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DOI:

[10.1093/jel/eqz034](https://doi.org/10.1093/jel/eqz034)

Document Version

Peer reviewed version

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Citation for published version (APA):

Webster, E. (2019). Information Disclosure and the Transition to a Low-Carbon Economy: Climate-related risk in the UK and France. *JOURNAL OF ENVIRONMENTAL LAW*. <https://doi.org/10.1093/jel/eqz034>

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INFORMATION DISCLOSURE AND THE TRANSITION TO A LOW-CARBON
ECONOMY: CLIMATE-RELATED RISK IN THE UK AND FRANCE

Emily Webster*

Abstract: Over the last several years there has been increasing recognition and acceptance of the threat that climate change poses to global financial stability and the concurrent need for corporations to identify and account for both climate-risks and their impacts on the environment. This has resulted in the emergence of climate-risk disclosure (CRD) as a voluntary standard as well as movement on the domestic level to introduce mandatory CRD, demonstrated by the introduction of CRD framework legalisation in France. This paper conducts a comparative analysis of France and the UK—states that are adopting divergent methods of legal development towards CRD—to analyse the potential of CRD as a policy tool to aid towards climate change mitigation and the transition to a low-carbon economy, and evaluate how effectively this is being achieved in practice.

Key words: Climate change; financial risk; comparative law; climate-risk disclosure; environmental law; corporations

1. Introduction

The climate crisis poses significant challenges for domestic, supra-national and global regulatory approaches to environmental problems. Climate change action emanating from states requires a diverse array of legislative and policy tools wielded over multiple levels¹ in

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¹ Jacqueline Peel, Lee Godden and Rodney J Keenan, 'Climate Change Law in an Era of Multi-Level Governance' (2012) 1(2) TEL 245.

order to promote climate change mitigation and meet the Paris Agreement targets.² As a policy tool to promote environmental objectives, the disclosure of information has provided a fertile source of legal development over the last several decades.

In the context of climate change, climate-risk disclosure (CRD) has been prompted by fears of the risks of climate change to global financial stability. It is therefore framed in a financial way. The concept of CRD has been introduced into mainstream financial dialogue both as a transnational voluntary framework, through the Task-force on Climate Related Disclosures (TCFD) and other standard-setting bodies such as the Climate Disclosure Standards Board (CDSB), and through the introduction of the only mandatory legislation of its kind globally; section 173 of the French Energy Transition Law 2015.³ No other country has introduced such legislation, yet there may be discerned movement towards CRD in other jurisdictions.

This paper adopts a comparative analysis of the regulatory approaches used to implement CRD in two jurisdictions: the UK and France. The two divergent approaches, one through the introduction of the framework legislation and the other through the use of delegated acts to amend existing law, will be compared and assessed to ascertain which most effectively realises the purposes of CRD, that is, the identification and disclosure of climate-related risks to the company or group of companies. First the objectives of information disclosure in the form of CRD will be explored (2). After first setting out the context of CRD in the UK and France

² Paris Agreement FCCC/CP/2015/10/Add 1 (adopted 12 December 2015, entered into force 4 November 2016) ‘Article 2(1). This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change’.

³ Law no 2015-992 on Energy Transition for Green Growth.

through their shared membership of the European Union (EU), the paper will then undertake a comparative analysis of the UK and France to demonstrate two different approaches taken, their similarities and ultimately their potential to harness investor power for climate change action (3). The paper concludes that, despite problems with implementation and enforcement, the French experience of introducing a legislative CRD framework obliges public companies and certain investors to identify and make public their climate risks thereby ensuring more companies fall within its scope. Further, it has the potential to be significantly strengthened over the next several years as companies adjust to the obligation. The UK approach in comparison is piecemeal, confusing and incoherent, ultimately leaving compliance as a voluntary endeavour thereby weakening the effectiveness of CRD and diluting the ability of investors to promote the low carbon transition.

2. CRD: purposes and potential

Disclosure of information is central to many environmental regimes and has various purposes depending on the environmental context. These include policy development, as components of permitting regimes, improving environmental governance through public engagement and holding the state and businesses to account for their environmental impacts.⁴ Mandatory information disclosure imposed by states on to businesses attempts to indirectly influence behaviour by exerting ‘pressure on firms to self-regulate and address poor environmental

⁴ Karen Morrow, ‘Informational Requirements and Environmental Protection’ in Emma Lees and Jorge E Viñuales (eds), *Comparative Environmental Law* (Oxford University Press 2019) 974–976; Elizabeth Kirk and Kirsty Blackstock, ‘Enhanced Decision Making: Balancing Public Participation against “Better Regulation” in British Environmental Permitting Regimes’ (2011) 23 JEL 97.

performance’.⁵ Yet, how this is achieved, varies from state to state;⁶ information requirements in different jurisdictions are often ‘grounded in long-established broader legal cultures and traditions, which while they may share certain core characteristics, can exhibit considerable variation in application across states.’⁷

Regulation to mandate or encourage the disclosure of information with the purpose of promoting environmental objectives has emerged as a regulatory device in many jurisdictions. ‘Reflexive regulation’ recognises the limitations of traditional, top down, law and instead promotes behavioural change, self-regulation and constant self-reflection in the face of changing circumstances and information.⁸ Proponents of reflexive regulatory approaches, such as Dennis Hess and Eric Orts, have argued that outcome-based regulation is inappropriate in situations where regulators do not have sufficient information relating to the impacts on the environment of the particular industry.⁹ The costs and complexities associated with mandating specific environmental targets or outcomes pressures policy-makers into finding alternative routes to environmental protection.¹⁰ Indeed, Hess has argued that attempts to ‘make the regulatory system sufficiently representative of social reality to apply to the variety of corporate

⁵ Morrow (n 4) 991.

⁶ *ibid* 974.

⁷ *ibid* 973.

⁸ Constance Z Wagner, ‘Evolving Norms of Corporate Social Responsibility: Lessons Learned from the European Union Directive on Non-Financial Reporting’ (2018) 19 *Transactions* 619, 697; Eric W Orts, ‘A Reflexive Model of Environmental Regulation’ (1995) 5(4) *BEQ* 779, 780; Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17(2) *L&Soc’yRev* 239.

⁹ Dennis D Hirsch, ‘Green Business and the Importance of Reflexive Law: What Michael Porter Didn’t Say’ (2010) 62(4) *ALR* 1063, 1115; Orts (n 8) 782.

¹⁰ Hirsch (n 9) 1116–18.

situations, would create a sea of law too complex for an organization to effectively comply with.’¹¹ In contrast, reflexive law attempts to ‘off-load some of the burdens of direct regulation’;¹² in the form of non-financial reporting it introduces mainly procedural elements which instead force companies to justify their behaviour.¹³ In this way behavioural changes may be induced¹⁴ resulting in indirect benefits to the environment.¹⁵ Ultimately, according to Hess, a ‘reflexive law approach to social reporting focuses on institutionalizing responsible decision-making within an organization and thereby sharing the regulation of corporate behaviour with the regulated entity.’¹⁶

Harnessing the traditional use of information disclosure in the context of climate risks may be achieved through, for example, corporate social responsibility (CSR) and environmental and social governance (ESG) developments, and through the turn to reflexive regulation. There may be identified the emergence of two approaches that reflect this: the first is through the development of a CRD framework through the transnational TCFD initiative; a body consisting of state representatives and private actors. The second is movement in some states towards, or in the case of France legislating for, mandatory CRD thereby imposing the responsibility of identification and disclosure on far more actors than would otherwise voluntarily adopt this obligation.

¹¹ David Hess, ‘Social Reporting: A Reflexive Approach to Corporate Social Responsiveness’ (1999) 25 JCL 41, 85.

¹² Orts (n 8) 780.

¹³ Hess (n 11) 51.

¹⁴ *ibid* 42.

¹⁵ Hirsch (n 9) 1119.

¹⁶ Hess (n 11) 43; Orts (n 8) 788.

2.1. *The TCFD*

The TCFD was established due to the growing recognition in the financial sector that climate change ‘could lead to catastrophic economic and social consequences’,¹⁷ and in the context of the greater international coordination on climate change that has emerged from the Paris Agreement.¹⁸ It has developed a comprehensive framework of recommendations for ‘voluntary, consistent climate-related financial disclosures that would be useful to investors, lenders, and insurance underwriters in understanding material risk’¹⁹ due to their need for consistent information when making investment decisions.²⁰

A key purpose of CRD is that stakeholders may understand the impacts of climate change on the ‘organization’s future financial position’²¹ from both physical impacts and transitional risks.²² It advances the use of scenario analysis²³ to take into account the impacts of ‘different climate-related scenarios, including a 2° Celsius or lower scenario’ on the entity or group of companies.²⁴ In order to provide consistent, comparable and sufficient information the recommendations attempt to provide ‘implementing guidance for companies on how to

¹⁷ Task Force on Climate-related Financial Disclosures, ‘Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures’ (2017) <<https://www.fsb-tcf.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf>> accessed 18 August 2019 1.

¹⁸ *ibid.*

¹⁹ *ibid.* iii.

²⁰ *ibid.* 1, 8.

²¹ *ibid.* 8.

²² *ibid.* 5–6.

²³ *ibid.* 25–32.

²⁴ *ibid.* v.

translate climate risks and opportunities into traditional financial terms... and how to integrate climate risks into existing business continuity and risk management systems.’²⁵

The TCFD recommendations have been developed in the context of existing mandatory non-financial information disclosure requirements for large companies that are in existence in many G20 jurisdictions.²⁶ The recommendations are therefore envisaged as aids for corporations to comply ‘more effectively with existing disclosure obligations’²⁷ and for whom ‘climate-related issues are or could be material’.²⁸ According to the financial services firm KPMG, these recommendations ‘while voluntary, are likely... to be accepted as de-facto global best practice... Board directors, as part of their fiduciary duty, will be expected to ensure they are applied so that the corporation reports appropriately on climate-related risk along with other material risks.’²⁹

An example of the voluntary adherence to the TCFD recommendations is seen in the case of Shell. Shell has voluntarily incorporated CRD into its reporting regime and introduced an emissions reduction target of 20% below 2017 levels by 2035 and 50% by 2050 (including its scope 3 GHG emissions³⁰). Adopting the relevant TCFD recommendations, Shell identifies

²⁵ ‘Climate-Related Financial Disclosures’ (*Center For Climate and Energy Solutions*, 2018)

<<https://www.c2es.org/content/climate-related-financial-disclosures/>> accessed 18 August 2019.

²⁶ TCFD (n 17) iv.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ ‘FSB Task Force on Climate-Related Financial Disclosures: KPMG Client Briefing’ (2017)

<<https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/01/fsb-task-force.pdf>> accessed 18 August 2019.

