

Stellungnahme des Deutschen Gewerkschaftsbundes

Opinion of the German Trade Union Confederation on the European Commission's Proposal for a Corporate Sustainability Reporting Directive

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1. Introduction and summary remarks

The German Trade Union Confederation (DGB) and its member unions regard sustainable development as of the utmost importance, in Germany, Europe and worldwide.

Part and parcel of this is the sustainability of corporate business policy: employee involvement (codetermination) promotes this in a variety of ways.

The German Trade Union Confederation has always emphasised that it welcomes accountability and reporting obligations for companies with regard to the environment, social affairs and human rights, not least as an important reference point for the work of employee representatives in the works council and the supervisory board, as well as trade unions, and as an essential condition for statutory regulation so that it may be more binding.

The proposed directive on sustainability reporting improves on the current provisions on non-financial reporting in a number of ways. On the positive side, one might mention in particular: the substantially expanded scope of application of the reporting obligations, although for the sake of consistency they should really cover all larger companies, regardless of legal form; the obligation to publish in the management report; and the progressive definition of 'double materiality'.

In other respects, however, the draft directive falls short of trade union expectations. For example, there is an urgent need to make reporting go into more detail on social matters – especially workers' concerns – in such a way that companies are, among other things, also required to furnish information on compliance with freedom of association, collective bargaining coverage and the presence of interest representation at the workplace or company level.

Overall, the social and environmental aspects of ongoing transformation should be more closely linked. Company management should also be obliged to consult the works council concerning sustainability reporting before the end of the financial year and to report in the supervisory board on the outcome.

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The DGB and its member unions furthermore strongly urge the European institutions to work out the criteria for sustainability reporting in a democratic process and not to delegate this core task to private organisations, which lack any kind of democratic legitimacy.

The DGB's detailed positions can be found in the following sections.

2. Sustainability reporting as a compelling notion

The DGB welcomes the terminological change from 'non-financial information' to 'sustainability reporting'.

The previous term could in effect have been misconstrued as designating a hierarchical relationship between supposedly significant 'financial information' and supposedly less significant 'non-financial information'. From the trade unions' standpoint the new term 'sustainability reporting' thus underlines the necessarily equal value of reporting on 'financial information' and 'non-financial information'.

Furthermore, a potential misunderstanding arising from the previous term is in this way eliminated, namely that 'non-financial' information cannot have financial consequences. The European Commission rightly emphasises in recital 7 the relevance of sustainability reporting also from a financial point of view.

3. The widening of the scope of application is an important step in the right direction, although it should be taken further

The DGB has always advocated 'the extension of the scope of application of non-financial reporting to all large companies, regardless of legal form'.¹ On top of this there was a call 'to ensure that, regardless of size, all companies are included that operate in sectors with particular risks of workers' and human rights violations, as well as environmental violations'.

In light of this the DGB expressly welcomes that the proposed directive in Article 10a henceforth extends the scope of application to all listed companies (with the exception of micro-enterprises) and to all limited companies and limited liability commercial partnerships that in accounting terms are 'large' by analogy with the provisions of § 267 III HGB (Handelsgesetzbuch – German Commercial Code). It is also welcome that a capital market orientation no longer takes precedence.

The DGB has always criticised the previous limitation of the scope of application to listed companies with more than 500 employees and public interest entities as inadequate and piecemeal.

To that extent the significantly extended scope of sustainability reporting in the present draft directive is a substantial step in the right direction. According to the estimates of the German

¹ Cf. DGB (2016): Opinion of the German Trade Union Confederation of 31.10.2016 on the draft bill on a law on strengthening companies' non-financial reporting in their management and group management reports (CSR Directive Implementation Act).



