“first Omnibus package”). These proposals seek to: (i) extend implementation

<sup>10</sup> SCHNEUWLY/DARBELLAY, p. 138.

<sup>11</sup> CANAPA/BARAKAT, p. 106; SCHNEUWLY/DARBELLAY, p. 138.

<sup>12</sup> Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code – Part V the Code of Obligations, SR 220.

<sup>13</sup> DARBELLAY/CABALLERO CUEVAS, p. 49; SCHNEUWLY/DARBELLAY, p. 138; CR CO II-CANAPA/SCHMID/CIMA, art. 964a, N 2.

<sup>14</sup> SFC, Report 2024, p. 7; SFC, Preliminary Draft, Art. 964a. For an analysis of the compatibility of this Preliminary Draft with the European framework, see CANAPA, p. 547 ff.

<sup>15</sup> WEBER/BAISCH, p. 34.

<sup>16</sup> The Draghi report: A competitiveness strategy for Europe (Part A), available at: <[https://commission.europa.eu/topics/eu-competitiveness/draghi-report\\_en#paragraph\\_47059](https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en#paragraph_47059)> (last accessed on 3.3.2025).

<sup>17</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, COM(2025) 80 final; European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/UE, (EU) 2022/2464 and (EU) 2024/2760 as regards certain corporate sustainability reporting and due diligence requirements, COM(2025) 81 final.

deadlines for the CSRD and the CSDDD and (ii) streamline and simplify these regulations<sup>18</sup>.

As these proposals undergo the EU legislative process, they are likely to influence the Swiss revision of Art. 964a–964c SCO, given Switzerland’s emphasis on regulatory alignment with the EU<sup>19</sup>. This paper thus considers the EU first Omnibus package and its potential implications for Switzerland.

Given the current revision of Art. 964a–964c SCO and the new EU developments, it is essential to assess whether Art. 964a–964c SCO as they currently stand or as they are laid out in the revision project align with their intended objectives. This assessment requires an exploration of key concepts related to transparency and sustainability (II.), a review of the underlying principles and rationale for these transparency obligations from an Economic (III.), and a Legal Perspective (IV.), followed by a concluding critique and summary (V.).

## II. Notions

Before delving deeper into the issues raised here, it is important to briefly outline the essential concepts involved, namely corporate social responsibility (A.) and transparency (B.).

### A. *Corporate Social Responsibility*

Corporate social responsibility (CSR) is an indeterminate legal concept<sup>20</sup>, subject to variation across time, geographic regions<sup>21</sup>, and differing perspectives. As such, its definition has shifted considerably over the years<sup>22</sup>, making it challenging to offer a universally accepted interpretation<sup>23</sup>.

CSR encompasses a broad spectrum of concerns, including environmental sustainability, social equity and integrity, economic issues, and stakeholders’ interests<sup>24</sup>. Accordingly, for the remainder of this study, we aim to highlight the multidisciplinary nature of CSR and emphasize that it should be understood in a broad manner.

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<sup>18</sup> COM(2025) 81 final, p. 2.

<sup>19</sup> See e. g., RIEDER, BO CE 2019 1213.

<sup>20</sup> SMITH, p. 472; NERI-CASTRACANE, p. 47.

<sup>21</sup> CAMPBELL, p. 950; GEORGE, N 128.

<sup>22</sup> For an overview of the historical evolution of this concept, see GEORGE, N 132 ff.

<sup>23</sup> SMITH, p. 472; NERI-CASTRACANE, p. 46; GEORGE, N 128. For an overview of definition of this concept, see NERI-CASTRACANE, p. 47 ff.; GEORGE N 136 ff.

<sup>24</sup> See NERI-CASTRACANE, p. 54.

However, for the sake of conciseness, given that the purpose here is not to define CSR, we adopt the view of NERI-CASTRACANE, who describes CSR as sustainable development applied to businesses, incorporating environmental, social, and economic dimensions<sup>25</sup>. This definition seems to align with the one used by the Swiss Federal Council (SFC), which defines CSR as a company's contribution to sustainable development, focusing on the effects of corporate activities on society and the environment, while considering the interests of stakeholders such as shareholders, employees, consumers, local communities, and non-governmental organizations<sup>26</sup>.

In recent years, the term “ESG” – which stands for “Environmental, Social and Governance” – has been widely used to refer to the dimensions of sustainability in a company's behavior. This term stems from and is mostly used in the financial realm<sup>27</sup>. It refers to the investor-led movement to understand how social and environmental issues create risk for a company and aims to help investors assess a company as an investment<sup>28</sup>. This term is however criticized for its nebulous nature and vague contours<sup>29</sup>. Focusing on transparency from a corporate law perspective, this paper uses the term *CSR*.

## B. Transparency

From a non-legal perspective, transparency can be defined as “*the characteristic of being easy to see through*”<sup>30</sup>. This notion can be readily applied to economic and legal contexts, where transparency would relate to the clarity and comprehensibility of processes<sup>31</sup>.

Transparency can be either voluntary or imposed, for example, by legal provisions<sup>32</sup>. It can also be a combination of both, where an entity voluntarily decides to exceed legal requirements<sup>33</sup>. In any case, for transparency to be truly effective,

<sup>25</sup> NERI-CASTRACANE, p. 55.

<sup>26</sup> SFC, Report 2015, p. 5.

<sup>27</sup> GEORGE, N 121.

<sup>28</sup> WINSTON.

<sup>29</sup> HUMBEL/WITTKÄMPER, p. 823; YERLY, p. 54; JÖRG/PLÜSS, p. 604; GEORGE, N 1062 ff. Some even demand that it be abandoned: see e.g. EDMANS, p. 3 ff.

<sup>30</sup> Cambridge Dictionary *ad* “Transparency”, available at: <<https://dictionary.cambridge.org/fr/dictionnaire/anglais/transparency>> (last accessed on 17 September 2024).

<sup>31</sup> JUTZI/HERTZOG, p. 366; BRÖHMER, p. 18; MERKT, p. 11.

<sup>32</sup> JUTZI, N 31.