³⁰ According to the Carbon Trust ‘Scope 1 covers direct emissions from owned or controlled sources. Scope 2 covers indirect emissions from the generation of purchased electricity, steam, heating and cooling consumed by the reporting company. Scope 3 includes all other indirect emissions that occur in a company’s value chain.’

and reports on climate-risks of a physical and transitional (regulatory and litigious) nature. These risks and the company's response are considered in the context of a range of different scenarios and time horizons. It has integrated climate-risk management into its business model, linking climate-risk with financial performance, removing climate change from the CSR arm of the company and ensuring that the Board engages sufficiently with these emerging risks. This has been strengthened by embedded 'the energy transition into the Chief Executive Officer's personal performance targets'.³¹ In this way it seems, from the annual report at least, that climate-risk and climate strategy have been embedded into Shell's business structure.³²

The use of CRD could be effective in terms of influencing corporations to begin to recognise and consider climate risks, potentially resulting in changes in the behaviour of the company itself. Nevertheless, this requires that the company not merely adopts and adheres to the TCFD requirements, but also embed them within the whole corporate structure and disclose them in a way that does not play down the significance of climate-risks nor the companies contribution

Carbon Trust, 'What Are Scope 3 Emissions, How Can They Be Measured and What Benefit Is There to Organisations Measuring Them?' (*Carbon Trust*, 2019)

<<https://www.carbontrust.com/resources/faqs/services/scope-3-indirect-carbon-emissions/>> accessed 11 August 2019.

³¹ Royal Dutch Shell plc, 'Annual Report and Form 20-F for the Year Ended December 31, 2017' <<https://www.shell.com/investors/financial-reporting/annual-publications/annual-reports-download-centre.html>> accessed 18 August 2019, 62.

³² Ibid; This has also been witnessed in the US by Chevron although not to the same extent as Shell. Chevron, 'Climate Change Resilience a Framework for Decision Making' <<https://www.chevron.com/-/media/shared-media/documents/climate-change-resilience.pdf>> accessed 18 August 2019.

to climate change more generally.³³ The content of the disclosures is therefore of high importance for their effectiveness in practice.

2.2. *The Role of Shareholders*

The purpose of CRD is twofold: to prompt companies to identify and internalise their climate risks and to provide investors with information regarding their current or prospective investments. Institutional investors are particularly powerful entities who may, in some instances, force changes in the way companies are operated. Drawing again on the example of Shell, shareholder resolutions by the company's activist investors *Follow This* in 2018, were intended to push it towards setting more ambitious climate targets in line with the Paris Agreement.³⁴ These types of activists deliberately invest in polluting companies thereby mobilising their influence from within in order to effect change. While often these resolutions are in opposition to the Board, they may also assist the directors attempts to introduce responses to climate change. In 2015 Shell's Board of Directors requested shareholders to vote in favour of a resolution advanced by 150 investors which required the company to test its business model against the Paris 2°C target.³⁵ Therefore, action by activist shareholders may not always be in conflict with the company's directors but rather complementary, thereby ensuring that

³³ This could be seen in Chevron's first climate-risk report in 2017 Chevron, 'Managing Climate Change Risks: A Perspective for Investors' <<https://www.chevron.com/-/media/shared-media/documents/climate-risk-perspective.pdf>> accessed 18 August 2019.

³⁴ Andrew Ward, 'Shell Faces Shareholder Push on Climate Change Goals' *Financial Times* (London, 25 March 2018) <<https://www.ft.com/content/fae8e478-2eba-11e8-9b4b-bc4b9f08f381>> accessed 18 August 2019.

³⁵ Damian Carrington, 'Shell Urges Shareholders to Accept Climate Resolution' *The Guardian* (London, 29 January 2015) <<https://www.theguardian.com/environment/2015/jan/29/shell-urges-shareholders-to-accept-climate-change-resolution>> accessed 17 August 2019.

the directors actions are clearly supported by the shareholders through the adoption of a special resolution.

According to the OECD, the

increased presence of large institutional investors in the last decade fostered the expectation that a new breed of highly skilled and well resourced professional shareholders would make informed use of their rights, promoting good corporate governance in companies in which they invest... However, institutional investors are not like other shareholders but have a unique set of costs, benefits and objectives. Accordingly, they have not always behaved as desired.³⁶

One reason for this is that they are mostly remunerated based on the number of assets under management which gives rise to '[i]ncentives for churning of assets and strong conflicts of interest' creating challenges for the 'promotion of better governance practices.'³⁷

One of the obligations of institutional investors is to provide value for their beneficiaries or clients.³⁸ Failing to adequately do so may result in the loss of clients to institutional investors who provide better returns. While individual investors may choose to invest with institutional investors on the basis that they explicitly practice socially responsible investing (SRI), this may be viewed as an obstacle to those who merely wish for the highest return on their investment.

³⁶ OECD, 'The Role of Institutional Investors in Promoting Good Corporate Governance' (2011) 9

<<http://www.oecd.org/daf/ca/49081553.pdf>> accessed 2 August 2019.

³⁷ *ibid.*

³⁸ International Corporate Governance Network, 'ICGN Guidance on Institutional Investor Responsibilities'

(2013) <https://www.icgn.org/sites/default/files/ICGN%20Institutional%20Investor%20Responsibilities_0.pdf>

accessed 18 August 2019, 8.

This pressure may therefore act as a barrier preventing institutional investors from leveraging their influence in ways that promote climate action.

SRI is increasingly used in order to promote change with the emergence of ethical institutional investors,³⁹ the turn to divestment from fossil fuel intensive companies,⁴⁰ and movement by established institutional investors towards SRI. An example of this move involves the institutional investor BlackRock. BlackRock ‘expects companies to identify and report on the material, business-specific E&S risks and opportunities and to explain how these are managed. This explanation should make clear how the approach taken by the company best serves the interests of shareholders and protects and enhances the long-term economic value of the

³⁹ eg see: The Church of England Ethical Investment Advisory Group, ‘Statement of Ethical Investment Policy’ <<https://www.churchofengland.org/sites/default/files/2019-01/Statement%20of%20Ethical%20Investment%20Policy%20-%20October%202018%5B1%5D.pdf>> accessed 17 August 2019; Damien Lardoux, ‘Struggling to Find an Investment That Aligns with Your Beliefs and Values? Here Are Five Top-Rated Ethical and Socially Responsible Funds’ (*This is Money.co.uk*, 31 August 2017) <<https://www.thisismoney.co.uk/money/investing/article-4711552/Five-rated-ethical-socially-responsible-funds.html>> accessed 17 August 2019.

⁴⁰ Damian Carrington, ‘Fossil Fuel Divestment Funds Rise to \$6tn’ *The Guardian* (London, 10 September 2018) <<https://www.theguardian.com/environment/2018/sep/10/fossil-fuel-divestment-funds-rise-to-6tn>> accessed 17 August 2019; Mwikali Muthiani, ‘Amnesty International to Divest from Fossil Fuel Companies’ (*Amnesty International*, 5 August 2019) <<https://www.amnesty.org/en/latest/news/2019/08/amnesty-international-to-divest-from-fossil-fuel-companies/>> accessed 17 August 2019; Michael Holder, ‘University of Liverpool to Ditch All Fossil Fuel Investments’ (*Business Green*, 16 August 2019) <<https://www.businessgreen.com/bg/news/3080535/university-of-liverpool-to-ditch-all-fossil-fuel-investments>> accessed 17 August 2019; see also: Neil Gunningham, ‘Review Essay: Divestment, Nonstate Governance, and Climate Change’ (2017) 39(4) *Law & Policy* 309.

company.’⁴¹ Unlike activist institutional investors BlackRock does ‘not see it as our role to make social or political judgments on behalf of clients. Our consideration of these E&S factors is consistent with protecting the long-term economic interest of our clients’ assets.’⁴² The movement of BlackRock towards SRI is discernible, nevertheless, it is focused on shareholder returns rather than tackling social, environmental or climate change related problems. It is these types of shareholder that CRD is attempting to influence. Harnessing SRI, and the function of institutional investors, it provides information for shareholders to assess the real position of the particular business and the risks posed by the physical and transitional risks of climate change to their investments. Therefore, CRD may bolster the SRI movement, which in turn may affect the behaviour of more companies thereby supporting the low carbon transition.

2.3. Mandatory CRD

Establishing a direct link between CRDs and climate change mitigation is problematic to say the least. How can the disclosure of climate-related risks (and opportunities) to the entity or group in question, promote behavioural changes in the most polluting companies? CRDs consist of developments in law and governance or, in the case of France entirely new legislation, which may result in some degree of behavioural changes. This is through the act of the identification of direct and indirect climate-risks, climate impacts and opportunities and subsequently making them public—usually through the annual report. This in turn may either dissuade potential investors from investing in the company or mobilise shareholders who are

⁴¹ BlackRock, ‘BlackRock Investment Stewardship Global Corporate Governance Guidelines & Engagement Principles’ (BlackRock, 2019) <<https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf>> accessed 2 August 2019, 7.

⁴² *ibid.*

motivated by environmental goals, the medium to long-term health of their investments, or both.

Attempts by states and private initiatives⁴³ to protect global financial stability through leveraging market pressures to change behaviour⁴⁴ requires both the adoption of CRD and the disclosure of information that is comparable; this is particularly the case given that the most polluting companies tend to be transnational in geographic scope.⁴⁵ Given that high intensity GHG emitters have a stake in perpetuating the status quo it seems unlikely that they would truly embed climate-risk identification into all aspect of their business (rather than merely the CSR arm) and then *act* upon the results.⁴⁶ It is likely that, for these industries at least, the shareholders would be, and have been, essential to force the implementation of CRD yet may not be in a position to do so. Therefore, the introduction of *mandatory* CRD may provide a leap forward, changing business practices in this area and providing shareholders with the justification to act. The TCFD recommendations and associated private standards developed to implement them,⁴⁷ may also be crucial for ensuring that regulation that imposes mandatory CRD in different states nevertheless results in information that is comparable.

⁴³ Such as the Financial Stability Board, TCFD, CDSB, and G20.

⁴⁴ Carol Farbotko, 'Global Financial Stability, Rapid Transition to a Low-Carbon Economy and Social Justice: Can Climate-Related Financial Risk Disclosure Do It All?' (2019) 50(3) Aust Geogr 273.

⁴⁵ Examples in the energy sector are Shell, BP, Total, Chevron, Exxon Mobil.

⁴⁶ Shell may be an exception to this general rule, however even the company's GHG reduction targets and climate-risk identification has not resulted in significant changes to its operations. At the time of writing the majority of its operations are of hydrocarbon extraction, processing and distribution.