Accounting Standards Committee (DRSC, Deutsches Rechnungslegungs Standard Committee) in Germany alone the number of companies subject to a reporting obligation will increase from the current 500 or so to around 15,000.²

It is difficult to see, however, why non-limited liability commercial partnerships and foundations are still not covered. This privilege must be rescinded, also from a competition policy standpoint. Ultimately, once again corporate arrangements are being favoured that are not subject to either statutory codetermination or gender quotas in the board of directors or the supervisory board. Nor is there a material and justified reason why, for example, the CO₂ emissions of a limited partnership (with natural persons as shareholders) or possible interference with a works council election in a foundation-owned company is less a matter of public interest than the corresponding behaviour of a limited company or a larger limited liability company (GmbH).

The DGB thus reaffirms its call for the scope of application of sustainability reporting to be extended beyond the companies covered by the accounting directive to encompass all larger companies, regardless of legal form. Unlisted small and medium-sized enterprises (SMEs) should be included in the reporting obligations if they operate in sectors with particular risks concerning the violation of workers' and human rights, as well as the environment – such as agricultural production, clothing or footwear manufacturing, as well as mining of minerals and rocks.³ The transition to a sustainable economy will mean that it will become common practice for companies, regardless of their size, to collect and share information on sustainability.

In order to create a level playing field in terms of competition, reporting obligations – as the European Parliament is also demanding – 'non-financial reporting obligations should also apply to non-EU companies operating in the EU market'.⁴

4. More precise requirements regarding sustainability reporting and its verification are welcome

The proposed directive goes beyond the existing provisions also in qualitative terms.

Particularly positive from a trade union standpoint is that the principle of double materiality is specified in the present draft directive. Until now, materiality – at least in Germany – has regularly been interpreted as an 'and-connection', by means of which certain effects of company activities on the environment were deliberately omitted with reference to the lack

² Cf. DRSC (2021): Kernbotschaften des DRSC-Verwaltungsrates zur Corporate Sustainability Reporting Directive (CSRD) [Key messages of the DRSC administrative board on the Corporate Sustainability Reporting Directive], available at: https://www.drsc.de/app/uploads/2021/04/210430_Kernbotschaften_VR_CS RD.pdf

³ Cf. for a complete overview: Federal Ministry of Labour and Social Affairs (2020): Die Achtung von Menschenrechten entlang globaler Wertschöpfungsketten: Risiken und Chancen für Branchen der deutschen Wirtschaft [Respecting human rights along global value chains: risks and opportunities for sectors of the German economy], Research Report No. 543, available at: <https://www.bmas.de/Shared- Docs/Downloads/DE/Publikationen/Forschungsberichte/fb-543-achtung-von-menschen-rechten-entlang-globaler-wertschoepfungsketten.pdf?jsessionid=53A56E8E7219B3651A5C3923AF6CFB4D.delivery1-replication? blob=publicationFile&v=1>

⁴ Cf. European Parliament (2020): Resolution of the European Parliament of 17 December 2020 on sustainable corporate governance (2020/2137(INI)).

of relevance to its own asset and profit position. From the provisions in Article 19a para 2 (especially letters f and g)⁵ and in connection with recital 25 it is clear that companies should report both on how sustainability issues affect the company and on the effects of company policy on people and the environment. It is also very positive that Article 19a para 2 letter e iii expressly contains reporting on adverse effects in the context of supply chains.

By means of the present draft directive the scope of reporting will henceforth be extended from the current intersection of information that is economically relevant to the company and, at the same time, socially and environmentally relevant information to the entire set of both dimensions.

— It is also positive that, under Article 19a para 2 letter c), companies are required to keep notes on the role of the board of directors and the company management, as well as the supervisory board in the context of sustainability policy. The gender balance in the two bodies should also be reported on. Numerous academic studies have shown that company codetermination and codetermination in the supervisory board are correlated with sustainable corporate governance, in a variety of ways.⁶ The abovementioned reporting obligation thus offers in particular to workers' representatives in a supervisory board with codetermination a further starting point to get involved in sustainable corporate governance.

— It is also welcome that henceforth, in accordance with Article 34 para 1, the management report is to be the mandatory place for sustainability reporting.

