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Do you know if your company is required to report on ESG criteria?

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The most read about acronym recently is without doubt ESG. People know that it means the application of common sense in the business world. This translates as follows: caring for resources in the knowledge that they are finite (i.e., making a conscious use of them without compromising future generations); caring for people because, even though we already know this, the pandemic has again shown us that they are the one asset that makes a company different; and caring for our organisations, since the better we run them while complying with the rules and being transparent, the more efficient they will be.

Inseparably linked to the criteria of ESG, we find the so-called "non-financial information", also known as "*corporate sustainability reporting*" or the ESG Report.

What are the legal requirements?

After the publication of Directive 2014/95/EU on 22 October 2014, Spain, issued Royal Decree-Law 18/2017 on 24 November, amending the Commercial Code, the Capital Companies Act ("LSC") and the Accounts Audit Act, with regard to non-financial information and diversity.

Under this amendment, entities of more than 500 workers were required to submit statements of non-financial information. A year later, specifically on 29 December 2018, the BOE [Official State Bulletin] published Law 11/2018 of 28 December, on the subject of non-financial information and diversity, which went into force on the day after it was published and which supplemented the aforementioned Royal Decree-Law.

It is important to highlight the Transitional Provision of Law 11/2018, since it contains the answer to the question that the title of this article asks. Effectively, this provision states that once three years have elapsed since it came into force, all corporations and all limited companies must prepare a statement of non-financial information if their average number of workers in the tax year 2021 is more than two hundred and fifty.

In addition to having more than that number of workers in the 2021 fiscal year, limited companies must be considered a public interest entity in order to be required to prepare and submit their ESG report. If they are not considered as such during the fiscal years 2020 and 2021, the value of their assets must have exceeded twenty million euros, or their turnover must have exceeded forty million euros.

What should we do if we find ourselves in these circumstances?

The statement of non-financial information has become one of the obligations of all companies to disclose their financial information, through the annual accounts, as regulated in Title VII of the LSC

Three months after the finalisation of the fiscal year, the administrators must prepare not only the annual accounts, but also the statement of non-financial information. This means that, considering that the fiscal year coincides with the calendar year, on March 31st 2022, the directors of companies that meet the aforementioned circumstances must prepare their ESG report.

But what does the preparation of that information entail?

It entails preparing a document that responds to what Art. 49.6 of the Commercial Code asks for. We must provide information that gives an understanding of the company's evolution, results and situation, the impact that its activity has on environmental and social issues, how human rights are respected and how the struggle against corruption and bribery is fought. It must also state what the impact of its activity has been on its personnel, including any measures that have been adopted to promote equal treatment and opportunities between women and men, non-discrimination and inclusion of people with disabilities and universal accessibility to professional opportunities.

Moreover, the legislator requests even more, and the aforementioned article 49.6 goes on for a further two and a half pages, requesting that significant information on environmental issues be included (contamination, a circular economy, use of resources, climate change and protection of biodiversity), social and personnel issues (distribution of jobs, organisation of the work, health and safety, social relationships, training, accessibility and equality), issues regarding respect for human rights, the fight against corruption and bribery and, in a kind of "catch-all" phrase, information about the company, which ends with the devastating "any other information that may be significant."

Although the request for information may be alarming, we believe that with a little dedication, the involvement of the right people in the company and a bit of organisation, there is still time for us not to get cold sweats when thinking about the non-financial information that will be required on March 31st 2022.

Of course, the sooner we get on with it, the better. We can imagine the feeling of vertigo for those who start preparing their non-financial information for the first time in March 2022 without having looked at the content that needs to be included and done something to organise it.

Now, what will happen if we do not publish our ESG report? Can we be penalised?

Yes, we can be penalised for not publishing the report on corporate sustainability. This must be verified by an independent provider of verification services. Together with the verifier's document, the management report and the rest of the documents that make up the annual accounts, we will submit the report on corporate sustainability to the Commercial Register, as required by Article 279 of the LSC.

If we do not submit it or, at the discretion of the commercial registrar, it is classed as being inaccurate or incomplete and we do not remedy this, the submission will be considered as not made.

In this regard, it should be noted that failure to comply with the obligation to submit the accounts within the established term (one month from the approval of the accounts) may result in a **fine of up to €300,000 in addition to the closure of** the registration page, which means the non-registration of any document referring to the company for as long as the non-compliance persists.

In addition, failure to submit the annual accounts to the Commercial Register may undoubtedly generate difficulties for the company in the commercial relations that it maintains or intends to maintain with financial entities, public administrations or third parties, for which the submission of the company's accounts is a necessary requirement.