<sup>33</sup> For example, in Switzerland, regarding CSR and the reports to be produced within this framework, Swiss companies can voluntarily choose to go beyond the Swiss regulatory framework and follow a more stringent set of rules, such as those of the EU (DARBELLAY/CABALLERO CUEVAS, p. 49).

the relevant information must be made public – publicity is key<sup>34</sup>. The goal of enhancing transparency in any sector can only be fulfilled if the reports or documents produced are accessible to the public. Without such publicity, the intended objective of transparency cannot be achieved.

However, it is important not to equate publicity with transparency. Publicity is merely a tool to achieve transparency<sup>35</sup>. Effective transparency requires that the disclosed information is presented “*in a concise, intelligible, and easily accessible form, using precise and plain language*”<sup>36</sup>.

### III. Economic foundations for transparency obligations

Traditionally, transparency obligations are justified on economic grounds. From an economic standpoint, the implementation of transparency and disclosure obligations offers three main advantages. In theory, it helps reduce information asymmetry (A.), lowers information-related costs (B.), and may positively impact a company’s stock price (C.).

#### A. Information Asymmetries

To enable an investor to make informed decisions, it is crucial that they have access to relevant information that guides their decision-making process. For instance, an investor looking to align their investments with CSR objectives must be able to assess whether the company in question aligns with their personal goals. Without clear and transparent information, this evaluation becomes challenging, as the investor is reliant on the data the company chooses to disclose<sup>37</sup>.

Transparency obligations are specifically designed to address these information asymmetries between corporate insiders (those with privileged information) and corporate outsiders (external parties such as investors)<sup>38</sup>. By making the company’s operations more transparent, transparency obligations aim to enable investors to make better-informed decisions<sup>39</sup>. Thus, in theory, the implementation of these obligations should reduce such informational imbalances.

However, it is important to note that the information provided must still be relevant and concise, to avoid information overload, which could ultimately hinder the

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<sup>34</sup> JUTZI, N 31.

<sup>35</sup> MERKT, p. 13.

<sup>36</sup> WEBER/BAISCH, p. 26.

<sup>37</sup> HELL, p. 58.

<sup>38</sup> JUTZI, N 114. It should be noted that information asymmetry can occur either *ex-ante* (before) or *ex-post* (after) the investment (see JUTZI, N 117 & 120; HELL, p. 59).

<sup>39</sup> NERI-CASTRACANE, p. 272; JUTZI, N 117. *Contra*: WEBER/BAISCH, p. 28 f.

clarity of the data and fail to resolve the issue of information asymmetry<sup>40</sup>. Therefore, having clear regulations that define the scope of information companies are required to disclose is also essential<sup>41</sup>.

### B. *Information Costs*

Another benefit of mandatory information disclosure is the reduction of costs associated with accessing information for investors. When companies are subject to common disclosure requirements, the information provided will be standardised<sup>42</sup>, making it easier for investors to find and understand<sup>43</sup>, and thereby improving the readability of reports. Theoretically, investors can more easily compare companies' disclosures, facilitating better-informed decisions<sup>44</sup>.

While these additional reporting requirements do mean companies incur significant costs, and add to the overall expenses of complying with regulations<sup>45</sup>, they can still yield economic advantages. Notably, standardised disclosure requirements can help reduce information costs, particularly in the form of agency costs<sup>46</sup>.

### C. *Impact on Company's share price*

Finally, it is important to recognize that the disclosure of essential information about a company's activities, particularly regarding CSR issues, can enhance the company's reputation in the market<sup>47</sup>. This increased transparency may foster greater investor confidence, which, over time, can positively influence the company's financial performance and, ultimately, its stock price<sup>48</sup>. Therefore, companies have a theoretical economic incentive to disclose key information about their practices, especially when they are proactive on CSR-related matters.

<sup>40</sup> HELL, p. 70; WEBER/BAISCH, p. 29 f. See *infra* IV.B.2.c).

<sup>41</sup> HAIL/PFAFF, p. 20.

<sup>42</sup> HELL, p. 71.

<sup>43</sup> Para. 3 Directive 2014/95/EU; CR CO II-CANAPA/SCHMID/CIMA, art. 964a, N 5; SCHNEUWLY/DARBELLAY, p. 145.

<sup>44</sup> HAIL/PFAFF, p. 20 f.; HELL, p. 71 f.; SCHNEUWLY/DARBELLAY, p. 146.

<sup>45</sup> On the impact of compliance regulations in the financial sector in general, see THOMSON REUTERS, *Cost of Compliance 2023*. On this point, NERI-CASTRACANE challenges the validity of an argument regarding the significant implementation costs of these rules, which she describes as a 'myth' based on a case study established in 2015 (NERI-CASTRACANE, p. 283 f.).

<sup>46</sup> HELL, p. 72; WEBER/BAISCH, p. 33.

<sup>47</sup> GASSER, p. 46; KERN/DARBELLAY, p. 4.

<sup>48</sup> GASSER, p. 46; KERN/DARBELLAY, p. 4.

## IV. Legal Functions of Transparency Obligations

From a legal and functional perspective, sustainability disclosure requirements can serve various purposes<sup>49</sup>. Generally, doctrine distinguishes between the informational function (B.) and the control function (C.)<sup>50</sup>. The objective of this article is, as a reminder, to assess whether these functions, which theoretically aim to enhance transparency in sustainability matters, are effectively achieved under the applicable Swiss regulation. Our analysis is conducted considering the current legal framework while considering, as far as possible, future legislative amendments. Accordingly, before analyzing these two functions, it is appropriate to briefly review the content of these legal obligations under Swiss law (A.).

### A. Swiss Model: art. 964a–art. 964c SCO

As in the EU, the Swiss legal system, as enshrined in Art. 964a–964c SCO, generally requires the production of an annual report on the company’s non-financial information. Nonetheless, it is important to briefly present its object (1.), scope (2.), and content (3.). It is also necessary to determine who is qualified to validate the reports issued (4.). Furthermore, it will be important to address the question of monitoring these reports (audit) (5.) and the potential sanctions that may be applicable (6.). This paper does not aim to provide a detailed review of this legal system, as several other contributions have already undertaken this task<sup>51</sup>. Instead, it seeks to shed light on the Swiss system to understand how the information and control functions can materialize under Swiss regulations.