In this way the EU is consistently maintaining its course towards fully integrated financial and non-financial reporting. From a practical trade union perspective, reporting in this place is given proper attention, both inside and outside the company. In this way, companies still have the option of full integration in the management report (integrated reporting, on the basis of which the interaction between quantitative [=financial] and qualitative information is particularly transparent) or by means of a separate section in the management report. Both will contribute in future to better comparability, and the Directive will invalidate the argument that there is a lack of qualitative data within the framework of the annual financial statement.

The DGB and its member trade unions have always advocated that the non-financial statement should be a mandatory component of the management report and thus also a mandatory component in the external audit of the management report, with reasonable assurance. This can be done by means of a separate section or fully integrated by means of a real amalgamation of relevant information from the rest of the management report.

From a trade union standpoint it is still acceptable that this audit will be implemented initially on the basis of limited assurance for the envisaged transitional period, until EU-specific

⁵ Unless otherwise stated, the references to the amended article always refer to changes in EU Directive 2013/34/EU, the so-called Accounting Directive.

⁶ For an overview see Kluge, Norbert / Vitols, Sigurt (2020): Das nachhaltige Unternehmen [The sustainable company], in: Mitbestimmungsreport No. 58, pp. 21 ff. as well as Markey, R., McIvor, J., O'Brien, M., and Wright, C. F. (2019): Reducing carbon emissions through employee participation: evidence from Australia, in: Industrial Relations Journal, 50(1), 57–83.

auditing standards have been developed. The necessary timeframe for technical training of the required new auditors also favours the transitional solution.

Based on the interdependencies of quantitative and qualitative information on the accuracy of the financial statement in the medium term an audit with reasonable assurance is a matter of urgency. Continued juxtaposition of data audited to different degrees, as has been the case hitherto, is untenable given the significant of company decision-making.

We also take a positive view of the fact that sustainability reports in accordance with Article 19d are supposed to be machine-readable in an electronic format, and that, in accordance with Article 51, the sanctions regime of the Accounting Directive covers sustainability reporting, and is to be substantially refined and extended.

5. Clearer definition of 'social matters' absolutely essential

Article 19b para 2 (b) ii lays down an obligation to disclose information on the following areas as regards social concerns: 'working conditions, including secure and adaptable employment, wages, social dialogue, collective bargaining and the involvement of workers, work-life balance, and a healthy, safe and well-adapted work environment'.

The DGB welcomes the fact that the list – in contrast to the Non-financial Reporting Directive – will henceforth expressly be included in the text of the directive itself. Hitherto, this was done only in a recital. A clear definition also seems to be called for because to date reporting on social matters has varied considerably between companies.⁷

From a trade union perspective, the selection and development of standards should always take into consideration the multidimensionality of corporate responsibility, which includes, besides the important environmental aspects, also responsibility for the employees of one's own company and in the value and supply chain. Furthermore, it is vital to ensure that reporting under no circumstances falls short of the provisions of the EU Taxonomy Regulation.⁸

It is also a good thing with regard to social factors that among other things the 'International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the ILO fundamental conventions' are expressly mentioned in Article 19b para 2 letter b iii. This list, however, should be supplemented with other important international standards, such as the OECD Guidelines for Multinational Companies (which are found in recital 39, but not in the text of the Directive). It should be considered whether to list broadly developed sectoral standards, such as the FSC or the PEFC on sustainable forestry.

On the negative side, although – through the ILO conventions – freedom of association is covered, information, consultation and employee involvement are not mentioned. This is a step backwards in relation to EU Directive 2014/95/EU (the so-called Non-financial Reporting

⁷ Cf. Qick, Reiner et al. (2021): Praxis der nichtfinanziellen Berichterstattung zu Sozialbelangen und deren Prüfung im DAX 30 [Practice of non-financial reporting on social matters and its auditing in the DAX30], in: IRZ, pp. 239 ff.

⁸ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

Directive or CSR Directive), which in recital 7 expressly called for declarations on 'the actions taken to ensure gender equality', as well as on 'respect for the right of workers to be informed and consulted, respect for trade union rights'. For that reason the list in Article 19b para 2 b II of the draft directive should, among other things, be supplemented by the 'gender equality' aspect.