The truth is that so far it cannot be said that the ICAC [Instituto de Contabilidad y Auditoría de Cuentas (Institute of Accounting and Account Auditing)] has imposed many sanctions for not submitting accounts, but, to prevent the sanctioning regime from becoming a damp squib, Royal Decree 2/2021 was published at the start of the year, which approves the regulations for the development of the Accounts Auditing Act, intended to give a boost to the regime for imposing sanctions and giving greater prominence to commercial registrars, establishing the deadline for the ICAC to make resolutions and facilitating criteria for determining the amount of any penalty.

In addition to submitting our ESG report to the Commercial Register, it must be taken into account that the Commercial Code obliges us to make it available to the public, free of charge on the company's website, within the six months following the closure **- in** other words , before June 30th if the fiscal year coincides with the calendar year **-** and for a period of five years.

What are the benefits to the company for preparing an ESG report?

As stated, although failure to publish the ESG report may result in a sanction in certain cases, it should also be taken into account that the preparation of the corporate sustainability report has numerous benefits. Among others, we highlight the following:

1. Being ready for new ESG regulations

Even if your company is not currently required to prepare its corporate sustainability report, we think you should be advised that the rapid progress we are seeing in ESG matters may soon require you to do so.
So companies that already have ESG reports will find it easier to adapt to new regulations.

2. Improving reputation, trust in the brand and the resulting increase in sales

Having a business strategy aligned with the 2030 Agenda that is reflected in the ESG report will increase trust in the brand and increase sales. In this regard, 64% of Spanish consumers take sustainability into account when they make purchases.

For this reason, the ESG report will not only improve the company's reputation to outsiders, but also to its own *stakeholders,* such as the workers, who will see that the company's purpose is to contribute to achieving a better society and world.

3. Benefits when it comes to awarding contracts with the Public Administration

In accordance with the provisions of Law 9/2017 of 8 November on Public Sector Contracts, environmental or social aspects are included as criteria for the awarding of contracts to companies with the Public Administration.

In this regard, companies will be at an advantage if they have measures in place to reduce the level of greenhouse gas emissions, measures for energy savings and energy efficiency, the implementation of a gender equality plan or the application of ethical criteria and social responsibility when providing their services under contract.

It is also logical to think that, if the Public Administration ensures sustainability, so will investors and financial institutions. So a company that has these measures in place will also find it easier to apply for new funding.

4. Help with cost savings

In accordance with the provisions of the CEPYME [Confederación Española de la Pequeña y Mediana Empresa] (Spanish Confederation of SMEs)] Guide, 67% of companies that implement sustainable strategies generate energy savings, which translates into cost savings.

5. Partnerships with companies

Despite the fact that at this time the current regulations do not oblige all companies to prepare an ESG report, it is sensible to think that, if we are prepared in this area, we will find more doors open when establishing links and accessing companies that also are. They evaluate their suppliers based on the same criteria that are required of them, in order to achieve their own objectives through these suppliers. This puts them in a better position when it comes to contracting with large companies.

In conclusion

If our company has more than 250 workers, it is a public interest entity or, if not, if it has a turnover of more than forty million euros or its assets are worth more than twenty million euros in the tax years 2020 and 2021, we must start preparing our ESG report for 2021, following the requirements that the law sets for us and with the aim of making it public before 30 June of next year.

We think it would be a good exercise to analyse ESG reports that are already published in some of the companies that make up IBEX 35, in order to assess how much effort is required to comply with the regulation.

The aim of the Directive, as we mentioned at the start, is to extend the obligation to provide an ESG report to more companies and to specify (which will undoubtedly be a good thing) the information that companies must provide, in order for them to be objectively comparable, something that at present is hard to achieve.

In short, corporate sustainability reports are an innovative tool that not only helps us to be able to reorient the company's current strategy in order to advance towards more sustainable development, but also at the same time improves annual management, anticipates potential crises and strengthens credibility with the environment, to the benefit of society as a whole.

In addition, the financial world – money – is increasingly talking about ESG criteria and we consider that, as a good practice, as is the case in the world of *compliance*, every company should be able to make public how it is implementing ESG criteria in its daily activities.

For the reasons explained, the preparation of these reports brings only benefits to the company, particularly today when the demands of society invite us to worry about society as a whole. These reports are a key part of the economic reform that the world needs in order to be able to resolve issues of various kinds such as climate change and social inclusion, which are of concern to us all.