⁴⁷ 'About Us' (CDP, 2017) <[ps://www.cdp.net/en](https://www.cdp.net/en)> accessed 3 December 2017; 'CDSB Framework for Reporting Environmental Information & Natural Capital' (CDSB, 2015)

The consideration of the climate-risks facing corporations is a new phenomenon that is likely to have powerful impacts upon business and the domestic and global economy. Ensuring that corporations turn their minds to these risks increases the likelihood that they may be addressed or that business models will be adapted or diversified to evolve for a future substantially altered by climate change.⁴⁸ Climate change mitigation in the form of GHG reductions is therefore secondary to the primary necessity of a societal and economic shift towards addressing the consequences of and their contribution to climate change.

3. Mandatory CRD: Legislative approaches in the UK and France

3.1. The EU

As current Member States of the EU, the UK and France have been hugely influenced by its climate policy. The ‘Europe 2020 Strategy’ sets out the EU’s ‘vision of Europe’s social market economy for the 21st century’⁴⁹ with three central priorities of smart, sustainable and inclusive

<https://www.cdsb.net/sites/cdsbnet/files/cdsb_framework_for_reporting_environmental_information_natural_capital.pdf> accessed 20 August 2019; TCFD (n 17).

⁴⁸ Mark Carney, ‘Breaking the Tragedy of the Horizon – Climate Change and Financial Stability’ (Lloyd’s of London, 29 September 2015) < <https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability.pdf?la=en&hash=7C67E785651862457D99511147C7424FF5EA0C1A>> accessed 18 August 2019.

⁴⁹ Communication from the Commission Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth (Com(2010) 2020) (2010)
<<http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>> accessed 18 August 2019, 3.

economic growth.⁵⁰ Within this overriding strategy is the 2020 Climate Package⁵¹ which will be followed by the 2030 Climate and Energy Framework from 2021. The EU has recognised that a significant risk to the economies of Member States—and the EU as a whole due to their interdependencies⁵²—is posed by climate change, fossil fuel dependency and from competition for natural resources.⁵³ The 2030 Climate Framework sets binding targets of at least a 40% reduction in GHG emissions compared to 1990 levels by 2030, a 27% increase in renewable energies and a 27% increase in energy efficiency⁵⁴ with a long-term goal to reduce emissions by 80-95% by 2050.⁵⁵ Therefore, changing corporate behaviour, especially that of the energy sector, is of great importance for any chance of meeting these targets.⁵⁶

The EU has positioned non-financial disclosure as a component towards achieving sustainable economic growth.⁵⁷ The Non-Financial Information Directive (NFD) links sustainability with

⁵⁰ *ibid.*

⁵¹ 2020 Climate & Energy Package (*European Commission*, 2018)

<https://ec.europa.eu/clima/policies/strategies/2020_en> accessed 18 August 2019.

⁵² Communication from the Commission Europe 2020 (n 49) 6.

⁵³ *ibid.*

⁵⁴ ‘2030 Climate & Energy Framework’ (*European Commission*, 2018)

<https://ec.europa.eu/clima/policies/strategies/2030_en> accessed 18 August 2019.

⁵⁵ ‘EU Climate Action’ (*European Commission*, 2018) <https://ec.europa.eu/clima/citizens/eu_en> accessed 18 August 2019.

⁵⁶ Magali Dreyfus and Roselyne Allemand, ‘Three Years After the French Energy Transition for Green Growth Law: Has the “Energy Transition” Actually Started at the Local Level?’ (2018) 30 JEL 109, 110.

⁵⁷ Directive 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 [2014] OJ L 330/1, Recital 3.

the disclosure of such information, incorporating ‘long-term profitability with social justice and environmental protection.’⁵⁸ The Commission’s guidance on the NFD aligns with the Sustainable Development Goals (SDGs)⁵⁹ and the Paris Agreement. Climate change *should* therefore be incorporated within the disclosures with the purpose of increasing transparency, GHG mitigation and ‘climate-resilient development’.⁶⁰ The guidance takes into account the TCFD recommendations which were finalised after the introduction of the Directive⁶¹ therefore reflecting the developments in CRD that occurred after the NFD was drafted and implemented in 2014.

Member States may provide requirements for the non-financial statement to be independently verified however the NFD merely requires that auditors confirm that the information has been provided, illustrating the procedural nature of the obligation.⁶² The non-financial statement must ‘[contain] information to the extent necessary for an understanding of the undertaking’s development, performance, position and impact of its activity, relating to, as a minimum,

⁵⁸ Ibid, Recital 3.

⁵⁹ United Nations, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ (2015)

A/RES/70/1 203

<<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> accessed 18 August 2019.

⁶⁰ Communication from the Commission Guidelines on Non-Financial Reporting (2017) C 215/01 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0705\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0705(01)&from=EN)> accessed 17 August 2019, 2.

⁶¹ *ibid*.

⁶² NFD (n 57) Recital 16.

environmental, social and employee matters’.⁶³ It must also include a description of the business model and policies, the principal risks and non-financial key performance indicators.⁶⁴

In regards to environmental matters the ‘statement should contain... details of the current and foreseeable impacts on the environment, and, as appropriate,... the use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution.’⁶⁵ However, the Directive does not explicitly mandate the disclosure of climate-risks. The NFD provides a minimum level of harmonisation across Member States, allowing for stricter domestic requirements to be introduced, and indeed, several Member States had already introduced mandatory requirements prior to the introduction to the Directive itself.⁶⁶

The NFD takes a flexible approach to disclosures allowing corporations to choose their method of reporting.⁶⁷ However, this has been identified as a major deficiency in the EU’s approach.⁶⁸ It is at odds with the purpose of the Directive as laid out in the preamble itself, namely, ‘to enhance the consistency and comparability of non-financial information disclosed throughout the Union.’⁶⁹ By allowing corporations to choose their own methods the obligations of the Directive become less onerous especially to those corporations already utilising international

⁶³ Ibid, Article 1.

⁶⁴ Ibid, Article 1(a)-(e).

⁶⁵ Ibid, Recital 7.

⁶⁶ Wagner (n 8) 694.

⁶⁷ Janja Hojnik, ‘Environmental Corporate Reporting under EU Law: Historic Achievement or Just a Moderate Step Forward?’ [2017] JEEPL 41, 67; NFD (n 57) Recital 9.

⁶⁸ Wagner (n 8) 643.

⁶⁹ NFD (n 57) Recital 6.

standards such as the Global Reporting Initiative.⁷⁰ Yet comparability is reduced markedly by the use of different standards and frameworks which ‘vary widely in scope and content.’⁷¹ Furthermore, with no verification of the information, the result may be that the quantity of information is increased yet the quality and usefulness of the information remains low.⁷² By permitting the report to be either integrated or separate from the financial report the NFD is again weakened through its failure to adequately link the financial and non-financial aspects of the corporations’ activities; the inter-dependencies and interlinkages are not revealed and thus its ability to create value over the medium to long-term cannot be properly assessed.⁷³ The usefulness of these disclosures, especially for cross-border investors, therefore remains questionable.

In 2018 the EU unveiled its Action Plan for Sustainable Finance, recognising the dangers associated with climate change and resource depletion and the concurrent need for investment to reach the Paris Agreement’s targets and sustainability goals more generally.⁷⁴ The aim of the Action Plan is to ‘[reorient] capital towards sustainable investment, managing financial risks that arise from climate change and other environmental and social problems, and fostering

⁷⁰ Wagner (n 8) 645.

⁷¹ Ibid, 623.

⁷² Hojnik (n 67) 72.

⁷³ Ibid, 50.

⁷⁴ European Commission Press Release: Sustainable Finance: Commission’s Action Plan for a Greener and Cleaner Economy (2018) <[http://europa.eu/rapid/press-release_IP-18-1404_en.htm?locale=en;%20http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635572/EPRS_BRI\(2019\)635572_EN.pdf](http://europa.eu/rapid/press-release_IP-18-1404_en.htm?locale=en;%20http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635572/EPRS_BRI(2019)635572_EN.pdf)> accessed 18 August 2019.

transparency and long-termism in financial and economic activity.’⁷⁵ A report in January 2019 by the Technical Expert Group (TEG) on Sustainable Finance made ‘recommendations that will allow the Commission to update its non-binding guidelines on non-financial reporting with specific reference to climate-related information’ in accordance with the TCFD recommendations.⁷⁶ ‘The report contained proposals for disclosing not just how climate change might influence the performance of a company, but also the impact of the company itself on climate change.’⁷⁷ The TEG also recommended legislative ESG disclosure requirements for investments ‘to introduce mandatory disclosure in order to reduce the asymmetry of information between financial entities and end-investors’.⁷⁸

⁷⁵ Communication from the Commission, ‘Guidelines on non-financial reporting: Supplement on reporting climate-related information (2019) C 209/1 <https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en> accessed 19 August 2019, 2.

⁷⁶ ‘Daily News - 10.01.2019 Sustainable Finance: Commission Expert Group Issues First Report on Disclosure of Climate-Related Information’ (2019) <<http://europa.eu/rapid/midday-express-10-01-2019.htm?locale=en#3>; <http://427mt.com/2018/03/15/eu-moves-towards-regulation-for-financial-risk-disclosure/>> accessed 19 August 2019.

⁷⁷ *ibid.*

⁷⁸ European Parliament Briefing: Sustainable Finance and Disclosures Bringing Clarity to Investors (2019) <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635572/EPRS_BRI\(2019\)635572_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635572/EPRS_BRI(2019)635572_EN.pdf)> accessed 19 August 2019; Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341 COM(2018) 354 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0354>> accessed 19 August 2019. The action plan also includes a ‘proposal for a regulation on the establishment of a framework to facilitate sustainable investment. This regulation establishes the conditions and the framework to gradually create a unified classification system (“taxonomy”) on what can be considered an environmentally sustainable economic activity... [and a] proposal for a regulation amending the benchmark regulation... which will provide investors with better information on

The European Commission responded to these recommendations in June 2019 by publishing guidelines on reporting climate related information, supplementing the existing non-financial disclosure guidelines, but without creating ‘new legal obligations’.⁷⁹ These guidelines state that CRD is necessary due to the critical role that companies and financial institutions ‘play in the transition to a low-carbon and climate-resilient economy.’⁸⁰ They emphasize that

[w]ithout sufficient, reliable and comparable sustainability-related information from investee companies, the financial sector cannot effectively direct capital to investments that drive solutions to the sustainability crisis we face and cannot effectively identify and manage the risks to investments that will arise from those crises.⁸¹

The supplement to the guidelines ‘integrates the TCFD recommendations and provides guidance to companies that is consistent with’ the NFD.⁸² However, in terms of materiality, the supplement goes further than the TCFD which concerns only financial materiality, to encompass ‘both financial materiality and environmental and social materiality’.⁸³ The supplementary guidelines go on to, *inter alia*, offer guidance on climate risks and opportunities throughout the value chain,⁸⁴ advice to companies relating to identification and disclosure of

the carbon footprint of their investments.’ European Commission, ‘Sustainable finance’ (*European Commission*) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en> accessed 18 August 2019.

⁷⁹ Communication from the Commission (n 75) 1.