In contrast to the abovementioned recital of the old directive, no mention is made in the present draft directive of employees' information and consultation rights – although a key part of the EU *acquis* – and trade union rights.

Employee representatives in works councils and supervisory boards with codetermination, as well as their trade unions, however, are recognised to be *the* experts on decent work in workplaces and companies. It is precisely their in-depth knowledge of the situation in the workplace and their critical attitude with which employee representatives in the supervisory boards strengthen monitoring of compliance and risk management systems. No less valuable is their knowledge of the risks existing in value and supply chains, including observance of labour rights. In particular, external trade union representatives in supervisory boards, with their sectoral knowledge and cross-company view of the economy, contribute to keeping in view not only capital market objectives, but also the company's long-term interests. This has a positive influence on the monitoring of compliance and risk management systems.

In this context, from the DGB's standpoint, it is a clear deficiency of the draft directive that the institutions of codetermination and the trade unions are not explicitly mentioned, either as regards social matters or in the realm of governance factors. Furthermore, it is questionable whether organisations of the private economy, ultimately dominated by representatives of the employers' and sectoral associations and by auditors, such as EFRAG,⁹ could have an intrinsic interest in taking adequate account of the role of codetermination actors and trade unions in the 'technical expertise' they make available.

The DGB thus urges the European institutions also to focus on trade unions, as well as co-determination actors (such as works councils, members of European and SE works councils, and employee representatives in supervisory boards with codetermination) as stakeholder groups. The social dimension in the draft directive should be defined in such a way that companies with a reporting obligation must, among other things, provide information on compliance with freedom of association, on collective bargaining and on the presence of interest representatives at workplace or company level. Conversely, information should also be provided on where and why the right to found an interest representative body was waived. The violation of employees' and codetermination rights should be disclosed, also in the supply chain. Any measures taken to compensate those affected should also be mentioned. Given the increasing avoidance of national regulations on company codetermination it is vital that reporting on compliance with national laws on company codetermination¹⁰ should be a mandatory element of reporting obligations.

⁹ For more on this see section 9 of this Opinion.

¹⁰ Cf. Sick, Sebastian (2020): Erosion als Herausforderung für die Unternehmensmitbestimmung [Erosion as a challenge to company codetermination], in: Mitbestimmungsreport No. 58, pp. 13 ff.

6. Link the social and environmental aspects of transformation more closely

Against the background of the urgent need for a sustainable reorganisation of economic structures it is crucial to think about social, economic and environmental aspects of sustainability together and to address them politically. As trade unions we are in favour of bringing together justly distributed prosperity with decent work, while respecting planetary limits. The DGB thus welcomes reinforcing the provisions on strengthening social and environmental policy reporting by means of statutory company reporting obligations. This will make a further contribution to shaping Europe's economic system more fairly and sustainably in line with the Sustainable Development Goals (SDGs).

To that end, however, the labour and environmental aspects must be harmonised more closely. The reporting obligations described in Article 19a para 2 are oriented too one-sidedly towards the environmental aspects of sustainability. Companies' strategies, goals and measures should not only be in harmony with the environmental dimension of sustainability and the 1.5 °C target of the Paris Climate Agreement (see 19a.2.a.iii, 19a.2.b, 19a.2.d), but also tackle employment protection and the promotion of decent work. Basically, environmental policy measures should not be allowed to lead to job losses or the precarisation of working conditions. That only generates resistance and threatens the acceptance of sustainable transformation of the European economy. Over the long term, safe work and decent jobs are essential for the fair distribution of prosperity and to foster social acceptance of environmental measures. This should be taken into account in the draft directive. Finally, the leitmotiv of Agenda 2030 and of the 17 sustainability goals of the United Nations, which are explicitly referenced in the draft directive (see page 3 para 4), is the motto 'Leave no one behind'.

Furthermore, the draft directive mentions reporting obligations in several paragraphs with reference to companies' value creation chains (see 19a.3, 29a.2.e.ii and 29a.3). At this point it should be noted that information on the whole supply chain (direct and indirect suppliers) is vital for safeguarding human rights, workers' rights and the environment more comprehensively, as well as avoiding social and environment-related upheavals.

