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MEETING DOCUMENT

From:	Council of the European Union
To:	Working Party on Company Law (Sustainability information)
Subject:	Corporate Sustainability Reporting Directive proposal (CSRD)

Delegations will find attached a Presidency discussion note on Corporate Sustainability Reporting Directive proposal (CSRD) a view to the Company Law (Sustainability information) WP meeting on 7 September 2021.



Working Party on Company Law (G.4)

Corporate Sustainability Reporting Directive proposal (CSRD)

Meeting on the 7th of September 2021

1. Introduction

This note aims to frame the discussion on the selected issues of the CSRD proposal for the fifth meeting of our working party dedicated to this file.

2. Key points discussed in previous meetings

Our first two meetings in June were about the presentations of the impact assessment and of the proposal by the European Commission. At the following two meetings the general discussion began on some aspects of the CSRD proposal regarding scope, definition, location, content of the sustainability reporting, diversity policy description and sustainability reporting standards.

Delegations have raised a number of important issues in the discussions held so far, including, but not limited to, the following:

- reporting on intangibles;
- balance between level 1 (the Directive) and level 2 (the standards);
- various issues around the scope of the proposed requirements (listed SMEs, companies operating in the EU market but not legally established in the EU, SME thresholds for financial sector companies, amongst others);
- consistency with other EU legislation, in particular other legislation related to sustainable finance;
- consistency with global reporting standards;
- how the proposed digital tagging requirements fit with existing national requirements;
- removing the possibility to publish sustainability information in a separate report;
- the timetable for the introduction of the proposed new reporting requirements;
- the penalties/sanctioning regime; and
- the involvement of Member States in the standard-setting process.

In the view of the Presidency, reporting on intangibles and the level 1/level 2 balance stand out at this stage as being two particularly important issues, both because of the number of delegations that have

raised them and because they are particularly likely to require further in-depth consideration. In both cases it seems likely that the Working Party will need to consider modifications to the Commission's proposal.

Intangibles

A number of delegations have expressed reservations about the inclusion of a disclosure requirement on intangibles under the CSRD, and/or have called for more precision in the text about exactly what information companies would have to disclose regarding intangibles. In this context some delegations have raised questions about the definition of intangibles. The Presidency acknowledges these reservations and will further consult delegations and the Commission in order to provide greater clarity about the scope of future reporting obligations in relation to intangibles in the context of sustainability reporting.

The balance between level 1 (the Directive) and level 2 (the standards)

A number of delegations have expressed concerns that the legislative proposal provides excessive discretion to the Commission (and EFRAG as technical advisor to the Commission) to define the content of the standards that will be adopted as delegated acts. Some delegations have suggested that the legislative proposal should exhaustively define the reporting areas and topics to be set-out in the delegated acts.

The Presidency acknowledges these concerns and will assess, in cooperation with delegations and the Commission, how to make the legislative proposal more precise on this point.

We have already received many comments by delegations on discussed aspects and we would like to thank you for presenting your views on these aspects. This enables us all to envisage a wider picture of such an important topic as sustainability reporting.

If you have any concrete suggestions on the modification of the wording, which in your opinion would improve the CSRD proposal, we would like to invite you to send them in writing as they mature. This will help us to start drafting the CSRD Presidency compromise text proposal with the intention of reaching a common agreement on the wording.

In September we will continue with the discussion and exchanging views. On the 7th September, which will be our first of three meetings being held that month, we will continue with the examination of Article 19c, Article 19d, Article 33, Article 49 and Article 51 AD as well as Article 4 and 28d of the Transparency Directive.

We would kindly ask to send your written suggestions on the Articles listed below by the end of August.

In the meantime, the Slovenian Presidency wishes you to enjoy your holidays and recharge your batteries so that we can continue our work successfully and in good spirits!

3. Sustainability reporting standards for SMEs - Article 1, paragraph 4 (new Article 19c AD)

This new article empowers the European Commission to adopt special, proportionate standards for SMEs by way of delegated acts. Taking account of SMEs' capacities and characteristics, these standards shall specify which information referred to in Articles 19a and 29a and using the criteria set out in Article 19b SMEs will need to report.

The deadline for adopting delegated acts related to sustainability reporting standards for SMEs is 31 October 2023.

Q: Do Member States agree with the proposed approach for sustainability reporting standards for SMEs?

4. Single electronic reporting format - Article 1, paragraph 4 (new Article 19d AD)

Article 19d requires undertakings subject to sustainability reporting obligations to prepare their financial statements and management reports in a single electronic reporting format in accordance with Article 3 of Commission Delegated Regulation (EU) 2019/815 and to mark-up sustainability information as and when specified in that Regulation, including the disclosures laid down in Article 8 of Regulation (EU) 2020/852.