⁸⁰ *Ibid*, 2.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ *Ibid*, 4.

⁸⁴ *Ibid*, 5-6, 7-8.

dependencies on natural capital that may be threatened by climate change,⁸⁵ and to highlight recognised reporting frameworks and standards that a company may use.⁸⁶ Despite being non-binding in character, the supplement to the guidelines offers a comprehensive approach to CRD. Furthermore, it clearly demonstrates both the position of the EU with regard to the importance placed on the identification and disclosure of climate-risks and opportunities and its movement towards the introduction of CRD as a standards business practice. Indeed, this is supported by the short period of time between the TEG report and the production of the supplementary guidance by the Commission. The developments in sustainable finance demonstrates movement towards CRD, movement that is bound to have already influenced and will continue to influence policy developments in relation to CRD in Member States, despite its non-binding status. It is likely that the EU will continue to embrace CRD and over the next several years may move to implement mandatory CRD across its jurisdiction.

3.2. UK

3.2.1. Context

In the late 2000s the UK gained a reputation as a world leader on climate action due to its introduction of a statutory GHG reduction target of 80% compared to 1990 levels by 2050 and five-yearly ‘carbon budgets’ prepared by the Chancellor of the Exchequer.⁸⁷ However, in the years since this introduction the impetus for climate action has generally emanated from the EU’s climate policy rather than domestically.⁸⁸ Despite this, in June 2019 delegated legislation

⁸⁵ Ibid, 6-7.

⁸⁶ Ibid, 8.

⁸⁷ Climate Change Act 2008 s 4.

⁸⁸ Eg: ‘2020 Climate & Energy Package’ (n 51); ‘EU Climate Action’ (n 55); ‘2030 Climate & Energy Framework’ (n 54).

to amend the Climate Change Act's (CCA) GHG reduction target to net zero by 2050 was introduced.⁸⁹ Unfortunately, it is likely that a key part of achieving this will be through the use of international carbon credits.⁹⁰

In 2016, the UK voted in a referendum to leave the EU, a process that has involved a great deal more complexity and difficulty than the 'Brexiters' had originally envisaged, resulting in a significant level of Parliamentary time and resources, as well as that of the civil service, wrapped up in this endeavour to the exclusion of many other areas of concern, including climate change. When, and at the time of writing if, the UK leaves the EU, the severance of environmental and climate policy advanced through directives or regulations from the EU will occur. Despite this, it is unclear how far in practice the UK will deviate from any seemingly 'beneficial' (especially if tied to a future trade agreement) environmental and climate policy.⁹¹ Indeed, the EU's sustainable finance policy is likely to continue to impact companies and investors within the UK; companies with subsidiaries or parent companies in Member States may be required to produce CRDs, and shareholders of companies in these states are also likely

⁸⁹ Climate Change Act (n 87) s1(1). It is likely that this was in response to widespread protests by Extinction Rebellion.

⁹⁰ Peter Walker, Rowena Mason and Damian Carrington, 'Theresa May Commits to Net Zero UK Carbon Emissions by 2050' *The Guardian* (London, 12 June 2019) <<https://www.theguardian.com/environment/2019/jun/11/theresa-may-commits-to-net-zero-uk-carbon-emissions-by-2050>> accessed 19 August 2019.

⁹¹ Eloise Scotford and Megan Bowman, 'Brexit and Environmental Law: Challenges and Opportunities' (2016) 27(3) *KLJ* 416.

to be captured⁹² with strengthened ESG obligations thereby diffusing these norms into the jurisdiction.

3.2.2. Scope and Legislative Framework

There are various legislative acts which may be interpreted to include the disclosure of climate-risks by the corporation in the UK.⁹³ However, unlike France, there has been no introduction of mandatory CRD requirements. Thus, there exists a piecemeal array of corporate law provisions which must be liberally interpreted in order to mandate corporate CRD.

In the UK, a director of a company owes a general duty under section 172(1) of the Companies Act 2006, to ‘act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole’⁹⁴ and in doing so have regard to ‘the impact of the company’s operations on the community and the environment’.⁹⁵ In order to fulfil this statutory requirement, ‘the question is whether the director honestly believed that his act or omission was in the best interests of the company.’⁹⁶ These requirements—to promote the success of the company and consider the environment—must be balanced, and it has been

⁹² BlackRock is a good example of this. On its website it publishes stewardship reports required under the regulatory regimes of each state where it is active. See: BlackRock, ‘Protecting and enhancing our clients’ assets for the long term’ (*BlackRock*, 2019) <<https://www.blackrock.com/corporate/about-us/investment-stewardship#guidelines>> accessed 19 August 2019.

⁹³ It should be noted that the Companies Act 2006 is applicable to England and Wales, Scotland and Northern Ireland and all companies incorporated in those countries are registered through Companies House.

⁹⁴ Companies Act 2006 s172(1).; See e.g. *Re Smith v Fawcett Ltd* [1942] Ch D 304.

⁹⁵ *ibid* 172(1)(d); For a discussion of section 172(1) see: Andrew Keay, ‘The Duty to Promote the Success of the Company: Is It Fit for Purpose?’ [2010] *Working Paper Centre for Business Law and Practice, School of Law, University of Leeds* <<http://ssrn.com/abstract=1662411>> accessed 19 August 2019.

⁹⁶ *Regentcrest plc v Cohen* [2001] BCC 494 [120].

suggested should be interpreted in the context of promoting the interests of its shareholders.⁹⁷

This requirement may however conflict with the costs of climate change mitigation, transitioning to a low carbon economy or future climate liabilities.⁹⁸

Usually, a company's board of directors must institute proceedings on its behalf.⁹⁹ Nevertheless, the board is unlikely to choose to do this in circumstances in which they are responsible for failing to fulfil their section 172(1)(d) duty to consider the impact of the entity on the environment.¹⁰⁰ Shareholders may also bring a derivative action—'instituting proceedings against wrongdoing directors on behalf of the company.'¹⁰¹ As Andrew Keay highlights however, 'the enforcement of breaches of these duties using private mechanisms has generally been ineffective' and few derivative actions for breaches of directors duties have been initiated.¹⁰²

Indeed, it is unlikely that a derivative action would be successful¹⁰³ for two reasons. Firstly, a shareholder must obtain permission to bring a derivative action. In deciding whether or not to

⁹⁷ *Brady v Brady* (1987) 3 BCC 535 [552].

⁹⁸ Lisa Benjamin, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' (2016) 5(2) TEL 353, 359.

⁹⁹ Andrew Keay, 'Applications to Continue Derivative Proceedings on Behalf of Companies and the Hypothetical Director Test' (2015) 34(4) CJQ 346, 347.

¹⁰⁰ *ibid.*

¹⁰¹ Andrew Keay, 'The Public Enforcement of Directors' Duties: A Normative Enquiry' (2014) 43 CLWR 89, 90.

¹⁰² *ibid* 91.

¹⁰³ A case that considered the directors duty under s172(1)(d) is *The Queen on the Application of People and Planet v HM Treasury* [2009] (QB) EWHC 3020 (Admin). However, it is important to note that this was a

grant this permission the judge asks ‘what a person acting pursuant to s. 172 would do. The court places itself in the shoes of the hypothetical director.’¹⁰⁴ If this person would not continue the claim, and/or if the ‘decision... [was] what a hypothetical director would have decided while acting in accordance with s.172’¹⁰⁵ then permission is denied. Secondly, if permission is granted, the court applies a *Wednesbury* standard of reasonableness asking whether the decision is one that no reasonable director could have made—a subjective standard of conduct¹⁰⁶ and a difficult standard to breach that in effect ‘insulates directors from liability’.¹⁰⁷ This results in a two part, *de minimus* objective and subjective test to determine the particular duty of care¹⁰⁸ of the director/s.¹⁰⁹

This lack of enforcement combined with the vague duty to consider the impact on the environment and the paucity of supplementary guidance explaining the duties associated with

permission hearing for a judicial review of the Government’s actions as a shareholder of the Royal Bank of Scotland rather than a private law action.

¹⁰⁴ Keay, ‘Applications to Continue Derivative Proceedings on Behalf of Companies and the Hypothetical Director Test’ (n 99) 357 Also see for discussion of the case law in this area particularly regarding the ‘hypothetical director’ and interpretation of section 172(1).

¹⁰⁵ Ibid, 359.

¹⁰⁶ Ernest Lim, ‘Judicial Intervention in Directors’ Decision-Making Process: Section 172 of the Companies Act’ [2018] J Bus. Law 169, 169.

¹⁰⁷ *ibid* 170; Nick Grant, ‘Mandating Corporate Environmental Responsibility by Creating a New Directors’ Duty’ (2015) 17(4) ELR 252, 255; *ibid*, 256.

¹⁰⁸ *Norman v Theodore Goddard* [1991] BCC 14 [15].

¹⁰⁹ For further discussion of derivative claims see: Keay, ‘Applications to Continue Derivative Proceedings on Behalf of Companies and the Hypothetical Director Test’ (n 99) 365.

the s172(1) stakeholder consideration,¹¹⁰ results in a weak provision for environmental protection.¹¹¹ Indeed, any action by a board—including introducing environmentally beneficial policies—that may affect the value of the shares could itself be open to a legal challenge from the shareholders or resolutions to remove or censure members of the Board.¹¹²

The limitations of section 172(1) have been somewhat lessened by secondary legislation.¹¹³ This development has introduced the obligation of producing a strategic report which requires companies that are not subject to the small businesses exemption¹¹⁴ or classified as micro-entities¹¹⁵ to compile non-financial information and present it within their annual reports. The implementation of the EU NFD by the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016, requires corporations with more than 500 employees or who are traded, banking, authorised insurance or carrying out insurance market activity, to also produce a non-financial statement.¹¹⁶ Therefore the mandatory obligations laid out in the regulations are more extensive for quoted companies and public interest entities

¹¹⁰ Despite, as Keay notes, the great deal of academic attention that has been given to section 172 and the statutory derivative claim: Keay, ‘The Public Enforcement of Directors’ Duties: A Normative Enquiry’ (n 101); Keay, ‘Applications to Continue Derivative Proceedings on Behalf of Companies and the Hypothetical Director Test’ (n 99).

¹¹¹ Grant (n 107) 255.

¹¹² For discussion of this see: *The Queen on the Application of People and Planet v HM Treasury* (n 103).

¹¹³ Companies Act (n 94) pt 14, chpt 4A.

¹¹⁴ Ibid, s414A.

¹¹⁵ Ibid, s384A.

¹¹⁶ Ibid, s414CA.