### 1. Object

Art. 964a–964c SCO require certain large companies to publish a report on non-financial matters, marking the first explicit legal obligation for non-financial disclosure under Swiss law.

These provisions were introduced as an indirect counter-proposal to the popular initiative “*For Responsible Businesses – Protecting Human Rights and the Environment*” (Responsible Businesses Initiative)<sup>52</sup>. The primary goal of the legisla-

<sup>49</sup> HELL, p. 93.

<sup>50</sup> See JUTZI, N 114; HELL, p. 93.

<sup>51</sup> See among others ATAMER/WILLI, p. 686 ff.; BRAND, p. 344 ff.; HOFSTETTER, p. 571 ff.; NERI-CASTRACANE/CANAPA/BRANDER, p. 819 ff.; CANAPA, p. 547 ff.

<sup>52</sup> SFC, Report 2024, p. 2; For a history of the legislative process, see FORSTMOSER/KÜCHLER, Vor. Art. 964a–964c und 964k–l CO, N 4 ff.; BSK OR II- OSER/MATTLE, art. 964a N 1 ff.

ture was to enhance transparency regarding sustainability issues without imposing new standards of civil liability, thereby harmonizing Swiss law with European legal frameworks<sup>53</sup>. Accordingly, the NFRD served as a significant source of inspiration for Art. 964a–964c SCO<sup>54</sup>.

## 2. Scope

The personal scope of application of Art. 964a–964c SCO aligns more closely with the NFRD rather than the updated European framework under the CSRD. According to Art. 964a para. 1 SCO, these provisions apply to Swiss-based companies meeting the following three cumulative criteria:

- The company qualifies as a public-interest entity under Art. 2 let. c of the Federal Act on the Licensing and Oversight of Auditors (AOA<sup>55</sup>), which includes (i) publicly listed companies and (ii) companies regulated by the Swiss Financial Market Supervisory Authority (FINMA).
- The company has an annual average of 500 full-time employees over two consecutive financial years, which may include employees of its Swiss or foreign subsidiaries under its control.
- The company, together with its controlled subsidiaries, meets or exceeds, over two consecutive financial years, either (i) a balance sheet total of CHF 20 million or (ii) a total turnover of CHF 40 million.

To prevent redundant or excessive reporting within corporate groups, Art. 964a para. 2 SCO exempts controlled entities from preparing a separate non-financial report if they are included in the group’s consolidated non-financial report<sup>56</sup>. This exemption applies if the parent company is subject to a reporting obligation under Swiss law or if it prepares “*an equivalent report under foreign law*” (Art. 964a para. 2, no. 2 SCO).

According to the SFC Preliminary Draft, the reporting obligation would, in the future, apply to<sup>57</sup>:

- All public-interest companies, irrespective of size criteria, excluding micro enterprises<sup>58</sup> (but including SMEs); and

<sup>53</sup> SFC, Report 2024, p. 2.

<sup>54</sup> SFC, Report 2024, p. 2. In general, for an examination of the differences between the Swiss and European systems, see NERI-CASTRACANE/CANAPA/BRANDER, p. 810 ff.

<sup>55</sup> Federal Act of 16 December 2005 on the Licensing and Oversight of Auditors (Auditor Oversight Act), SR 221.302.

<sup>56</sup> OFJ, Report 2019, p. 13.

<sup>57</sup> SFC, Preliminary Draft, Art. 964a para 2.

<sup>58</sup> Microenterprises are defined as any companies which, over two consecutive financial years, do not exceed, either individually or together with the companies they control, two of the following three criteria: a total balance sheet of CHF 450,000, annual turn-

- All large companies, defined as those meeting at least two of the following three criteria over two consecutive financial years:
  - A balance sheet total of CHF 25 million,
  - Sales revenue of CHF 50 million,
  - At least 500 full-time equivalent (FTE) positions on an annual average.

Thus, it appears that the Swiss legislator considers that the advantages of reducing the risks of double reporting and increasing alignment with the CSRD outweigh the reporting costs incurred by SMEs that would be then included in the scope<sup>59</sup>. However, this perspective may shift following the EU’s publication of the first Omnibus package. The EU legislator proposes narrowing the scope of application to “*large undertakings which, on their balance sheet dates, exceed the average number of 1000 employees during the financial year*”<sup>60</sup>. Companies below this threshold would have to option to report sustainability information voluntarily, using specific reporting standards to be adopted by the Commission through a delegated act<sup>61</sup>. Given this approach, it appears very likely that the Swiss legislator will abandon plans to expand the scope of Art. 964a–964c SCO and instead propose that SMEs publish sustainability reports on a voluntary basis.

### 3. Content

The report on non-financial matters must include information necessary to understanding the company’s business performance, results, overall condition, and the impacts of its activities on specific non-financial matters (Art. 964b para 1 SCO). These topics include environmental issues (notably CO<sup>2</sup> objectives), social issues, employee-related matters, respect for human rights, and anti-corruption efforts (Art. 964b para. 1 SCO).

At a minimum, pursuant to Art. 964b para. 2 SCO, the report must include the following<sup>62</sup>:

- A description of the business model (no. 1);
- A description of the policies adopted for each non-financial matter (no. 2);
- A presentation of measures implemented to enact these policies and an evaluation of their effectiveness (no. 3);

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over of CHF 900,000, and an average annual workforce of at least 10 full-time employees (SFC, Report 2024, p. 12; SFC, Preliminary Draft, Art. 964b para 1, no. 2).

<sup>59</sup> This is what comes from the impact assessment analysis on which the SFC based its Preliminary Draft. See MEYER/LEGLER/GAILHOFFER, p. 55.

<sup>60</sup> COM(2025) 81 final, p. 30.

<sup>61</sup> COM(2025) 81 final, p. 34.

<sup>62</sup> For further developments on this point, see BSK OR II-OSER/MATTLE, art. 964b, N 7 ff.; CR CO II-CANAPA/SCHMID/CIMA, art. 964b, N 11 ff.

