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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Company Law (Sustainability information)
Subject:	Presentation by the Commission on the Proposal for a Corporate Sustainability Reporting Directive - Powerpoint presentation (WP 07.09.2021)



Proposal for a Corporate Sustainability Reporting Directive

Council WG

7 September 2021

Legal structure

CSRD = amending Directive



- **Accounting Directive (Article 1)**
- **Transparency Directive (Article 2)**
- Audit Directive (Article 3)
- Audit Regulation (Article 4)

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➤ Amendments to Accounting Directive (AD) and Transparency Directive (TD)

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Sustainability reporting standards for SMEs - Article 19c AD

Article 1 - Amendments to Directive 2013/34/EU, paragraph 4

(4) the following Articles 19b, 19c and 19d are inserted:

Article 19c, Sustainability reporting standards for SMEs

The Commission shall adopt delegated acts in accordance with Article 49 to provide for sustainability reporting standards proportionate to the capacities and characteristics of small and medium-sized undertakings. Those sustainability reporting standards shall specify which information referred to in Articles 19a and 29a small and medium-sized undertakings referred to in Article 2, point (1)(a) shall report. They shall take into account the criteria set out in Article 19b, paragraphs 2 and 3. They shall also, where relevant, specify the structure in which that information shall be reported.

The Commission shall adopt those delegated acts at the latest by 31 October 2023.

Sustainability reporting standards for SMEs - Article 19c AD

Recital 18

(18) Considering the growing relevance of sustainability-related risks and taking into account that small and medium-sized enterprises (SMEs) listed on regulated markets comprise a significant proportion of all listed undertakings in the Union, in order to ensure investor protection it is appropriate to require that also those SMEs disclose information on sustainability matters. The introduction of this requirement will help to ensure that financial market participants can include smaller listed undertakings in investment portfolios on the basis that they report the sustainability information that financial market participants need. It will therefore help to protect and enhance the access of smaller listed undertakings to financial capital, and avoid discrimination against such undertakings on the part of financial market participants. The introduction of this requirement is also necessary to ensure that financial market participants have the information they need from investee undertakings to be able to comply with their own sustainability disclosure requirements laid down in Regulation (EU) 2019/2088. SMEs listed on regulated markets should, however, be provided with sufficient time to prepare for the application of the requirement to report sustainability information, due to their smaller size and more limited resources, and taking account of the difficult economic circumstances created by the COVID-19 pandemic. They should also be given the **possibility to report according to standards that are proportionate to the capacities and resources of SMEs. Non-listed SMEs can also choose to use these proportionate standards on a voluntary basis**. The SME standards will set a reference for undertakings that are within the scope of the Directive regarding the level of sustainability information that they could reasonably request from SME suppliers and clients in their value chains.

Reasoning

- ❑ “specify which information referred to in Articles 19a and 29a small and medium-sized listed undertakings shall report”



Necessary flexibility to standard setting process – very technical discussion. We cannot / should not pre-empt which are the most relevant reporting elements for SMEs.

- ❑ BUT we can require that the “standards are proportionate to the capacities and characteristics of small and medium-sized undertakings”.

Reasoning

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- ❑ Available for voluntary use by non-listed SMEs



Standards will set a reference for the sustainability information that larger companies could reasonably request from SME suppliers and clients in their value chains (e.g. information that banks could expect from clients).

Reasoning

❑ Adoption at the latest by 31 October 2023



- If ready, earlier
- Allows time for testing with SMEs
- Standards for larger companies will inevitably influence the content of SME standards, so logical that SME standards come afterwards
- SME compliance with requirements, 3 years later

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Single electronic reporting format - Article 19d AD

Article 1 - Amendments to Directive 2013/34/EU, paragraph 4

(4) the following Articles 19b, 19c and 19d are inserted:

Article 19d, Single electronic reporting format

1. Undertakings subject to Article 19a shall prepare their financial statements and their management report in a single electronic reporting format in accordance with Article 3 of Commission Delegated Regulation (EU) 2019/815*15 and shall mark-up their sustainability reporting, including the disclosures laid down in Article 8 of Regulation (EU) 2020/852, in accordance with that Delegated Regulation.
2. Undertakings subject to Article 29a shall prepare their consolidated financial statements and their consolidated management report in a single electronic reporting format in accordance with Article 3 of Delegated Regulation (EU) 2019/815 and shall mark-up sustainability reporting, including the disclosures laid down in Article 8 of Regulation (EU) 2020/852.