(PIEs).¹¹⁷ Where the company in question is a parent company the ‘strategic report must be a group strategic report relating to the entities included in the consolidation’,¹¹⁸ in this case the subsidiary is not then required to produce a non-financial information statement.¹¹⁹

‘[T]he purpose of the strategic report is to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company)’.¹²⁰ Importantly, it must be integrated with the financial statements in the annual report, thereby linking and acknowledging the interconnectedness between the financial and the wider non-financial issues facing the company.¹²¹ The non-financial report must review appropriate information to the ‘extent necessary for an understanding of the development, performance or position of the company’s business’.¹²² Within the non-financial statement information regarding ‘environmental matters’ must be included, and information regarding the policies and principal risks related to environmental matters must also be addressed. For those companies that are not required to produce a non-financial report, the contents of the disclosure are limited to the principal risks and uncertainties facing the business.¹²³

¹¹⁷ Financial Reporting Council, ‘Guidance on the Strategic Report’ (*Financial Reporting Council*, July 2018) <<https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf>> 8–9; Companies Act (n 94) s414CA.

¹¹⁸ Companies Act (n 94) s414A(3); Financial Reporting Council (n 117) 7.

¹¹⁹ Financial Reporting Council (n 117) 9; Companies Act (n 94) s14CA(7).

¹²⁰ Companies Act (n 94) s414C(1).

¹²¹ Financial Reporting Council (n 94) 7.

¹²² Companies Act (n 94) s414C(7).

¹²³ *Ibid*, s414C(2)(b).

The Financial Reporting Council (FRC) has developed guidance supplementing these regulations, to ‘encourage preparers to consider how the strategic report fits within the annual report as a whole, with a view to improving the overall quality of corporate reporting.’¹²⁴ The guidance incorporates the requirements of all the applicable regulations¹²⁵ as well as aligning with the requirements of the UK Corporate Governance Code.¹²⁶ It highlights the purpose of non-financial reporting, consistent with the TCFD recommendations although without explicitly mentioning them, of providing context for the financial statements and emphasises the importance of ensuring the materiality and forward looking nature of the information provided.¹²⁷ The guidance sets out not merely the statutory disclosure requirements but also best practice guidance,¹²⁸ suggesting that it is the materiality of the information that determines whether or not it should be included in the strategic report, ‘irrespective of whether there is an explicit statutory disclosure requirement.’¹²⁹

In relation to the environmental matters that must be considered in the non-financial statement, the guidance does incorporate considerations of climate change although this only applies to those companies captured by the strongest of the obligations. The guidance suggests that boards should consider the following questions: ‘Will the entity’s business be affected by climate change, either as a result of regulation or climate change affecting how the business can

¹²⁴ Financial Reporting Council (n 117) 3.

¹²⁵ Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013/1970; Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016; Companies (Miscellaneous Reporting) Regulations 2018.

¹²⁶ Financial Reporting Council (n 117) 3.

¹²⁷ Ibid, 4.

¹²⁸ Ibid, 5.

¹²⁹ Ibid, 7.

operate? [And, what] are the effects of an entity's activities on climate change?'¹³⁰ Furthermore, it suggests that entities, when disclosing information, consider 'the potential severity or frequency of the impacts on the environment.'¹³¹

Additionally, the Companies (Miscellaneous Reporting) Regulations 2018 'requires all large companies to include a section 172(1) statement as part of its strategic report.'¹³² There is no exemption for subsidiary companies from providing a section 172(1) statement because the director owes the section 172(1) duty to the company itself.¹³³ This statement must 'describes how the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty under section 172.'¹³⁴ The section 172(1) statement must be published on the company's website as well as in the strategic report.¹³⁵ FRC guidance states that the Section 172(1) statement 'should explain how the board has had regard to the broader matters in their actions, behaviours and decisions.'¹³⁶ The guidance highlights some types of information that companies would 'probably want to include' such as information that directors consider relevant and how they formed that opinion, how the directors 'engage with stakeholders and understand the issue to which they must have regard' and 'the effect of that regard on the company's decisions and strategies.'¹³⁷ The regulations do not mandate the detail that should be included in the section 172(1) statement and the FRC guidance instead suggests

¹³⁰ *ibid* 32.

¹³¹ *ibid*.

¹³² *ibid* 9; Companies (Miscellaneous Reporting) Regulations 2018 s414CZA.

¹³³ Financial Reporting Council (n 117) 58.

¹³⁴ CMRR (n 132) s414CZA.

¹³⁵ Financial Reporting Council (n 117) 62.

¹³⁶ *Ibid*, 58.

¹³⁷ *ibid*.

what information may, could or should be included.¹³⁸ Although there exists a statutory requirement to state that the directors have considered stakeholders and fulfilled their statutory duties, ensuring that they do in fact turn their minds to the issue, it is unclear whether this would actually ensure that the duties are fulfilled in any more meaningful way than prior to the recent amendments.

If a director knowingly or recklessly provides misleading or untrue statements, or conceals facts by omission that leads to the company suffering any loss, the director is personally liable to compensate the company for the loss, although this liability does not extend to losses suffered by the shareholders.¹³⁹ Directors are collectively responsible for the production of the strategic report¹⁴⁰ therefore if any director fails ‘to comply with the requirement to prepare a strategic report, an offence is committed by every person who (a) was a director of the company immediately before the end of the period for filing accounts and reports for the financial year in question, and (b) failed to take all reasonable steps for securing compliance with that requirement.’¹⁴¹ The penalty for this offence on conviction on indictment and on summary conviction is a fine.¹⁴² For quoted companies requiring more extensive disclosures, if the information relating to environmental matters is not included in the strategic report it ‘must state which of those kinds of information it does not contain’—that is it takes a ‘comply or explain’ approach.¹⁴³

¹³⁸ Ibid, 58–60.

¹³⁹ *ibid* 14; Companies Act (n 94) s463.

¹⁴⁰ Companies Act (n 94) s414A(1).

¹⁴¹ *Ibid*, s414A(5).

¹⁴² *Ibid*, s414A(6).

¹⁴³ *Ibid*, s414C(7)(b).

3.2.3. Codes

The updated UK Corporate Governance Code 2018 mandates that a company's directors must disclose and explain the principal risks faced by the business including those that endanger the business model of the company and how they are being mitigated or managed.¹⁴⁴ This requires an explanation regarding how these risks were assessed and should state 'whether they have a reasonable expectation that the company will be able to continue in operation and meet its liabilities as they fall due over the period of their assessment, drawing attention to any qualifications or assumptions as necessary'.¹⁴⁵ The purpose of the Code is to facilitate 'effective board practice'¹⁴⁶ and good corporate governance and thus has no overt environmental objects. All companies with a premium listing of equity shares are required under the Listing Rules to report on how they have complied with the Code in their annual report and accounts, in line with the general 'comply or explain' approach.¹⁴⁷

The Code 'focuses on the application of the Principles' by the board thereby promoting flexibility.¹⁴⁸ Companies must then make a statement regarding 'how they have applied the Principles, in a manner that would enable shareholders to evaluate how the Principles have been applied.'¹⁴⁹ The Code emphasises the importance of high quality information and the

¹⁴⁴ UK Corporate Governance Code (*Financial Reporting Council*, 3 May 2018) paras 28–31

<<https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code>> accessed 19 August 2019.

¹⁴⁵ Ibid, para 31.

¹⁴⁶ Ibid, Principle A.

¹⁴⁷ Ibid, 2; Financial Conduct Authority, 'FCA Handbook' (*Financial Conduct Authority*, 2019) <

<https://www.handbook.fca.org.uk/handbook>> accessed 19 August 2019, LR9.8.6.

¹⁴⁸ UK Corporate Governance Code (n 144) 2.

¹⁴⁹ *ibid*.

importance of avoiding ‘boilerplate’ and ‘tick-box’ reporting.¹⁵⁰ While it also does not explicitly mention the environment or climate change, Principle O states that ‘[t]he board should establish procedures to manage risk, oversee the internal control framework, and determine the nature and extent of the principal risks the company is willing to take in order to achieve its long-term strategic objectives.’¹⁵¹ The provisions provide further information regarding how to apply the Principles, in particular stating that companies should: carry out robust assessments of emerging and principal risks, describing the risks, how they are identified, and how they are being mitigated or managed. The board should monitor and review annually the effectiveness of the company’s risk management systems.¹⁵² For companies involved in intensive GHG industries and which undertake these obligations in good faith, it seems highly unlikely that climate change could *not* be considered in these risk assessments.

The UK Stewardship Code is complimentary to the UK Corporate Governance Code, setting out ‘the principles of effective stewardship by investors’.¹⁵³ The Code emphasises the role of investors beyond merely voting; their obligation is to hold ‘the board to account for the fulfilment of its responsibilities.’¹⁵⁴ The Code is directed primarily at institutional investors with holdings in listed companies; ‘all UK-authorized Asset Managers are required under the [Financial Conduct Authority’s (FCA)] Conduct of Business Rules to produce a statement of commitment to the UK Stewardship Code or explain why it is not appropriate to their business

¹⁵⁰ *ibid.*

¹⁵¹ *Ibid.*, 10.

¹⁵² *Ibid.*, 28–31.

¹⁵³ Financial Reporting Council, ‘The UK Stewardship Code 2012’ (*Financial Reporting Council*, September 2012) < [https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-\(September-2012\).pdf](https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf) > accessed 19 August 2019, 1.

¹⁵⁴ *ibid.*

model.’¹⁵⁵ It also applies to foreign investors in as much as it does not duplicate the obligation of ‘other national or international code that have similar objectives’.¹⁵⁶ The signatories to the Code should publish a statement regarding how they have complied on their website.¹⁵⁷

The Code consists of principles and guidance which may be applied flexibly and, indeed, ‘departures from the Code should not be automatically treated as breaches.’¹⁵⁸ It attempts to influence behavioural changes¹⁵⁹ by promoting investor engagement and, ultimately, corporate accountability.¹⁶⁰ The Code attempts to encourage the best practice to which ‘institutional investors should aspire.’¹⁶¹ In other words, the purpose of the Code is to attempt to mobilise investors to wield the influence that they possess to promote good corporate governance. This may be more effective at changing the behaviour of the board of a corporation than mere financial penalties in relation to climate change and CRD. Nevertheless, investors are reliant upon the information provided to them by the company, and obtaining this when it is not forthcoming and without mandatory CRD requirements, may be incredibly difficult. Indeed, ‘[m]ore than half of 497 institutional investors surveyed by HSBC said they were receiving

¹⁵⁵ FCA Handbook (n 147) COBS 2.2.3; UK Stewardship Code (n 153).

¹⁵⁶ The UK Stewardship Code (n 153) 3.

¹⁵⁷ Ibid, 2.

¹⁵⁸ Ibid, 4.

¹⁵⁹ Ibid, 2.

¹⁶⁰ Financial Reporting Council, ‘Developments in Corporate Governance and Stewardship 2016’ (*Financial Reporting Council*, 2017) 24 <<https://www.frc.org.uk/getattachment/ca1d9909-7e32-4894-b2a7-b971b4406130/Developments-in-Corporate-Governance-and-Stewardship-2016.pdf>> accessed 19 August 2019.