- A description of the principal risks associated with non-financial matters stemming from the company's operations and, where relevant and proportionate, from its business relationships, products, or services, along with the associated risk management strategies (no. 4);
- Key performance indicators (KPIs) relevant to the company's non-financial matters (no. 5);

Regarding this point, it is important to underline that the SFC has elaborated on climate-specific reporting requirements through the Ordinance on the Report on Climate Issues (ORCI)<sup>63</sup>, effective as of January 1<sup>st</sup>, 2024. The ORCI presumes compliance with climate reporting obligations if a company adheres to the Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) in their 2017 iteration<sup>64</sup> and its Annex in the 2021 iteration (Art. 2 para. 1 and 3 ORCI)<sup>65</sup>. The ORCI is currently being revised. According to this draft revision, the report on climate issues would be presumed to meet the legal requirement if it is drawn up in accordance with the European standard (i. e. ESRS 2) or any other equivalent international standard, in particular the ISSB standard<sup>66</sup>.

The report must also include a transition plan aligned with Switzerland's climate goals and, where feasible and appropriate, provide quantitative data to ensure comparability (Art. 3 para. 3 ORCI). Additionally, the report should, where possible, disclose all greenhouse gas (GHG) emissions, quantified GHG reduction targets, and other relevant quantitative metrics (Art. 3 para. 4 ORCI).

Swiss law does not mandate adherence to specific reporting standards for other non-financial matters. Companies may choose to apply national, European, or international frameworks, as long as they meet the minimum requirements outlined in Art. 964a–964c SCO<sup>67</sup>. If these minimum requirements are not met, the company must prepare an alternative report (Art. 964b para. 5 SCO).

<sup>63</sup> *Ordonnance du Conseil fédéral du 23 novembre 2022 relative au rapport sur les questions climatiques, RS 221.434* (available only in German, French and Italian).

<sup>64</sup> TCFD, Recommendations of the Task Force on Climate-related Financial Disclosures, Final Report, June 2017, available at: <<https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf>> (last accessed on 17 September 2024).

<sup>65</sup> TCFD, Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures, October 2021, available at: <[https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing\\_Guidance.pdf](https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf)> (last accessed on 17 September 2024).

<sup>66</sup> Département fédéral des finances, Modification de l'ordonnance relative au rapport sur les questions climatiques, p. 6. (available only in German, French and Italian), available at: <<https://www.admin.ch/gov/it/pagina-iniziale/documentazione/comunicati-stampa.msg-id-103451.html>> (last accessed on 4 March 2025).

<sup>67</sup> SFC, Report 2024, p. 12.

The aforementioned Preliminary Draft proposes several changes, notably a shift in terminology: the “non-financial report” would be renamed the “sustainability report”, and “non-financial matters” would be referred to as “sustainability matters”<sup>68</sup>. Moreover, two substantive amendments are also included:

- The removal of the *comply or explain* principle, aligning with the example set by the CSRD<sup>69</sup>. A choice that is more coherent to ensure the effectiveness of the rules with regard to the European framework<sup>70</sup>.
- A requirement under Art. 964c para. 5 of the Preliminary Draft that published information must adhere to the European Sustainability Reporting Standards (ESRS) or equivalent standards designated by the SFC<sup>71</sup>. These standards must be applied comprehensively to all information required by Art. 964c SCO, and the report must specify which standards were used<sup>72</sup>.

#### 4. Competences

In accordance with the current Art. 964c SCO, the report on non-financial matters is subject to two levels of review. First, the report must be “*approved and signed by the supreme management or administrative body*”, which, in the case of a public limited company, is the Board of Directors (BoD). Second, it must be “*approved by the body responsible for approving the annual accounts*”, which, for a public limited company, is the General Meeting of shareholders (GM).

While the report requires BoD approval, the actual drafting of the report may be delegated to individuals within the company or external third parties<sup>73</sup>. However, the BoD retains ultimate responsibility for its preparation. Therefore, it must ensure that those tasked with drafting the report carry out their duties accurately and appropriately<sup>74</sup>.

Regarding the legal implications of the GM’s (non-)approval of the report, it currently remains unclear from a pure statutory language and have sparked debate in

<sup>68</sup> SFC, Report 2024, p. 12.

<sup>69</sup> SFC, Report 2024, p. 12.

<sup>70</sup> Also in favor of the removing of this principle, see NERI-CASTRACANE/CANAPA/BRANDER, p. 837; CANAPA, p. 554 f. For a critique of the *comply or explain* principle, see PERRIARD, p. 667 ff.

<sup>71</sup> In its first Omnibus package, the EU proposes to revise the ESRS with the aim to substantially reduce the number of mandatory ESRS datapoints. In particular, there would be no sector-specific reporting standards. These changes must clarify provisions that are deemed unclear – in particular on how to apply the materiality principle – and enhance the degree of interoperability with global sustainability reporting standards. See COM(2025) 80 final, p. 5.

<sup>72</sup> SFC, Report 2024, p. 32. On the opportunity of such modification, see *infra* IV.B.2.a).

<sup>73</sup> BSK OR II-OSER/MATTLE, Art. 964a, N 32; BRAND, p. 356.

<sup>74</sup> SCHENKER/SCHENKER, p. 367.

legal literature<sup>75</sup>. Art. 964c para. 1 SCO merely states that the report must receive GM approval, leaving open the question of whether the GM's vote is binding or advisory. Some Swiss scholars view this debate as largely academic, and without concrete implications<sup>76</sup>. Indeed, under Swiss law, any GM decision aimed at rejecting or altering corporate strategy is ultimately constrained by the non-transferable and inalienable duties of the BoD (Art. 716a SCO). Nonetheless, Art. 964c para. 2 SCO explicitly provides that a report not approved by the GM cannot be published, indicating that GM disapproval could have practical consequences<sup>77</sup>. This situation might be improved in a near future, since the SFC's Preliminary Draft clarifies this ambiguity by stipulating that the GM's decision is binding rather than advisory<sup>78</sup>. This change suggests that the Swiss legislature intends to grant shareholders a degree of influence over sustainability issues. However, as explained above, this shareholder influence on the sustainability report, as envisaged by the future Art. 964c SCO, does not seamlessly align with the organizational framework of Swiss corporate law.

## 5. Audit

Art. 964a–964c SCO do not impose a mandatory audit requirement for non-financial reports. However, these reports may still be subject to an audit in specific circumstances. For instance, if the non-financial report forms an integral part of the management report, it becomes subject to the same verification requirements as the financial report. Additionally, companies may choose to voluntarily submit their non-financial report for audit.