In addition to the evaluation of the ESG (environmental, social governance) criteria set out in Article 19b.2, another point of criticism is that individual employment policy aspects, especially in relation to the social-environmental transformation of the economy and society, fall short. Besides detailed information on the areas of equality of opportunity, decent work and workers' participation, the central issue of basic, advanced and follow-up training for employees, with the aim of improving their employment chances at the firm level and in the labour market, is addressed inadequately. In order to be able proactively to tackle the long-term challenges arising from tighter climate goals or technological change companies need to react early to branch- and sector-specific transformation processes with appropriate strategies for basic, advanced and follow-up training and specify them.

Furthermore, the reporting obligations laid down in Article 19b.2 should be extended to encompass a description of health hazards and safety risks in the workplace. This is particularly important in the context of climate change because changed climate conditions are already affecting a large number of occupations (for example, because of extreme heat or bad weather). At the same time, in the context of the socio-environmental transformation companies are changing their production processes or workflows. This harbours new challenges and risks for employees.

In addition, in para 19.b.2.c, activities should be explicitly included in a new sub-item (vi) in which the company takes part in shaping the socio-environmental transformation in (cross-) regional alliances with state and civil society organisations. In this way it is easier to monitor the extent of any proactive efforts to develop a balanced transformation framework for society as a whole.

7. Effective involvement of democratically elected employee representatives in formulating reporting obligations

The DGB takes the view that it continues to be necessary for the expertise of employee representatives to be involved in the drafting of reports. In the past, it turns out that little account was taken of these groups in stakeholder dialogues. However, they are THE experts when it comes, among other things, to reporting on 'social concerns'.

We thus propose supplementing the draft directive at an appropriate place, such that the central management shall inform the corresponding company interest-representing body before the end of the business year concerning sustainability reporting and consult with it. A report on this consultation should be presented to the supervisory board or the audit committee of the supervisory board.

By 'corresponding company interest-representing body' we mean – depending on a company's corporate constitution or European orientation – a European works council, an SE works council, a group or general works council, or an 'ordinary' works council.

That would also comply with the intention of the European Parliament, which highlighted in a recent Resolution that 'workers' representatives should be involved in defining the process for reporting non-financial information and in verifying information, in particular regarding social sustainability goals and issues related to the supply production chain, including outsourcing and subcontracting'.¹¹

We know from trade union practice that in many large German companies with codetermination it is already an active part of corporate culture to discuss and tackle sustainability issues with the codetermination side.

It is also evident, however, that most companies lack a clearer framework for the ongoing involvement of codetermination actors in reporting.

¹¹ European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI)), section 'Non-financial reporting obligations', 12.

8. More detailed diversity reporting for listed companies

The draft directive also tightens up diversity reporting for listed companies with an amendment to Article 20 para 1 point g.

While hitherto a description of the notion of diversity was prescribed 'with regard to aspects such as, for instance, age, gender or educational and professional backgrounds' (DGB emphasis) in the legal text now being presented reporting on gender issues is obligatory, albeit still only if corresponding concepts exist. That is unsatisfactory because it is only the gender distribution of employees in the company, in general and encompassing individual pay categories, workers outside collective agreements, the board of directors and central management, as well as the supervisory board, and also the gender balance between full- and part-time employees that provide a good estimate of the state of equality. This can and should be presented independently of available gender concepts.

Furthermore, the draft directive provides for the option of integrating reporting on these aspects in sustainability reporting.

The DGB welcomes both measures, although it reiterates its failure to understand, already expressed in earlier opinions,¹² why measures on integrating people with disabilities were not included in obligatory reporting.

9. Rejection of transfer of competences to the private organisation EFRAG

The draft directive provides, under Article 19 para 1 (in combination with recital 34), that the European Commission should enact so-called 'delegated acts' in which it should be specified what information reports must contain. The European Financial Reporting Advisory Group (EFRAG) is supposed to carry out the technical preparation of the standards governing sustainability reporting. It has already advised the European Commission on the adoption of international financial reporting standards.