¹⁶¹ The UK Stewardship Code (n 153).

‘highly inadequate’ information from companies about their risk of disruption from climate change and opportunities to benefit from the shift to low-carbon technologies’.¹⁶²

Principle 3 of the Stewardship Code requires that ‘[i]nstitutional investors should monitor their investee companies’.¹⁶³ This involves ensuring that the investor keeps abreast of developments that ‘drives the company’s values and risks’, that the board adheres to the ‘spirit of the UK Corporate Governance Code’, and ‘consider the quality of the company’s reporting.’¹⁶⁴ While this Principle seems to introduce relatively weak requirements, there is nothing to prevent an investor taking a stronger interest in the company’s climate-risk identification, especially for those in the energy industry. However, the Code does caution that it ‘does not constitute an invitation to manage the affairs of the company’¹⁶⁵ thereby creating significant uncertainties regarding how greatly investors may influence the policies of the company in practice and demonstrating the fine line that they must tread.

The highly flexible nature of this Code, and the minimum requirements that the Principles introduce, ensures that a great deal of the power that institutional investors possess and may be leveraged to promote corporate behaviour change, is ultimately lost.

3.2.4. Enforcement

A corporation’s annual report, including the strategic report, must be independently audited, to ensure that it was prepared in accordance with the statutory requirements¹⁶⁶ and to determine

¹⁶² House of Commons Environmental Audit Committee, *Greening Finance: Embedding Sustainability in Financial Decision Making* (Seventh Report of Session 2017-19) (2018) HC 1063 476.

¹⁶³ The UK Stewardship Code (n 153) 7.

¹⁶⁴ *ibid.*

¹⁶⁵ *Ibid.*, 1.

¹⁶⁶ Companies Act (n 94) s496(1)(ii).

whether any ‘material misstatements’ have been made.¹⁶⁷ The enforcement mechanisms concentrate on compliance with the procedural aspects of the statutory obligation to produce a strategic report and section 172(1) statement rather than the contents and quality of the disclosure. Additionally, the liability of directors under section 172(1) is limited to a very narrow set of circumstances and where there has been a financial loss to the company.

Section 414A the Companies Act 2006 does provide a criminal penalty for the failure to take reasonable steps to produce the information for the strategic report. However, the regulator, Companies House, is explicit that it will only investigate offenders where there is ‘persistent, repeated and wilful non-compliance.’¹⁶⁸ Ensuring compliance therefore rests upon investors who are motivated to pursue this via shareholder resolutions (often requiring 75% of the shareholders to vote it favour for it to pass) or private law. Assuming that the information is provided, investors who are concerned at the lack of consideration within the corporation of environmental and, by extension, climate-risks, again have recourse to shareholder resolutions or may attempt to apply for permission to bring a derivative claim.

The lack of enforcement and verification of the content of the strategic report therefore results in a situation in which a failure to account for climate-risks cannot in reality be challenged through the courts by a shareholder. While majority shareholders (or groups of likeminded shareholders) may propose and successfully vote through resolutions, therefore wielding their influence to force CRD, minority shareholders in corporations where the majority shareholders

¹⁶⁷ Ibid, s496(1)(b).

¹⁶⁸ Companies House, Companies House Enforcement Strategy (*Gov.UK*, 21 July 2015)

<<https://www.gov.uk/government/publications/enforcement-strategy-at-companies-house/companies-house-enforcement-strategy>> accessed 19 August 2019.

are content for the entity to fail to consider its climate-risks will have little power or influence to change this behaviour.

CRD requirements within the Corporate Code also lack an appropriate enforcement mechanism. The FCA may issue a fine to companies or individuals for breaches of the Listing Rules or the Code of ‘a penalty of such amount as it considers appropriate’.¹⁶⁹ Nevertheless, it is unlikely that this would extend to the content of the report unless, as under the Companies Act 2006, it could be shown that the report contained misleading or untrue statements or principal risks were omitted.

3.2.5. UK: Conclusion

The UK Government endorsed the TCFD recommendations in September 2017, and launched the ‘Green Finance Task Force’ (GFTF) in order to inform policy development directed at green investment.¹⁷⁰ The TCFD recommendations were positioned as a cross-cutting issue to be considered in relation to the six workstreams covering specific financing options.¹⁷¹ The GFTF published its report in March 2018, stating as one of its key recommendations that:

¹⁶⁹ Financial Services and Markets Act 2000 s91(1), 91(1B).

¹⁷⁰ Department for Business, Energy & Industrial Strategy, ‘Guidance: Green Finance’ (*Gov.UK*, 2 July 2019) <<https://www.gov.uk/guidance/green-finance>> accessed 19 August 2019.

¹⁷¹ Department for Business, Energy & Industrial Strategy, ‘Green Finance Taskforce: Terms of Reference’ (*Gov.UK*, 2017)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/675361/Green_Finance_Taskforce_-_terms_of_reference.pdf> accessed 19 August 2019, 2.

[t]he Government and relevant financial regulators must clarify in their guidelines that disclosing material environmental risks, including physical and transition climate-related risks, is already mandatory under existing law and practice.¹⁷²

This recommendation demonstrates the uncertainty that has existed regarding whether CRDs are mandatory or not. Indeed, Ministers have reported to the Environmental Audit Committee (EAC) that there may be a possibility for these disclosures to become mandatory in the future should there be a failure of voluntary compliance.¹⁷³ These statements suggest that the Government did not consider that CRDs are mandatory under the law as it currently stands, but rather voluntary disclosures that a corporation may choose to make above the minimum requirements. This may be the motivation behind the TFGF's further recommendation to conduct a review of disclosures in 2020 to determine, no doubt, the take up of these voluntary requirements.¹⁷⁴ The EAC has stated that it wishes to see mandatory CRDs for large companies and institutional investors by 2022 depending on the outcome of this review.¹⁷⁵

This serves to indicate that the UK Government (albeit through the GFTF who met with Ministers prior to final drafting¹⁷⁶) does take seriously the threat of climate change to business. Furthermore, it highlights the UK's approach to legislative developments in this area; the GFTF

¹⁷² Green Finance Task Force, 'Accelerating Green Finance' (March 2018)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/703816/green-finance-taskforce-accelerating-green-finance-report.pdf> accessed 19 August 2019. Emphasis added.

¹⁷³ Madeleine Cuff, 'Climate Risk Disclosure Could Become Mandatory, Government Hints' *BusinessGreen* (London, 22 February 2018) < <https://www.businessgreen.com/bg/analysis/3027196/climate-risk-disclosure-mandatory-could-become-mandatory-for-firms-government-officials-hint>> accessed 19 August 2019.

¹⁷⁴ Green Finance Task Force (n 172) 37.

¹⁷⁵ House of Commons Environmental Audit Committee (n 162) 4.

¹⁷⁶ Green Finance Task Force (n 172) 93.

is a partnership of the private sector, government and academia.¹⁷⁷ Nonetheless, whether or not the recommendations are adopted, and go far enough, remains to be seen.

Indeed, in relation to the introduction of mandatory GHG emissions disclosure earlier this decade, the Government emphasised the ‘aim to reduce the regulatory burden on companies’¹⁷⁸ and as such limited the scope of the requirement to quoted companies and scope 1 and 2 emissions.¹⁷⁹ At this time the Government’s agenda was concerned with deregulation, nevertheless this did not present a barrier to the introduction of the legislation instead a balance was struck between mandatory GHG emissions disclosure and limiting the burden on business. The CCA 2008 required that the Government to introduce regulation to mandate GHG emissions disclosure or explain to Parliament why they did not do so.¹⁸⁰ The fact that the Government subsequently chose to introduce such legislation indicates that information disclosure was viewed in a positive light by the more conservative Government at the time.¹⁸¹ While this is in the context of GHG emissions reporting, it may be that the extension of information disclosure to climate risks may also be interpreted as an opportunity to further the low carbon transition in accordance with the emissions reduction target in the CCA 2008 in a way that also limits the regulatory burden placed upon businesses.

¹⁷⁷ Ibid, 87.

¹⁷⁸ Department for Environment, Food and Rural Affairs, ‘Measuring and Reporting of Greenhouse Gas Emissions by UK Companies: Summary of Consultation Responses’ (Gov.UK, June 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/86569/20120620-ghg-consult-sumresp.pdf> accessed 5 August 2019, 14.

¹⁷⁹ Ibid, 12.

¹⁸⁰ Climate Change Act (n 87) ss 85(1)-(2).

¹⁸¹ This occurred during the Conservative-Liberal Democrat Coalition Government 2010-2015 whereas the CCA 2008 was drafted and introduced under the previous Labour Government.

The UK has implemented a comprehensive corporate governance strategy adopting statutory requirements supplemented by codes and guidance with the emphasis placed upon transparency and accountability. Nonetheless, when examined through the lens of climate change, and climate-risk reporting in particular, the current governance requirements are not adequate for promoting quality disclosures and thus influencing behavioural changes as envisaged in the TCFD recommendations. There are several failures in this regard including: the limited scope of the requirements; limitations to the use of section 172(1) duties for climate change; limitations regarding the content of the strategic report; and the limited application of the UK Stewardship Code. While the use of both hard and soft law measures to promote behavioural changes may be effective over the medium to long-term, as soft law may be used as a way of subtly changing the hard law provisions,¹⁸² taken in isolation and in the context of the immediate changes necessary to mitigate climate change and the transition to the low carbon economy, this is not sufficient.

Given that in the last year the section 172(1) statement was introduced, the UK Corporate Governance Code has been updated, and consultations on the UK Stewardship Code have included considerations of the TCFD recommendations and climate-risks,¹⁸³ it is clear that the Government and FRC are moving in the right direction. Nonetheless, as the GFTF states, ‘only if reporting is mandatory are we likely to see comprehensive and comparable climate risk disclosures.’¹⁸⁴

3.3. France

¹⁸² Gregory Shaffer and Mark Pollock, ‘Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance’ (2010) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426123> accessed 19 August 2019.

¹⁸³ UK Stewardship Code (n 153).

¹⁸⁴ House of Commons Environmental Audit Committee (n 152) 86.

3.3.1. Context

The introduction of the French Energy Transition Law 2015 coincided with the country hosting the landmark Paris Agreement 2015 and has the purpose of diversifying the country's energy mix in the context of climate change. As Magali Dreyfus and Roselyne Allemand have argued, '[t]his law became the flagship of the country's national commitment to fight against climate change and a political incentive towards other states to commit to reduce their greenhouse gases (GHG) emissions and ensure the success of COP-21'.¹⁸⁵ Within its 215 articles are those introducing binding GHG reduction targets, renewable energy targets, targets aimed at reducing energy consumption and an increase in the carbon tax.¹⁸⁶ Article 173 of the Energy Transition law introduces a CRD framework, which the French government hopes will create 'a ripple effect, both internationally and on a national level, across the investment value chain.'¹⁸⁷ France has therefore positioned itself as a climate leader both domestically and within the EU. Indeed, in collaboration with other likeminded Member States: Spain, Portugal, Sweden, Luxemburg, the Netherlands, Belgium and Denmark, it has pushed for the introduction of a EU-level net zero GHG target by 2050.¹⁸⁸ In May 2019, the French

¹⁸⁵ Dreyfus and Allemand (n 56) 109.