Single electronic reporting format - Article 19d AD

Recitals 48

(48) Directive 2013/34/EU does not require that the financial statements or the management report are provided in a digital format, which hinders the findability and usability of the reported information. Users of sustainability information increasingly expect such information to be findable and machine-readable in digital formats. Digitalisation **creates opportunities to exploit information more efficiently** and holds the **potential for significant cost savings** for both users and undertakings. Undertakings should therefore be required to prepare their financial statements and their management report in XHTML format in accordance with Article 3 of Commission Delegated Regulation (EU) 2019/815, and to mark-up sustainability information, including the disclosures required by Article 8 of Regulation (EU) 2020/852, in accordance with that Delegated Regulation. **A digital taxonomy to the Union sustainability reporting standards will be necessary to allow for the information reported to be tagged in accordance with those standards.** These requirements should feed into the work on digitalisation announced by the Commission in its Communication A European strategy for data and in the Digital Finance Strategy for the EU. These requirements also **complement the creation of a European single access point** for public corporate information as envisaged in the capital markets union action plan, which also considers the need for structured data.

To point out

- ❑ Requirement applies ONLY to undertakings subject to Articles 19a and 29a.
- ❑ Requirement is built via a link with ESEF Regulation, to ensure consistency between requirements on listed/non-listed companies
- ❑ Requirement has 2 parts
 - prepare financial statements and management report in xhtml (in accordance with existing Article 3 of ESEF Regulation)
 - mark-up/tag sustainability reporting (part of management report), including the disclosures of Article 8 of Taxonomy Regulation (in accordance with – *future amended* – ESEF Regulation)

NO new requirement to mark-up/tag financial statements (beyond TD/ESEF existing requirements on listed companies reporting at consolidated level) !!!

- 1) ESMA updates RTS (digital taxonomy for sustainability reporting developed by EFRAG)
- 2) COM amends ESEF Regulation
- 3) ESEF regulation requires listed companies to mark-up sustainability information
- 4) By reference to ESEF Regulation, AD requires non-listed companies to mark-up sustainability information.

Adoption of standards - Article 19b(1) AD

Article 1 - Amendments to Directive 2013/34/EU, paragraph 4

(4) the following Articles 19b, 19c and 19d are inserted:

Article 19b, Sustainability reporting standards

1. The Commission shall adopt delegated acts in accordance with Article 49 to provide for sustainability reporting standards. Those sustainability reporting standards shall specify the information that undertakings are to report in accordance with Articles 19a and 29a and, where relevant, shall specify the structure in which that information shall be reported. In particular:

- (a) by 31 October 2022, the Commission shall adopt delegated acts specifying the information that undertakings are to report in accordance with paragraphs 1 and 2 of Article 19a, and at least specifying information corresponding to the needs of financial market participants subject to the disclosure obligations of Regulation (EU) 2019/2088.
- (b) by 31 October 2023, the Commission shall adopt delegated acts specifying:
 - (i) complementary information that undertakings shall report with regard to the sustainability matters and reporting areas listed in Article 19a(2), where necessary;
 - (ii) information that undertakings shall report that is specific to the sector in which they operate.

The Commission shall, at least every three years after its date of application, review any delegated act adopted pursuant to this Article, taking into consideration the technical advice of the European Financial Reporting Advisory Group (EFRAG), and where necessary shall amend such delegated act to take into account relevant developments, including developments with regard to international standards.