The Preliminary Draft proposes introducing a mandatory audit requirement for non-financial reports, with the SFC tasked with defining the audit's scope via ordinance<sup>79</sup>. The SFC will need to decide whether the audit should be limited to verifying the existence of indicators suggesting incomplete or inaccurate information (limited or negative assurance) or extend to a substantive examination (reasonable or positive assurance)<sup>80</sup>. This decision will have to consider international developments, particularly within Europe<sup>81</sup>. As the EU Commission's first Omnibus package proposes eliminating the possibility to transition from limited to rea-

<sup>75</sup> See KAUFMANN/BIGGOER, Art. 964c, N 34; BAHAR, Vote, p. 1; FORSTMOSER/KÜCHLER, Art. 964b, N 5; SCHENKER/SCHENKER, p. 368.

<sup>76</sup> BAHAR, Nature, p. 2.

<sup>77</sup> JENTSCH, p. 529.

<sup>78</sup> SFC, Report 2024, p. 36.

<sup>79</sup> SFC, Report 2024, p. 35.

<sup>80</sup> SFC, Report 2024, p. 35.

<sup>81</sup> SFC, Report 2024, p. 35.

sonable assurance<sup>82</sup>, it is highly likely that the Swiss legislator will only mandate negative assurances.

## 6. Sanctions

Regarding sanctions, since January 1<sup>st</sup>, 2022, the new Art. 325<sup>ter</sup> of the Swiss Criminal Code (SCC)<sup>83</sup> introduces criminal liability for violations of the Art. 964a–964c SCO. This provision sanctions three specific behaviors that are not related to a violation of substantive content or a violation of due diligence obligations, it concerns only<sup>84</sup>:

- Providing false information in the report;
- Failing to submit the required report;
- Failing to retain and document the report as required.

However, contrary to the expectations raised by the Responsible Businesses Initiative, no distinct civil liability framework has been introduced. Nevertheless, under certain conditions, existing civil liability provisions<sup>85</sup> and unfair competition laws may still be invoked<sup>86</sup> in cases where the required report is not submitted or contains false information, such as in instances of greenwashing<sup>87</sup>.

### B. Information Function

To analyse the estimated practical impact of the Swiss system on the information function, it is first necessary to understand what this function entails and what it theoretically aims to achieve (1.), before evaluating its practical application (2.).

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<sup>82</sup> COM(2025) 80 final, p. 4.

<sup>83</sup> Swiss Criminal Code of 21 December 1937, SR 311.0.

<sup>84</sup> Art. 325<sup>ter</sup> para 1 lit. a and b SCC.

<sup>85</sup> Some authors argue that these rules may give rise to civil liability, including for the BoD (see CANAPA, p. 557). However, this view runs counter to the express will of the legislator not to introduce such a source of civil liability in Swiss law (See e.g. RIEDER, BO CE 2019 1213). On this point, see NERI-CASTRACANE/CANAPA/BRANDER, p. 834 f.

<sup>86</sup> NERI-CASTRACANE/CANAPA/BRANDER, p. 835.

<sup>87</sup> See BSK OR II-OSEER/MATTLE, Art. 964a, N 43 ff.; CR CO II-CANAPA/SCHMID/CIMA, art. 964a, N 39 ff. On liability for sustainability information under Swiss law in general, see JENTSCH/ANGLIKER, p. 213 ff.

## 1. Theory

The publication of information serves what is known as the informational function<sup>88</sup>. In the context of non-financial disclosure, this function operates both externally and internally<sup>89</sup>.

Externally, as mentioned above, it helps reduce information asymmetries by providing specific data about the company to all market participants<sup>90</sup>. This transparency strengthens investor confidence<sup>91</sup> and broadly protects market integrity<sup>92</sup>.

Internally, the informational function enables the company to maintain accurate data about its own operations, improving the monitoring and management of its activities<sup>93</sup>. Transparency obligations compel companies to become more aware of their environmental and social impacts, their respect for human rights, and the risks associated with these areas<sup>94</sup>.

By gaining a comprehensive view of the company's operations, management can enhance decision-making processes<sup>95</sup>. This information allows them to better understand market expectations and stakeholders needs, guiding the company's long-term strategic decisions<sup>96</sup>.

## 2. Application

First, as described above, Art. 964a–964c SCO primarily fulfill an informational function, aiming to provide managers and stakeholders with pertinent non-financial data.

Art. 964a–964c SCO are mainly designed to improve both the quantity and quality of available information while fostering consistency and comparability across disclosures<sup>97</sup>. However, the effectiveness of this informational function is subject

<sup>88</sup> JUTZI, N 114.

<sup>89</sup> HELL, p. 93.

<sup>90</sup> NERI-CASTRACANE, p. 272; JUTZI, N 114 f.; HELL, p. 93 f.

<sup>91</sup> JUTZI, N 129; GASSER, p. 46; KERN/DARBELLAY, p. 4.

<sup>92</sup> JUTZI, N 131; HELL, p. 94.

<sup>93</sup> JUTZI, N 128; HELL, p. 95 f.

<sup>94</sup> NERI-CASTRACANE, p. 272.

<sup>95</sup> HESS, p. 81 f.

<sup>96</sup> HESS, p. 81 f. WEBER/BAISCH caution that a cognitive bias of overconfidence may still exist, where individuals believe they have control over a situation or project but fail to consider all relevant factors, hindering optimal decision-making (WEBER/BAISCH, p. 30).

<sup>97</sup> See e.g. NFRD Preamble § 6: “*In order to enhance the consistency and comparability of non-financial information disclosed throughout the Union, certain large undertakings should prepare a non-financial statement containing information relating to at*

to certain limitations, particularly in two key areas, namely the quality (a.) and quantity of information (b.). These limitations are linked to certain assumptions that should be taking into consideration while assessing this question (c.).

a) *Quality of Information*

Currently, there is a lack of uniformity in disclosures, as companies are free to choose from various frameworks and standards<sup>98</sup>. The adoption of the proposed amendment to Art. 964a–964c SCO, which would mandate the use of European Sustainability Reporting Standards (ESRS) or equivalent standards, could improve this situation. The quality and comparability of sustainability reporting could be substantially enhanced using common standards<sup>99</sup>. Currently, there is no international standard considered equivalent to the ESRS, in particular because of the requirement of double materiality. However, the Preliminary Draft mentions that the norms of the Global Reporting Initiative (GRI) in combination with the standards of the International Sustainability Standards Board could be considered equivalent<sup>100</sup>. However, how equivalence can be achieved remains unclear, especially as the EU aims to simplify the ESRS and clarify the application of the double materiality principle to enhance interoperability with global reporting standards.