¹⁸⁶ London School of Economics, 'Law No. 2015-992 on Energy Transition for Green Growth (Energy Transition Law)' (*LSE*, 2015) <<http://www.lse.ac.uk/GranthamInstitute/law/law-no-2015-992-on-energy-transition-for-green-growth-energy-transition-law/>> accessed 19 August 2019.

¹⁸⁷ Emilie Mazzacurati, 'Art. 173: France's Groundbreaking Climate Risk Reporting Law' (*FourTwentySeven*, 17 January 2017) <<http://427mt.com/2017/01/16/impact-french-law-article-173/>> accessed 18 August 2019.

¹⁸⁸ Rochelle Toplensky, 'Eight EU Countries Call for Net-Zero Carbon Emissions by 2050' *Financial Times* (London, 7 May 2019) <<https://www.ft.com/content/77b0fd1e-7010-11e9-bf5c-6eeb837566c5>> accessed 19 August 2019.

Government also proposed legislation to enshrine this target into domestic law.¹⁸⁹ However, it should be noted that concurrently there has been, and remains, civil unrest in France. So called *gilets jaunes* protesters emerged after President Macron attempted to introduce a fuel tax as part of the country's climate policy—a policy which was quickly withdrawn.¹⁹⁰

3.3.2. Scope and Legislative Framework

The purpose of article 173 of the Energy Transition Law is to increase disclosures by listed companies and financial institutions and importantly, to align investment portfolios with both French and international climate policies.¹⁹¹ The provision requires both listed companies and institutional investors to make certain disclosures in their annual reports. Listed companies must disclose, *inter alia*: financial risks related to the effects of climate change; the measures adopted by the company to reduce them; and, the consequences of climate change on the company's activities and of the use of goods and services it produces. Institutional investors must disclose information on, *inter alia*: how ESG is considered in their investment portfolio; physical risks and those stemming from the transition to a low-carbon economy; and, how their

¹⁸⁹ Natalie Sauer and Karl Mathiesen, 'France Introduces 2050 Carbon-Neutral Law' *Climate Home News* (London, 8 February 2019) <<https://www.climatechangenews.com/2019/02/08/france-proposes-2050-carbon-neutral-law/>> accessed 19 August 2019; 'PROJET DE LOI: Énergie-Climat' <https://reporterre.net/IMG/pdf/projet_de_loi_e_nergie-fe_v_2019.pdf> accessed 19 August 2019.

¹⁹⁰ Angelique Chrisafis, 'Who Are the Gilets Jaunes and What Do They Want?' *The Guardian* (London, 7 December 2018) <<https://www.theguardian.com/world/2018/dec/03/who-are-the-gilets-jaunes-and-what-do-they-want>> accessed 19 August 2019.

¹⁹¹ Amy Mason, Will Martindale, Alyssa Heath and Sagarika Chatterjee, Principles of Responsible Investment, 'French Energy Transition Law: Global Investor Briefing' (2016) <<https://www.unepfi.org/fileadmin/documents/PRI-FrenchEnergyTransitionLaw.pdf>> accessed 19 August 2019, 7-8.

policies align with the national strategy for energy and ecological transition and international climate commitments.¹⁹² Crucially however, ‘all reportable data in the decree represents best practice and not an obligation.’¹⁹³

This provision therefore specifically incorporates the consideration of climate-risks from physical and transitional impacts, thereby ensuring that corporations begin to consider climate change as a matter of course when identifying risks to the entity. It goes beyond the TCFD recommendations; rather than merely recognising the power of institutional investors that may be leveraged upon corporations, article 173-VI recognises that investors too must account for the impact of their investments. The provision, in contrast with the UK’s legislative approach, provides companies with a clear, identifiable and consistent obligation of CRD.

The challenges of regulating companies in this area has been highlighted by the difficulties implementing article 173, leading some private actors to identify an avenue by which this mandatory legislation may be supported. The International Standards Organisation (ISO), the French Government and the 2 Degrees Project are in the process of developing a new standard, ISO 14097, that encompasses both the French Law, the TCFD Recommendations and would be consistent with the SDGs.¹⁹⁴ In this way, private actors support article 173 by providing a standard by which corporations can be guided into compliance with the mandatory

¹⁹² Ibid, 8.

¹⁹³ Forum Pour L’investissement Responsable, ‘Article 173-VI: Understanding the French Regulation on Investor Climate Reporting’ (2016) <https://www.frenchsif.org/isr-esg/wp-content/uploads/Understanding_article173-French_SIF_Handbook.pdf> accessed 19 August 2019, 5.

¹⁹⁴ 2 Degrees Investing Initiative, ‘ISO Standard for Investment, Financing and Climate Change’ (2017) <http://degreesilz.cluster023.hosting.ovh.net/wp-content/uploads/2018/01/iso14097_scoping_report_v0.pdf> accessed 19 August 2019.

requirements. This may then be used by other state and private actors, thereby potentially diffusing this legislation and creating a new international normative framework for CRDs and, importantly, providing for the comparability of the information disclosed.

3.3.3. Codes

Order No 2017-1180 of 2017¹⁹⁵ amended the Commercial Code to implement the EU NFD—it must be interpreted in the context of article 173—ensuing that climate-risks are now included within its scope.¹⁹⁶ The Commercial Code establishes that PIEs and large companies must produce a consolidated statement of non-financial performance.¹⁹⁷ The Code extends and clarifies the threshold by which companies are obliged to produce the statement. Listed companies must produce a statement if they employ over 500 employees in the ‘relevant reporting period’¹⁹⁸ and have ‘a balance sheet total in excess of €20m or a net turnover in excess of €40m’.¹⁹⁹ Companies that do not meet this threshold must instead produce a simplified statement.²⁰⁰ For unlisted companies, the threshold consists of employing more than 500 employees and ‘a balance sheet total in excess of €100m or a net turnover in excess of €100m’.²⁰¹ The obligation to provide a performance statement has been extended to ‘partnerships where all the shares... are held by legal entities that are themselves public limited companies, joint-stock companies or limited companies or have a comparable legal status under

¹⁹⁵ Order No 2017-1180 of 19 July 2017.

¹⁹⁶ Catherine Malecki, ‘French Implementation of the EU CSR Directive: Sustainable Corporate Governance Has Begun’ (2018) 12(2) LFM 86, 86.

¹⁹⁷ *ibid*; Article L225-102-1, II Commercial Code.

¹⁹⁸ Malecki (n 196) 87; Article R225-104, 1° Commercial Code.

¹⁹⁹ Malecki (n 196) 87; Article R225-104, 1° Commercial Code.

²⁰⁰ Malecki (n 196) 87.

²⁰¹ *ibid*; R225-104, 1° Commercial Code.

foreign law.’²⁰² If a parent company based in France or another Member State produces a consolidated performance statement the subsidiary is exempted from producing one.²⁰³ This therefore extends the scope of CRD requirements beyond those companies that are captured under article 173.

The statement takes the form of ‘comply or explain’ requiring ‘a clear and reasonable explanation justifying’ why a company does not pursue a policy in respect of a particular risk or matter.²⁰⁴ Interestingly, and again moving beyond the requirements of the UK, it is to be verified by an independent third-party body (ITPB) who must provide an “opinion” regarding the disclosures, its compliance with the Commercial Code and, for example, any non-financial risks identified.²⁰⁵ The non-financial performance statement must be published on the entity’s website within ‘eight months of the balance sheet date and for a duration of five years.’²⁰⁶ Therefore, this provision is aimed at promoting the publication of the relevant information in order to ensure that existing or potential investors in the company are fully informed of the potential risks to it, thereby providing an opportunity to leverage their economic power.

The Commercial Code sets out information that *may* be included in the performance statement including ‘the consequences for climate change of the company’s activities and of the use made of the goods and services that it produces; [and] the company’s societal commitments in relation to sustainable development’.²⁰⁷ The statement should contain considerations of ‘the

²⁰² Malecki (n 196) 87–88; L221-7 para 4 Commercial Code.

²⁰³ Malecki (n 196) 88; L225-102-1, IV Commercial Code.

²⁰⁴ Malecki (n 196) 90; R 225-105 I para 6; L 225-102-1, III, para 1 and 2 Commercial Code.

²⁰⁵ Malecki (n 196) 91; L225-102-1, V Commercial Code.

²⁰⁶ Malecki (n 196) 90; L225-102-1, III, para 4; R225-105–1 III Commercial Code.

²⁰⁷ Malecki (n 196) 88; L225-102–1, III, para 2 Commercial Code.

main risks related to the activity of the company or of the group of companies, including, where relevant, and proportionate, the risks created by its business relationships, products or services’.²⁰⁸ This involves the policies that the company has established to avoid risks, and information regarding the principal risks or policies in relation to climate change.²⁰⁹ More specifically, information is required regarding the production of GHG emissions, measures taken to adapt to climate change and voluntary emissions reduction targets in the medium and long-term and how they may be achieved.²¹⁰ For institutional investors, the Monetary and Financial Code mandates that they provide their subscribers with information regarding how they take into account ESG objectives and consideration of exposure to climate risks²¹¹ of both a transitional and physical nature²¹² and details regarding the considerations that companies must take into account.²¹³ Nevertheless, given that the disclosure of the information is not mandatory, it is unclear the extent to which it would be adequately provided.

The *Devoir de vigilance* Law 2017²¹⁴ amended the Commercial Code to complement the legislation outlined above by introducing due diligence requirements for specific companies exceeding 5,000 employees in France or 10,000 globally (and that are registered in France).²¹⁵ This requires the production of annual ‘vigilance plans’ that ‘includes due diligence measures

²⁰⁸ R225-105 I-1° Commercial Code.

²⁰⁹ R225-105 I-2 Commercial Code.

²¹⁰ L225-102-1; R225-105 IIA2(d) Commercial Code.

²¹¹ L533-22-1 Monetary and Financial Code.

²¹² D533-16-1 III(1)(b)(i) Monetary and Financial Code.

²¹³ D533-16-1, III(3)(b) Monetary and Financial Code.

²¹⁴ Law No. 2017-399 of March 27, 2017 on the Duty of Care of Parent Companies and Ordering Companies.

This has been further amended by Order No 2017-1180.