Adoption of standards - Article 19b(1) AD

Delegated Acts

- ☐ Specify the information that undertakings are to report in accordance with Articles 19a and 29a AD (i.e. how should undertakings provide this information so that it is comparable)
- ☐ Where relevant, specify the structure in which that information shall be reported
- ☐ 1st set of standards:
 - ✓ Basic set of information required under articles 19a and 29a
 - ✓ Should address needs of FMP subject to SFDR (minimum)
- ☐ 2nd set of standards
 - ✓ Complementary information
 - ✓ Sector specific information

Tight timeline unavoidable:

- ☐ FMP subject to SFDR need information from CSRD companies
- ☐ Sustainability reporting contributes to addressing the objectives of the Green Deal
- ☐ BUT, remain realistic, not everything can be done in year 1. Allow for enhanced, additional disclosures in year 2

Adoption of standards - Article 19b(1) AD

COM reviews DA

- ☐ At least 3 years after date of application
- ☐ Taking into consideration the technical advice of EFRAG
- ☐ Where necessary, amend DA to take into account relevant developments
 - including developments with regard to international standards

Exercise of delegation - Article 49 AD

Article 1 - Amendments to Directive 2013/34/EU, paragraph 11

(11) Article 49 is amended as follows:

(a) paragraphs 2 and 3 are replaced by the following:

‘2. The power to adopt delegated acts referred to in Article 1(2), Article 3(13), Article 46(2), Article 19b and Article 19c shall be conferred on the Commission for an indeterminate period of time.

3. The delegation of power referred to in Article 1(2), Article 3(13), Article 46(2), Article 19b and Article 19c may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of that decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.’;

- ☐ References to Articles 19b and 19c added.
- ☐ Same conditions as for other delegated acts of AD.

Exercise of delegation - Article 49 AD

COM considers
EFRAG's advice
ONLY if

Article 1 - Amendments to Directive 2013/34/EU, paragraph 11

(b) the following paragraph 3a is inserted:

'3a. When adopting delegated acts pursuant to Articles 19b and 19c, the Commission shall take into consideration technical advice from EFRAG, provided such advice has been developed with proper due process, public oversight and transparency and with the expertise of relevant stakeholders, and is accompanied by cost-benefit analyses that include analyses of the impacts of the technical advice on sustainability matters.

The Commission shall consult the Member State Expert Group on Sustainable Finance referred to in Article 24 of Regulation (EU) 2020/852 on the technical advice provided by EFRAG prior to the adoption of the delegated acts referred to in Articles 19b and 19c.

The Commission shall request the opinion of the European Securities and Markets Authority on the technical advice provided by EFRAG, in particular with regard to its consistency with Regulation (EU) 2019/2088 and its delegated acts. The European Securities and Markets Authority shall provide its opinion within two months from the date of receipt of the request from the Commission.

The Commission shall also consult the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Environment Agency, the European Union Agency for Fundamental Rights, the European Central Bank, the Committee of European Auditing Oversight Bodies and the Platform on Sustainable Finance established pursuant to Article 20 of Regulation (EU) 2020/852 on the technical advice provided by EFRAG prior to the adoption of delegated acts referred to in Articles 19b and 19c. Where any of those bodies decide to submit an opinion, they shall do so within two months from the date of being consulted by the Commission.';

...

Bodies
to
consult

Exercise of delegation - Article 49 AD

Article 1 - Amendments to Directive 2013/34/EU, paragraph 11

...

(c) paragraph 5 is replaced by the following:

‘5. A delegated act adopted pursuant to Article 1(2), Article 3(13), Article 46(2), Article 19b and Article 19c shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.’

☐ Objection period: 2 months.