The absence of a mandatory audit undermines the credibility and reliability of non-financial reports, since audits play a crucial role in enhancing the trustworthiness of disclosed information. By improving the reliability of the data, an audit directly contributes to the overall quality of the reporting. Therefore, the proposed introduction of a mandatory audit is also a positive step toward addressing these shortcomings.

b) *Quantity of Information*

Currently, the personal scope of disclosure requirements remains limited, as Art. 964a–964c SCO apply only to large publicly traded companies. Accordingly, the quantity of information is limited. As mentioned above<sup>101</sup>, according to the Preliminary Draft, the situation might improve since the personal scope is expected to include all public companies and large private entities. Thus, the

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*least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters”.*

<sup>98</sup> See *supra* IV.A.3.

<sup>99</sup> See *supra* III.B.

<sup>100</sup> *Département fédéral de justice et police, Rapport explicatif*, p. 7 (available only in German, French and Italian) <<https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-101585.html>> (last accessed on 4 March 2025).

<sup>101</sup> See *supra* IV.A.2.

scope of entities subject to disclosure requirements is expanding and more information will be available. The proposal of the preliminary draft does not, however, take into account the recent European proposal to narrow the scope to large companies with more than 1000 employees.

The inclusion of SMEs remains a contentious issue, as recent European proposals show. Critics argue that the costs of mandatory disclosure for SMEs may not be justified, given their typically small shareholder base and frequent family ownership, which do not necessitate the same level of public access to detailed non-financial information<sup>102</sup>. In our view, a broad scope is essential to ensuring the effective achievement of the objectives underlying transparency requirements and a coherent framework with the EU, and SMEs should therefore be included in future regulations. In this sense, the European proposal to introduce a voluntary regulatory framework for SMEs seems to us an interesting compromise. It has already been demonstrated that many SMEs are already and will continue to be contractually subject to sustainability reporting obligations as part of the value chain of a company that is itself subject to legal requirements<sup>103</sup>. Such rules would meet the market demand for reporting rules adapted to SMEs.

*c) Reasons for these limitations*

The informational function is predicated on certain assumptions that, upon closer examination, reveal inherent weaknesses.

- Internal Information Function: this function assumes that company's directors are actively engaged with and have a comprehensive understanding of the non-financial information contained in these reports. The objective is to ensure that managers consider non-financial factors they might otherwise overlook<sup>104</sup>. However, since the drafting of the report can be outsourced or internally delegated<sup>105</sup>, there is no guarantee that the directors will fully assimilate the information or integrate it into their decision-making processes.
- External Information Function: this function aims to reduce information asymmetries and provide market participants with the necessary data to make well-informed decisions. Its primary purpose is to protect market participants and ensure the proper functioning of the market by mandating the disclosure of relevant non-financial information that might not otherwise be voluntarily disclosed. Art. 964a–964c SCO contribute to this objective by enhancing the quality of publicly available information, thereby enabling market actors to make more informed decisions. However, a reporting framework used by a

<sup>102</sup> See NAEGELI/KAPTAN, p. 8 f.

<sup>103</sup> See e.g. NERI-CASTRACANE/BRANDER, p. 592.

<sup>104</sup> See *supra* IV.A.3.

<sup>105</sup> See *supra* IV.A.4.

company can result in the disclosure of numerous and complex datapoints. Since non-financial reporting obligations serve a diverse audience – each with varying preferences and capacities to process information<sup>106</sup> – this complexity can lead to cognitive overload for recipients with limited data assimilation and assimilation abilities. As a result, even when information is presented clearly, it is not always fully understood or utilized<sup>107</sup>. In this context, ESG information intermediaries can play a crucial role in filtering, interpreting and structuring data to enhance its accessibility and usefulness<sup>108</sup>.

### C. *Controlling Function*

To now assess the impact of the Swiss system regarding the control function, it is once again necessary to revisit the theoretical aspects of this function (1.) before evaluating its practical application (2.).

#### 1. **Theory**

Mandatory disclosure of information can ultimately influence and control the behavior of companies subject to these requirements<sup>109</sup>, with this control being direct or indirect.

Control is direct because the disclosure of information allows regulatory authorities to verify companies' compliance with the applicable legal framework<sup>110</sup>.

The regulatory influence on corporate behavior is also indirect, since failing to meet certain objectives, particularly those related to CSR, can lead to *ex-post* “sanctions” from investors and consumers<sup>111</sup>. By forcing access to certain data about a company, the purpose of disclosure rules is to trigger a reaction from the recipient and, ultimately, to enable recipients to influence the behavior of the party subject to the disclosure obligation<sup>112</sup>.

In the context of sustainability reporting, transparency obligations function as an indirect mechanism for regulating CSR practices<sup>113</sup>. By mandating companies to disclose their impacts and the measures taken in this area, reporting rules exert a normative influence aimed at encouraging companies to adopt more sustainable

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<sup>106</sup> KOLTER, p. 241.

<sup>107</sup> HELL, p. 61.

<sup>108</sup> MÖLLERS/KERNCHEN, p. 9 f.

<sup>109</sup> JUTZI, N 128.

<sup>110</sup> HELL, p. 113.

<sup>111</sup> JUTZI, N 125.

<sup>112</sup> JUTZI, N 128; MARTINEZ, p. 22; STÜCKELBERGER, p. 91.

<sup>113</sup> WOLFMAYER, p. 281.

approaches<sup>114</sup>. If a company fails to meet CSR expectations (or commitments), this will be reflected in the reports it must submit under the new regulatory obligations. Consequently, the absence of strong CSR policies or the failure to honor public commitments relating to CSR may erode investors and consumers trust, potentially leading to reputational harm and financial consequences for the company<sup>115</sup>. Thus, the disclosure of information indirectly allows control of companies' CSR practices<sup>116</sup>, subjecting them to market pressure to comply<sup>117</sup> and theoretically reducing undesirable behaviors<sup>118</sup>.