²¹⁵ L225-102-4, I Commercial Code.

to identify risks and to prevent serious violations of human rights and fundamental freedoms, human health and safety and the environment’ including their subsidiaries and supply chains, and to provide measures to mitigate against these risks.²¹⁶ Accordingly, [‘i]t grounds a duty of care with respect to human and environmental rights and compels companies to plan for and carry out affirmative action.’²¹⁷ The obligation to produce vigilance plans has further been extended to, *inter alia*: listed companies governed by the law of a Member State, certain credit institutions;²¹⁸ insurance and reinsurance companies;²¹⁹ provident societies and their unions;²²⁰ and certain agricultural cooperative societies.²²¹

The inclusion of ‘environmental’ suggests that climate change could be included, especially when the body of climate-related corporate law is taken into account. Nonetheless, the human rights focus of this legislation may suggest that any environmental concerns should be connected to its direct effects on people. While increasingly climate change is framed in terms of human rights violations, this could be too remote from the ‘people’ affected when considering direct and indirect GHG emissions from supply chains and subsidiaries, in a way that proximate environmental damage from identifiable installations may not be. This line of reasoning would suggest that a general, and taken individually, a *small* contribution to climate

²¹⁶ L225-102-4 para 3 Commercial Code.

²¹⁷ Emily Holland, ‘French Duty of Vigilance Law Takes Trend toward Mandated Corporate Disclosure

Regimes to New Level’ (*Freshfields Brukhaus Deringer*, 6 April 2017)

<<http://humanrights.freshfields.com/post/102e4aq/french-duty-of-vigilance-law-takes-trend-toward-mandated-corporate-disclosure-reg>> accessed 6 August 2019.

²¹⁸ L511-35 Monetary and Financial Code.

²¹⁹ L310-1-1-1 Insurance Code.

²²⁰ L931-7-3 para 1 Social Security Code.

²²¹ L524-2-1 para 1 Rural and Maritime Fisheries Code.

change, may be unlikely to fall within the vigilance plan as a legal requirement. Nevertheless, if interpreted to include climate change, this would provide a further element to influence corporate behaviour by incorporating the impact of the corporation and its operation on the causes of climate change from a human rights perspective.

3.3.4. Enforcement

Alongside difficulties with the implementation of article 173, its enforcement has also proven elusive. At the time of writing, there is no decree regarding how this law is to be enforced.²²² This raises serious questions as to the effectiveness of this provision—if there is no enforcement mechanism not only will a failure to disclose go unanswered, but the quality of the disclosures may be suspect. Without the weight of the financial regulator, the *Autorité des marchés financiers* (AMF), and any penalties that they have discretion to impose, enforcement rests upon the shareholder.²²³ The AMF has instead issued guidance to corporations, investors and issuers combining the different disclosure requirements and making recommendations on the provision of non-financial information within annual reports.²²⁴ Despite the unique introduction of legislation mandating CRDs, at present this renders the outcome of this legal innovation much the same as that of the UK given their ‘comply or explain’ basis.

Alongside a lack of enforcement on the procedural aspects, there is also concurrently little to promote high quality disclosures. Research conducted by *Four Twenty Seven* into the

²²² Mason and others (n 191) 8.

²²³ *ibid.*

²²⁴ Autorité des marchés financiers, ‘Report on Social, Societal and Environmental Responsibility: Will Financial and Non-Financial Information Converge?’ (*Autorité des marchés financiers*, November 2016) <https://www.amf-france.org/technique/multimedia?docId=workspace:/SpacesStore/b0fba89a-1720-48be-a093-66b22da9716b_en_1.0_rendition> accessed 19 August 2019, 2.

disclosures of financial companies including asset managers, has shown that the first year of reporting (2017) ‘saw limited uptake of physical risk and opportunities’, with only 36 out of 50 organisations reviewed publishing article 173 reports. However, the research identified that of those who did mention physical risks most ‘emphasized the lack of tools and models as a major impediment to reporting’ on them.²²⁵ Therefore the development of ISO 14097 may provide an important component to promote adequate compliance. The second reporting year 2018, showed an increase in the uptake of the disclosure of physical risk of almost half of respondents. The research found that ‘23 companies (47%) made significant improvements in their disclosure since last year... Only four companies (8%) have provided reports which were less complete than last year, including one company for which we found a report last year, but not this year. 45% of the firms published reports which were very similar to last year.’²²⁶ The research concludes that ‘[m]any organizations lack the tools, models and data to perform a comprehensive assessment of their portfolios, and for many firms, physical risks appear to still be a lower priority than transition risks. Those firms that are on the forefront of climate risk reporting disclose asset-level risk exposure and are beginning to explore how to assess value at risk and scenario analysis for physical climate risks.’²²⁷ It is likely therefore that CRDs mandated by article 173 will take several years to develop and several years more until there is widespread adoption of the identification and quality reporting of climate-risks.

²²⁵ Leonie Chatain, ‘Art. 173: Lessons Learned from Climate Risk Disclosures in France’ (*FourTwentySeven*, 2018) <<http://427mt.com/2018/03/21/art-173-lessons-learned-climate-risk-disclosures-france/>> accessed 9 February 2018.

²²⁶ Nathalie Borgeaud, ‘Article 173: Lessons Learned from 2018 Climate Risk Disclosures in France’ (*FourTwentySeven*, 2019) <<http://427mt.com/2019/04/30/article-173-lessons-learned-from-2018-climate-risk-disclosures-in-france/>> accessed 18 August 2019.

²²⁷ *ibid.*

In terms of the Commercial Code, if a company does not provide a non-financial performance statement ‘any interested person may request the court to grant summary judgement against the board, subject to penalties where applicable, obliging it to communicate the information’,²²⁸ with the members of the board liable both collectively and individually for the omission.²²⁹ However, it is unclear whether this would be applicable for statements which are ‘incomplete or inadequate’.²³⁰

3.3.5. France: Conclusion

France has undoubtedly far exceeded the UK by introducing clear and concise framework legislation for CRD as well as clearly identifying those that are under an obligation to disclose this information. The retention and amendment of existing legislation that complements article 173 of the Energy Transition Law serves to strengthen the environmental and climate-oriented legislative framework within France. Indeed, by amending the Commercial Code, France has located CRD in just two places, environmental law and corporate law, thus preventing much of the complexity and confusion identified in the UK’s approach.

The use of secondary legislation to amend the Commercial Code and strengthen non-financial reporting has enabled the law to adapt and evolve over a short period of time. Furthermore, all requirements are mandatory legislation—while supplemental guidance is provided to aid implementation—boards and financial organisations must consider climate-risks and opportunities as a matter of course. While it will take several years for reporting on climate-risks to be truly mainstreamed and embedded within the corporate structure thereby resulting

²²⁸ Malecki (n 196) 91; L225-102 para 3 Commercial Code.

²²⁹ Malecki (n 196) 91.

²³⁰ *ibid.*

in higher quality disclosures, this is likely to be achieved in a much more widespread and expedited timeframe than in the UK.

The monitoring of disclosures is also more stringent; by mandating that the performance statements are verified by an ITPB rather than merely verifying that the statement has been produced this also looks, to some degree, at the content of the statements. Furthermore, the development of ISO 14907 will provide guidance on how to adequately define physical and transitional climate-risks and provide higher quality disclosures. Nevertheless, in terms of enforcement there is still greater reliance on upholding the procedural requirements than the substantive; failure to provide adequate CRDs is unlikely, at present, to result in a penalty.

4. Conclusion

The above comparative analysis of CRD has highlighted the divergent ways countries implement concepts that have pervaded the public/private international arena; in this case CRD as a response to the problem of and challenges for corporations, investors and financial systems from climate change. On the one hand, the UK has shown less enthusiasm for CRD, amending existing legislation through delegated acts and relying on voluntary action through the provision of supplementary guidance. On the other, France has introduced framework CRD legislation that has encompassed far more actors and more stringent obligations. Both however, lack in sufficient monitoring and enforcement capabilities, yet both have grasped that investors may be harnessed to carry out the ‘task’ of the state, that is to change the behaviour of GHG intensive corporations.

Yet, a core problem associated with these different interpretations of CRD, and in the absence of a corporation’s full adoption and implementation of the TCFD recommendations, is the comparability of information—an important element in a globalised world full of cross-border investments and investors. Those companies that fail to disclose their real climate-risks or

who frame them in a disingenuous way, may be at a (short term) competitive advantage while concurrently investors are unable to use their relative economic power when not in full possession of the facts. This is a real weakness of the introduction of mandatory CRD requirements at the domestic level rather than at the global level.

Indeed, this is one reason that the movement at the EU-level towards greater CRD is an interesting development; introducing EU-wide minimum CRD requirements would provide for greater comparability of information, bring on board a far greater volume of actors, potentially instigate the introduction of domestic mandatory CRD in Member States jurisdictions and diffuse these requirements to other jurisdictions due to the cross border nature of many corporations and institutional investors who are captured by EU law.²³¹ It is likely that as time progresses, greater insistence will be placed on CRD at the EU-level given the ever greater urgency for climate action. In this way, domestic unwillingness to institute mandatory CRD may be bypassed while the EU may serve to influence the use of these types of disclosures well beyond its geographical and jurisdictional borders.

Even without mandatory CRD at the EU-level, given that many of the most GHG intensive companies are transnational in that they act across borders, and that many states allow their non-financial information reports to be compiled at the group level, any group with subsidiaries based within the French jurisdiction would most likely comply with these greater disclosure

²³¹ eg see: Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) SSRN , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1901952> accessed 22 August 2019; Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders', *Transnational Legal Orders* (Cambridge University Press 2015); Daniel Bodansky, 'Climate Change, Transnational Legal Order or Disorder?' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015); Gregory Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 *AnnuRevLawSocSci* 231; Harold Hongju Koh, 'Transnational Legal Process after September 11th' (2004) 22 *BerkeleyJIntL* 337.

requirements whatever jurisdiction the parent is based in. Therefore, these stricter disclosure requirements are imported into jurisdictions where the obligations are less onerous and cover the subsidiaries wherever in the world they are located. Ultimately, this may result in the diffusion of the more onerous CRD requirements from France to corporations based within the UK where their operations may be affected. This may have one of two consequences on the development of the law in the UK: it may encourage the UK to introduce new legislation or amend the Companies Act 2006 to simply codify existing practice, or, allow the status quo to continue. However, a consequence of this would be to fail to capture other corporations which have no subsidiaries or parent company located within the reach of France who do not have the motivation to voluntarily disclose.

The introduction of legislation that attempts to tackle environmental problems such as climate change, cannot but be influenced by what is happening outside of the jurisdiction: at the global, transnational and domestic levels. This encompasses actions by state and non-state actors. Despite the individual limitations of legislative interventions, engagement with a variety of forms of regulation at the domestic level is important to leverage influence and promote behavioural changes in GHG intensive corporations. In terms of CRD the states' recognition of the power of investors combines the influence wielded by both these powerful entities to exert pressure and facilitate the transition to a low carbon economy.

Acknowledgements: I would like to thank Myriam Gicquello for her useful comments on an earlier draft.