Exercise of delegation - Article 49 AD

Recital 34

(34) The European Financial Reporting Advisory Group (EFRAG) is a non-profit association established under Belgian law that serves the public interest by providing advice to the Commission on the endorsement of international financial reporting standards. EFRAG has established a reputation as a European centre of expertise on corporate reporting, and is well placed to foster coordination between European sustainability reporting standards and international initiatives that seek to develop standards that are consistent across the world. In March 2021, a multi-stakeholder task force set up by EFRAG published recommendations for the possible development of sustainability reporting standards for the European Union. Those recommendations contain proposals to develop a coherent and comprehensive set of reporting standards, covering all sustainability matters from a double-materiality perspective. Those recommendations also contain a detailed roadmap for developing such standards, and proposals for mutually reinforcing cooperation between global standard-setting initiatives and standard-setting initiatives of the European Union. In March 2021, the EFRAG President published recommendations for possible governance changes to EFRAG if it were to be asked to develop technical advice about sustainability reporting standards. These recommendations include offsetting up within EFRAG a new sustainability reporting pillar while not significantly modifying the existing financial reporting pillar. When adopting sustainability reporting standards, the Commission should take account of technical advice that EFRAG will develop. In order to ensure high-quality standards that contribute to the European public good and meet the needs of undertakings and of users of the information reported, EFRAG's technical advice should be developed with proper due process, public oversight and transparency, accompanied by cost benefit analyses, and be developed with the expertise of relevant stakeholders. To ensure that Union sustainability reporting standards take account of the views of the Member States of the Union, before adopting the standards the Commission should consult the Member State Expert Group on Sustainable Finance referred to in Article 24 of Regulation (EU) 2020/852 on EFRAG's technical advice. The European Securities and Markets Authority (ESMA) plays a role in drafting regulatory technical standards pursuant to Regulation (EU) 2019/2088 and there needs to be coherence between those regulatory technical standards and sustainability reporting standards. According to Regulation (EU) No 1095/2010 of the European Parliament and of the Council, ESMA also plays a role in promoting supervisory converge in the enforcement of corporate reporting by issuers whose securities are listed on EU regulated markets and who will be required to use these sustainability reporting standards. Therefore, ESMA should be required to provide an opinion on EFRAG's technical advice. This opinion should be provided within two months from the date of receipt of the request from the Commission. In addition, the Commission should consult the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Environment Agency, the European Union Agency for Fundamental Rights, the European Central Bank, the Committee of European Auditing Oversight Bodies and the Platform on Sustainable Finance to ensure that the sustainability reporting standards are coherent with relevant Union policy and legislation. Where any of those bodies decide to submit an opinion, they shall do so within two months from the date of being consulted by the Commission.

Responsibility of A/M/S bodies - Article 33 AD

Article 1 - Amendments to Directive 2013/34/EU, paragraph 9

(9) in Article 33, paragraph 1 is replaced by the following:

‘1. Member States shall ensure that the members of the administrative, management and supervisory bodies of an undertaking, acting within the competences assigned to them by national law, have collective responsibility for ensuring that the following documents are drawn up and published in accordance with the requirements of this Directive and, where applicable, with the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002, with Delegated Regulation 2019/815, with the sustainability reporting standards referred to in Article 19b of this Directive, and with the requirements of Article 19d of this Directive:

(a) the annual financial statements, the management report and the corporate governance statement when provided separately;

(b) the consolidated financial statements, the consolidated management reports and the consolidated corporate governance statement when provided separately.’;

Responsibility of A/M/S bodies - Article 33 AD

Recital 52

(52) Article 33 of Directive 2013/34/EU requires Member States to ensure that the members of the administrative, management and supervisory bodies of an undertaking have collective responsibility for ensuring that the (consolidated) annual financial statements, the (consolidated) management report and the (consolidated) corporate governance statement are drawn up and published in accordance with the requirements of that Directive. That collective responsibility should be extended to the digitalisation requirements laid down in Delegated Regulation (EU) 2019/815, to the requirement to comply with Union sustainability reporting standards and to the requirement to mark up sustainability reporting.