## 2. Application

Art. 964a–964c SCO serve a control function aimed at enabling recipients of disclosed information to influence corporate behavior toward greater sustainability. The transparency requirements, which compel companies to disclose their sustainability-related impacts and actions, are designed to exert an indirect normative influence, encouraging companies to adopt more sustainable practices. This control function operates through internal (a.) and external (b.) mechanisms, each of which faces inherent limitations.

### a) *Internal Mechanism: Self-Reflection*

The internal mechanism relies on a process of self-reflection. The disclosure of non-financial information in company reports is intended to prompt directors to reflect independently and adopt behaviors deemed more desirable by the legislator. This mechanism operates on the premise that the systematic collection of information required for disclosure fosters a process of moral reflection<sup>119</sup>. As managers gain a deeper understanding of the impact of their company's activities, they may be naturally inclined to adopt behaviors that align more closely with the expectations of the legislator.

Under Art. 964a–964c SCO, this mechanism assumes that directors will voluntarily internalize non-financial issues and adapt their behavior accordingly. To be effective, this process requires directors to move beyond superficial “box-

<sup>114</sup> WOLFMEYER, p. 281.

<sup>115</sup> CANAPA, p. 558.

<sup>116</sup> WOLFMEYER, p. 251. See also SCHNEUWLY/DARBELLAY, p. 146.

<sup>117</sup> NERI-CASTRACANE, p. 271; SCHNEUWLY/DARBELLAY, p. 146. On the pressure mechanism, see PARKINSON, p. 11 ff.

<sup>118</sup> HELL, p. 97. See also NERI-CASTRACANE, p. 271.

<sup>119</sup> PARKINSON, p. 4.

*ticking*<sup>120</sup> and formal regulatory compliance, embedding sustainability considerations into the company's broader strategy.

However, the success of this mechanism depends heavily on the commitment and intent of the directors<sup>121</sup>. Without genuine engagement, the self-reflection process risks being purely procedural, with little substantive impact on corporate practices. As a result, the desired impact of these measures would be significantly diminished. Yet, directors may be inclined to present data in a way that enhances their company's image, selectively disclosing information to shape stakeholder perceptions<sup>122</sup>. Even when reports are published, their content can be framed more to influence external opinion than to drive meaningful changes in corporate behavior<sup>123</sup>. Thus, it is doubtful that reporting obligations can bring significant change in the behavior of the company through the behavior of managers<sup>124</sup>.

b) *External Mechanism: Stakeholder Pressure*

The external mechanism relies on the ability of transparency recipients to effectively influence corporate behavior toward sustainability. To impact directors' decisions, recipients must exert sufficient pressure, which in turn requires the presence of reaction mechanisms. However, not all stakeholders have the same capacity (nor the same willingness) to react. A stakeholder's ability to influence a company largely depends on its economic leverage<sup>125</sup>. In this context, we can differentiate between shareholders (aa), contractual partners (bb), and the civil society (bb).

aa) Shareholders

Sustainability-related disclosures for shareholders assume, on the one hand, that shareholders are able to exert pressure on the company to behave more responsibly, and, on the other hand, that they are willing to do so<sup>126</sup>.

Shareholders typically possess the institutional capacity to exert pressure. Thanks to their status as shareholders, they have several means of action at their disposal: they can voice their concerns at GMs, divest from the company, or choose to remain invested while advocating for change<sup>127</sup>. The Swiss legislator's intent to

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<sup>120</sup> On this point, see also CHOUDHURY, p. 209.

<sup>121</sup> PARKINSON, p. 4.

<sup>122</sup> CHOUDHURY, p. 209.

<sup>123</sup> CHOUDHURY, p. 209.

<sup>124</sup> See also SMIT *et al.*, p. 102.

<sup>125</sup> KOLTER, p. 202.

<sup>126</sup> MEIER-SCHATZ, p. 490.

<sup>127</sup> On shareholders' means of intervening, see e. g. KARAMETAXAS, p. 101 ff.

strengthen shareholder's tools to influence over the company's sustainability strategy is reflected in its draft amendment to Art. 964a–964c SCO, which explicitly states that the GM's vote is “*binding*”<sup>128</sup>.

The question as to whether shareholders are willing to leverage these tools to advocate for sustainable corporate practices is more complex. Under Swiss law, shareholders are under no obligation to act beyond paying for their shares<sup>129</sup>. In particular, they are free to exercise their right to vote as they wish, or to disengage from corporate life and not use their voice at all<sup>130</sup>. Moreover, shareholders have their own preferences<sup>131</sup>. They have a financial interest that logically stems from their shareholding in the company. Consequently, they seek to maximize their return on investment, whether through dividends or capital gains. They may, or may not, have other preferences. These preferences can be numerous and varied. They may, or may not, extend to CSR considerations.

Even when some shareholders seek to exercise their rights to influence corporate behavior, their ability to do so may be constrained. The structure of corporate control plays a crucial role in determining how effectively shareholders can make their voices heard<sup>132</sup>. In companies with a concentrated shareholder base, shareholders often hold managerial or board positions, allowing them to exert their influence directly through their roles. Conversely, in companies with a widely dispersed shareholder base, this influence diminishes, making individual shareholders less influential and their voices less audible. Moreover, there are still barriers that prevent the effective involvement of shareholders. In particular, the existing legal system makes it difficult for shareholders to work together outside the general meeting<sup>133</sup>.

#### bb) Contractual partners

Contractual partners have economic and legal leverage to exert pressure on companies. Their economic relationship with the company is formalised through a contract, allowing them to activate legal mechanisms in case of a breach. In accordance with general principles of contract law, they can enforce their rights when faced with non-performance, including termination, specific enforcement, or the award of damages.

<sup>128</sup> Its practical impact, however, should not be overstated. See *infra* V.

<sup>129</sup> Art. 680 para 1 SCO. CR CO II-CHENAUX/GACHET, art. 680 N 3.