It is among the characteristic features of delegated acts that although the Parliament and the Council can revoke delegation or express reservations concerning delegated acts, real participation of co-legislators in working out contents is not provided for.

By all accounts, in May 2021 – and thus before the completion of the legislative procedure – the European Commission called on EFRAG to develop corresponding standards.

According to the European Commission EFRAG was founded in 2001 with the Commission's support as a private not-for-profit organisation. As a majority EU-financed public/private partnership EFRAG was established to advise the Commission on the adoption of international accounting standards in EU law. According to its home page, EFRAG's members at European level (there are also members at member state level) include BUSINESSEUROPE,

¹² Opinion of the DGB of 27 May 2013 on the draft of the Proposal for a directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups, available at: <https://www.dgb.de/-/sHX>

as well as European analysts, banking and insurance associations. No European civil society organisations or trade unions appear to be members.

With regard to sustainability reporting EFRAG appears to be considering a revision of governance structures in this regard, with a view to enhancing stakeholder participation. The composition of a task force EFRAG set up for the purpose of sustainability reporting is more diverse than its membership. From a trade union standpoint, however, the assumption cannot be disregarded that EFRAG's committee work is dominated by representatives of employers' and business associations, auditors, academics, other standard setters and rating agencies, or at least strongly influenced by them.

The DGB and its member trade unions therefore strongly urge the European institutions to work out the criteria for sustainability reporting in a democratic process and not to pass on this key task to private organisations, which lack democratic legitimacy. It would be scandalous if the European institutions were to gift employers' and business organisations the opportunity, via EFRAG, to shape reporting obligations concerning labour relations in accordance with their own interests.

From the DGB's standpoint, this lack of democratic legitimacy cannot be compensated with 'stakeholder dialogue' or 'outreach events', the knowledge gained from which would ultimately be determined solely by the organising private organisations.

It is therefore vital to ensure that reporting requirements in relation to social and environmental matters are already detailed in the directive and formulated as precisely as possible in order to limit any discretionary political leeway for non-state standard setters in this regard as much as possible. Furthermore, civil society representatives and trade unions must be included in their downstream work on specifying politically established requirements on sustainability reporting. A tripartite composition of the relevant governance structures would be welcome, with representatives of business, the trade unions and NGOs. Funding for this should come from EU resources.

10. Necessary connection to the draft directive on sustainable corporate governance

Transparency obligations can only be a first step towards more binding implementation of corporate responsibility. Others must follow. The DGB considers it a matter of urgency to synchronise the present draft directive with the announced draft directive on sustainable corporate governance.

In particular, guidelines on what in Germany is a statutory orientation towards sustainability for executive pay should be based on information to be published within the framework of this directive. This would favour making the setting of sustainable executive pay part of supervisory board practice.

In addition, it would make sense to synchronise the reporting obligations on human rights due diligence obligations in the supply chain with the guidelines of the abovementioned EU

directive and existing national regulations, such as the planned German due diligence law. Furthermore, it must be ensured that standards with regard to social concerns may not be weaker than the future criteria of social taxonomy.

11. Full sustainability reporting also for subsidiaries

The DGB and its member trade unions favoured explicit reporting in all companies covered by the EU directive already in the context of the previous non-financial reporting. Bundling reporting at a superordinate group level can mean that a subsidiary's employees and other stakeholders can no longer separate out the social and environmental sustainability of that subsidiary's business activities. It should also be noted that this threatens to shift the materiality threshold because its definition can differ at the levels of the parent company and the subsidiary. This means that exclusively consolidated reporting can diminish the significance of the sustainability information at subsidiary level. It must also be taken into account here that reporting on respect for employees' and human rights cannot be summarised to the same degree as in the case of balance sheet figures.

To that extent the present guideline – according to which subsidiaries exempt from reporting under Article 19a para 7 are obliged to publish the consolidated annual report of the parent company, reporting at group level – is ultimately an unsatisfactory measure, which should be tightened up in the sense previously mentioned.