According to the Article 3 of Commission Delegated Regulation (EU) 2019/815 the annual financial reports have to be prepared in XHTML format.

According to the Article 8 of the Regulation (EU) 2020/852 non-financial undertakings have to disclose:

(a) the proportion of their turnover derived from products or services associated with economic activities that qualify as environmentally sustainable under Articles 3 and 9; and

(b) the proportion of their capital expenditure and the proportion of their operating expenditure related to assets or processes associated with economic activities that qualify as environmentally sustainable under Articles 3 and 9.

The requirement also applies to undertakings subject to sustainability reporting obligations, which have to prepare consolidated financial statements and management reports.

Q: Do Member States consider appropriate the proposed single electronic reporting format with reference to the Commission Delegated Regulation (EU) 2019/815?

5. Exercise of delegated powers – Article 1, paragraph 11
(Article 49 AD)

This article empowers the Commission to adopt delegated acts referred to in Article 1(2), Article 3(13), Article 46(2), Article 19b and Article 19c AD, which can be revoked at any time by the European Parliament or the Council.

It also envisages the procedure the Commission needs to follow when adopting delegated acts pursuant to Articles 19b and 19c. Prior to the adoption the Commission has to consider the technical advice provided by EFRAG. The process of developing the technical advice by EFRAG has to meet several conditions.

The Commission also has to consult the technical advice of EFRAG with:

- the Member State Expert Group on Sustainable Finance,
- the European Securities and Markets Authority,
- 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.

The European Parliament and the Council have the right to object to the delegated act, which prevents its adoption.

Q: Would Member States view the conditions to be met by EFRAG when developing the technical advice satisfactory ones?

Q: Would Member States consider that the list of relevant existing expert groups and institutions to be included in the consultations with the Commission on the technical advice provided by EFRAG is appropriate?

6. Responsibility and liability for drawing up and publishing the financial documents – Article 1, paragraph 9 (Article 33, paragraph 1 AD), Article 2, paragraph 2, point (a) (Article 4, paragraph 2, point (c) Transparency Directive)

Paragraph 1 of Article 33 AD requires of Member States to ensure collective responsibility of the members of the administrative, management and supervisory bodies of undertakings to draw up and publish:

1. the annual financial statements and the management report as well as
 2. the corporate governance statement and the non-financial statement when provided separately
- in accordance with the requirements of AD and, where applicable, with the international accounting standards.

The responsibility of the members of the administrative, management and supervisory bodies of undertakings in the proposed new paragraph 1 of Article 33 AD is extended to ensure the compliance of the financial documents (with the exception of the non-financial statement) with the revised sustainability reporting requirements in the amended AD and the new sustainability reporting standards as well as with the requirements in the adopted Commission Delegated Regulation (EU) 2019/815 with regard to regulatory technical standards on the specification of a single electronic reporting standard.

Proposed changes in the paragraph 1 have an effect on the liability of the members of the administrative, management and supervisory bodies in paragraph 2 for breaching their duties.

The new provisions apply, *mutatis mutandis*, to the consolidated financial documents.

Paragraph 2 of Article 4 of Transparency Directive specifies the content of the annual financial report of issuers, which also comprises the statements of persons responsible for financial reporting about the financial statements and the management report as provided in the point (c) of paragraph 2.

Proposed changes in point (c) of paragraph 2 amend the content of the statements, so that the management report is prepared in accordance with sustainability reporting standards, where appropriate.

Q: Would Member States agree with the proposed provisions?
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7. Sanctions – Article 1, paragraph 12 (Article 51 AD)

The proposed Article 51 AD specifies as a minimum the following administrative measures and sanctions:

1. a public statement indicating the natural person or the legal entity responsible and the nature of the infringement;
 2. 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;
 3. administrative pecuniary sanctions
- and lays down several circumstances to be taken into account when determining the type and level of penalties, administrative sanctions or measures.



Q: Would Member States agree with the proposed types of administrative measures and sanctions?

Q: Would Member States view the conditions for determining the type and level of penalties, administrative sanctions or measures sufficiently clear?

8. ESMA guidelines - Article 2, paragraph 4 (new Article 28d Transparency Directive)

According to the proposed new Article 28d of the Transparency Directive ESMA will be empowered to issue guidelines on the supervision of sustainability reporting by national competent authorities with aim of promoting supervisory convergence of sustainability reporting. Prior to issuing the guidelines, EMSA is required to consult with the European Environment Agency and the European Union Agency for Fundamental Rights.

Q: Would Member States agree with the proposed additional responsibility of EMSA?