<sup>130</sup> BAHAR, p. 307; VON DER CRONE/WIPF, p. 636.

<sup>131</sup> BAHAR, p. 308.

<sup>132</sup> BAHAR, p. 308.

<sup>133</sup> NERI-CASTRACANE, Shareholder, p. 167 ff.

Under Swiss law, fixed-term<sup>134</sup> or indefinite contracts may be terminated at any time for just cause. Such termination requires the occurrence of unforeseeable circumstances that make the continuation of the contractual relationship intolerable, which is particularly the case when the relationship of trust between the parties is broken<sup>135</sup>. In addition, the reason must actually make the continuation of the contract intolerable for the terminating party. It is therefore conceivable that failure to comply with certain CSR practices could constitute grounds for termination, provided such practices have been established as contractual obligations or the terminating party has made it clear that compliance with such CSR practices was a key factor in entering the contract.

Beyond the right to terminate, a party in a contractual relationship may also assert subjective rights derived from the contract. These rights encompass both the primary rights to performance and secondary rights, which arise from breaches of contractual duties and may entitle the non-breaching party to remedies such as damages or contractual renegotiation. One of the most significant levers available is the right to renegotiate contract terms, which can be exercised strategically, including by referencing the enforcement of primary contractual rights. This gives considerable leverage over a company's behavior, as the assertion of such rights carries direct financial and operational consequences for the company. In this regard, the non-financial report can help substantiate the primary claim. It might provide critical evidence to support contractual claims when CSR obligations or commitments have been incorporated into the contract.

The non-financial report can also be used as evidence for tort claims where a company causes damage to others through an unlawful act. If an individual suffers damage as a result of a company's behavior, he or she can theoretically exercise a right to compensation by bringing an action in tort. He or she thus has legal and economic leverage against the company which – even if the unlawful act relates to a past event – can allow it to influence the company's future behavior. However, this only constitutes leverage in so far as this party has a subjective right enforceable against the company concerned. In Switzerland, however, victims of unlawful acts that occur in the supply chain or in subsidiaries abroad do not have a subjective right directly enforceable against the parent company based in Switzerland.

cc) Other Stakeholders

Other stakeholders – civil society organisations, NGOs, advocacy groups and even individual consumers –, do not have a direct influence over companies in the way shareholders or contractual partners do. As we have seen, they cannot

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<sup>134</sup> See e. g. ATF 133 III 360; ATF 128 III 428.

<sup>135</sup> ZEN-RUFFINEN, p. 3 and the numerous references to case law.

exert pressure through subjective rights of contractual or tortious nature, nor do they have a formal economic or legal relationship with companies. Without tools such as voting rights or legal sanction mechanisms, they lack direct means to impose financial consequences on companies.

Instead, their ability to exert pressure is primarily indirect, relying on mechanisms that influence corporate reputation and consumer behavior. Public advocacy or media campaigns can shape public perception which can then translate in the market. However, the effectiveness of this influence remains an open question: it remains to be proven empirically whether these mechanisms consistently produce meaningful, long-term changes.

Furthermore, the extent to which stakeholders are willing to exert sustained pressure on companies to influence their behavior towards more CSR practices is not a given and would require in-depth research into consumer behavioral practices that go beyond the scope of this article.

This analysis has highlighted the following points:

- the reporting requirements of Art. 964a–964c SCO primarily serve an information function and an indirect control function.
- the effectiveness of the mechanism of the indirect control function requires actions, in particular from shareholders and other stakeholders
- shareholders, by virtue of the means at their disposal in their capacity as shareholders, are best placed to make the necessary response to the mechanism of the indirect control function, but they are free to decide to exercise it or not.
- in the absence of a direct economic and legal relationship with the company, other stakeholders can exert only a limited influence on the company's behavior.

The limited effectiveness (by design) of the response mechanism necessary for the indirect control function calls into question the relevance of the transparency rules (as they are organized) to achieve their objective of indirect control. We are not questioning transparency rules *per se*. However, we believe that, if an indirect control function is to be pursued, it should be supported by tools that ensure the effective functioning of the underlying reaction mechanisms.

## V. Conclusion

Art. 964a–964c SCO fulfill two primary functions: an information function and a control function, targeting a diverse audience that can be broadly categorized into four groups: managers, shareholders, contractual partners and other stakeholders.

The obligation to provide a non-financial report primarily serves an information function aimed specifically at investors. These provisions are intended to address information asymmetries, enabling investors to make well-informed decisions

and thereby protecting both the investors themselves and the market. This function is based on the premise that market mechanisms alone are insufficient to resolve information asymmetries and safeguard investors. The effectiveness of this function is largely contingent upon the quality and quantity of information disclosed by companies. In this respect, Swiss regulations exhibit room for improvement<sup>136</sup>. The proposed amendments in the preliminary draft of the SFC – particularly the introduction of a mandatory audit and the expansion of the scope of application – represent positive steps forward. However, these measures alone are insufficient to fully address sustainability challenges.

Art. 964a–964c SCO also serve a control function, which is particularly significant in the context of sustainability disclosures. The indirect purpose of such disclosures is to act as a regulatory tool for CSR, with the aim of influencing corporate behavior toward adopting more sustainable practices. However, the internal and external mechanisms underlying this control function rest on assumptions that have been critically evaluated in this paper. Based on our analysis, the effectiveness of the control function hinges on two key factors: the willingness of shareholders to incorporate sustainability considerations into their decision-making processes and the capacity of other stakeholders to apply pressure on companies. Currently, shareholders' engagement with sustainability issues is not guaranteed, and stakeholders lack sufficient tools to meaningfully influence corporate behavior.

To enhance the effectiveness of the control function, regulatory measures should focus on introducing mechanisms that encourage shareholders to integrate sustainability considerations into company management and establishing avenues that empower stakeholders to exert pressure on companies.

In conclusion, while transparency and information disclosure are necessary tools for addressing CSR issues, they are not sufficient on their own. A comprehensive regulatory framework must also incorporate mechanisms that actively promote sustainable corporate behavior and provide stakeholders with effective means of influence.

## VI. Bibliography

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<sup>136</sup> Of this opinion as well, see NERI-CASTRACANE/CANAPA/BRANDER, p. 835 ff.

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