To point out - AD

- ❑ TODAY: MS shall already ensure that the members of the administrative, management and supervisory bodies of an undertaking have collective responsibility for ensuring that the non-financial statement is provided, even when it's published separately.
- ❑ New elements introduced, “where applicable” (i.e. only for companies subject to the corresponding obligation)
 - Collective responsibility on the compliance with Union sustainability reporting standards
 - Collective responsibility on the compliance with digitalisation requirements laid down in ESEF Regulation – clarification of responsibility of board in the case of listed companies preparing financial consolidated reporting in compliance with ESEF Regulation.
 - Collective responsibility on the compliance with new Article 19d [CSRD companies: 1) prepare financial statements and management report in xhtml (in accordance with existing Article 3 of ESEF Regulation); 2) mark up sustainability reporting according to future amended ESEF Regulation].

Responsibility statements- Article 4(2)(c) TD

Article 1 - Amendments to Directive 2004/109/EC , paragraph 2, point (a)

(2) Article 4 is amended as follows:

(a) in paragraph 2, point (c) is replaced by the following:

‘(c) **statements made by the persons responsible within the issuer**, whose names and functions shall be clearly indicated, to the effect that, **to the best of their knowledge**, the financial statements prepared in accordance with the applicable set of accounting standards give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer and the undertakings included in the consolidation taken as a whole and **that the management report includes** a fair review of the development and performance of the business and the position of the issuer and the undertakings included in the consolidation taken as a whole, together with a description of the principal risks and uncertainties that they face and, **where appropriate**, that it **is prepared in accordance with sustainability reporting standards** referred to in Article 19b of Directive 2013/34/EU.’;

“where appropriate” = only for companies subject to the corresponding obligation (i.e. micro listed undertakings excluded)

Recital 70

(70) Article 24 of Directive 2004/109/EC assigns to national supervisors the task of enforcing compliance with corporate reporting requirements by undertakings with securities listed on regulated markets. Article 4 of that Directive specifies the content of the annual financial reports, but lacks an explicit reference to Articles 19a and 29a of Directive 2013/34/EU, which require the preparation of a (consolidated) non-financial statement. This implies that national competent authorities of some Member States have no legal mandate to supervise those non-financial statements, especially where those statements are published in a separate report, outside of the annual financial report, which Member States may currently allow. It is therefore necessary to insert into Article 4(5) of Directive 2004/109/EC a reference to sustainability reporting. It is also necessary to require that the persons responsible within the issuer confirm in the annual financial report that, to the best of their knowledge, the management report is prepared in accordance with the sustainability reporting standards. In addition, given the novel character of those reporting requirements, the European Securities and Markets Authority should issue guidelines for national competent authorities to promote convergent supervision of sustainability reporting by issuers subject to Directive 2004/109/EC.

Penalties - Article 51 AD

☐ Relevant for unlisted companies

Article 1 - Amendments to Directive 2013/34/EU, paragraph 12

(12) Article 51 is replaced by the following:

‘Article 51, Penalties

1. Without prejudice to paragraph 2, Member States shall provide for penalties applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that those penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive.’
2. In case of a breach of the national provisions transposing Articles 19a, 19d and 29a, Member States shall provide for at least the following administrative measures and sanctions:
 - (a) a public statement indicating the natural person or the legal entity responsible and the nature of the infringement;
 - (b) an order requiring the natural person or the legal entity responsible to cease the conduct constituting the infringement and to desist from any repetition of that conduct;
 - (c) administrative pecuniary sanctions.
3. Member States shall ensure that, when determining the type and level of penalties, administrative sanctions or measures referred to in paragraph 2, all relevant circumstances are taken into account, including:
 - (a) the gravity and the duration of the breach;
 - (b) the degree of responsibility of the natural person or legal entity responsible;
 - (c) the financial strength of the natural person or legal entity responsible;
 - (d) the importance of profits gained or losses avoided by the natural person or legal entity responsible, in so far as such profits or losses can be determined;
 - (e) the losses sustained by third parties as a result of the breach, in so far as those losses can be determined;
 - (f) the level of cooperation of the natural person or legal entity responsible with the competent authority;
 - (g) previous infringements by the natural person or legal entity responsible.’.

Penalties - Article 51 AD

☐ Relevant for unlisted companies

Recital 69

(69) According to Article 51 of Directive 2013/34/EU, the enforcement of corporate reporting by undertakings the securities of which are not listed on regulated markets is carried out by Member States. The types of sanctions are, however, not specified, which means that sanctioning regimes can vary widely between Member States, so undermining the single market. To improve sustainability reporting in the internal market and to contribute to the transition towards a fully sustainable and inclusive economic and financial system in which the benefits of growth are broadly shared in accordance with the European Green Deal, Member States should provide for certain sanctions and administrative measures in the case of infringements of sustainability reporting requirements. The sanctioning regime of Directive 2013/34/EU should therefore be strengthened accordingly, whereby Member States are to provide for appropriate sanctions and administrative measures.

Reasoning - AD

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- ❑ More strict and homogenous measures are necessary to address breaches in sustainability reporting → Improve sustainably reporting
- ❑ Current provision of Article 51 AD is too broad
 - Criteria to determine penalty too broad (effective, proportionate and dissuasive), can lead to light sanctions.
 - Added value of specifying minimum types of sanctions.
- ❑ Specification of minimum types of sanctions (administrative measures), added value:
 - More homogenous implementation across MS (not undermine single market)
 - More framed requirement
 - List of sanctions consistent with those prescribed in the TD (homogenous sanctioning rules in Financial market legislation)
- ❑ Specification of conditions to determine the type and level administrative measure or sanctions
 - Consistent with those prescribed in the TD

ESMA guidelines - Article 28d TD

❑ Relevant for listed companies

Article 1 - Amendments to Directive, paragraph 4

(4) the following Article 28(d) is inserted:

‘Article 28d, ESMA guidelines

After consulting the European Environment Agency and the European Union Agency for Fundamental Rights, ESMA shall issue guidelines in accordance with Article 16 of Regulation 1095/2010 on the supervision of sustainability reporting by national competent authorities.

Recital 70

(70) Article 24 of Directive 2004/109/EC assigns to national supervisors the task of enforcing compliance with corporate reporting requirements by undertakings with securities listed on regulated markets. Article 4 of that Directive specifies the content of the annual financial reports, but lacks an explicit reference to Articles 19a and 29a of Directive 2013/34/EU, which require the preparation of a (consolidated) non-financial statement. This implies that national competent authorities of some Member States have no legal mandate to supervise those non-financial statements, especially where those statements are published in a separate report, outside of the annual financial report, which Member States may currently allow. It is therefore necessary to insert into Article 4(5) of Directive 2004/109/EC a reference to sustainability reporting. It is also necessary to require that the persons responsible within the issuer confirm in the annual financial report that, to the best of their knowledge, the management report is prepared in accordance with the sustainability reporting standards. In addition, given the novel character of those reporting requirements, the European Securities and Markets Authority should issue guidelines for national competent authorities to promote convergent supervision of sustainability reporting by issuers subject to Directive 2004/109/EC.

To point out -TD

PUBLIC

TODAY

- ❑ TD: task of enforcing compliance with corporate reporting requirements by undertakings with securities listed on regulated markets ➡ national supervisors (NCAs)
- ❑ Article 4 TD (content of the annual financial reports) lacks explicit reference to Articles 19a and 29a of AD
- ❑ NCAs of some Member States have no legal mandate to supervise non-financial statements, especially where published in a separate report, outside of the annual financial report

Proposed amendments

- ❑ Insertion of reference to sustainability reporting requirements in Article 4(5) TD to clarify legal mandate to NCAs, and inclusion of sustainability reporting in the management report.
- ❑ Issuance of guidelines for NCAs to promote convergent supervision of sustainability reporting by issuers subject to TD

Thank you

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