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CSRD (Corporate Sustainability Reporting Directive) and Sustainability Reporting Standards:

Assessment and review of the drafts submitted by EFRAG

Expert investigation commissioned by the Confederation of German Employers' Associations (BDA)

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Executive Summary

1. The provisions of the Corporate Sustainability Reporting Directive (CSRD) stipulate that the European Commission shall adopt sustainability reporting standards by way of delegated legislation (Art. 290 TFEU (Treaty on the Functioning of the European Union)), in which companies' specific reporting obligations in the areas of environment, social affairs and governance shall be defined. The European Commission is to base this on drafts of the European Financial Reporting Advisory Group (EFRAG).

2. EFRAG submitted its draft reporting standards for discussion end of April 2022. EFRAG intends to revise these drafts in the light of a public consultation early August 2022 and then submit them to the European Commission.

3. The European Commission may not adopt reporting standards that are incompatible with the CSRD requirements. It must also observe the requirements of EU primary law when adopting delegated acts in accordance with Art. 290 TFEU.

4. This investigation examines the extent to which the reporting standards developed by EFRAG are compatible with the CSRD requirements. It also clarifies whether the requirements of EU primary law (order of competences, EU fundamental values and EU fundamental rights, principle of proportionality, principle of certainty under the rule of law) have been observed.

5. The investigation shows that the standards submitted by EFRAG disregard or exceed the framework set by EU law in many respects.

6. The standards submitted by EFRAG deviate from the basic structure of the CSRD requirements:

- The CSRD requires reporting to the extent "necessary". EFRAG does not indicate in the standards, in the "application guidance" themselves or in the "basis for conclusions" that it has assessed and positively determined the necessity of the specific report contents. The criteria for the selection of the specific report contents remain unclear (due to a lack of necessity or proportionality).
- With regard to the information density, the CSRD differentiates between areas in which a "brief description" is required and areas in which the company must provide a more detailed description. This difference is not reflected by EFRAG.
- The CSRD requires that the reference works of global standardisation bodies "shall be taken into account". Appropriate consideration requires that the degree of inclusion of certain reporting requirements in these reference works is taken into account in an evaluative manner, as well as the extent to which a transfer to the specific context of EU sustainability reporting is appropriate. EFRAG does not indicate which benchmarks it "uses" for the reference works; the selection seems arbitrary and indiscriminate.
- The CSRD requires companies to report (only) on the "most significant" negative impacts on social factors. In EFRAG's standards, there is no discernible consideration of this normative qualification. This is a

significant deviation from the CSRD.
- The CSRD also limits the reporting obligations of companies in the area of value chains, without EFRAG taking this into account.
- The CSRD provides for an asymmetry of the reporting obligation on negative impacts and business opportunities, which EFRAG fundamentally disregards. Here, too, EFRAG's drafts differ substantially from the CSRD.
- EFRAG does not provide for any consideration of the fact that companies can be forced to behave in a certain way by EU law or state law. An appropriate sustainability assessment of an entity's behaviour is not possible without taking this into account.

7. The standards developed by EFRAG deal with the social factor "human rights" only unsystematically and inadequately in terms of content. There is no orderly examination of which human and fundamental rights are directed at companies at all (beyond the obligation of states). The reference to the human rights documents mentioned in the CSRD does not reveal any system or order. In part, the contents of the documents are arbitrarily distorted or even changed.

8. The reporting obligations laid down by the CSRD are inadmissibly overstretched by EFRAG in various areas:

- EFRAG wants to introduce "entity-specific disclosure", which is not provided for in the CSRD.
- Companies are to be obliged to report on support measures and corporate sustainability goals without this finding a basis in the CSRD in the manner envisaged by EFRAG.
- Companies are to report on the accommodation of employees, on their social security, on the improvement of their health and the general living situation without this being provided for in the CSRD.
- Companies are to be obliged to report retrospectively without this being provided for in the CSRD.

9. EFRAG introduces its own normative assessments at various points without this being provided for in the CSRD and without EFRAG having the competence and legitimacy to do so. This can be observed in the area of remuneration, privacy protection, the improvement of the qualification level of employees, the scope of the "social dialogue" and the "due diligence" communication channels.

10. In the area of equal opportunities and equal treatment, EFRAG introduces a group-based approach without this being sufficiently clearly provided for by the CSRD.

11. The standards presented by EFRAG suffer from various deficits in terms of the rule of law and fundamental rights (lack of certainty, violation of fundamental rights, etc.).

12. The standards developed by EFRAG understand the relationship between the company and the employees as a subject-object relationship: the company has a negative impact as well as a "positive impact" on the object "employee". Thus, the structure of social relations, in which the actions of the company management with effects on the employees are always influenced by the circumstances on the employee side is not adequately covered by EFRAG, even at the outset.

13. The European Commission would exceed its powers under Art. 290 TFEU if it were to enact the drafts prepared by EFRAG without the need for amendments resulting from the CSRD and EU law.

Table of contents

A. Introduction and formulation of the question

I. Development of European Sustainability Report Standards (ESRS)

The European Commission submitted a draft directive on 21 April 2021, which substantially reformulates and further develops the requirements that have been placed so far on the non-financial reporting of the[1] companies.[2] In the future, companies will be asked for a 'sustainability reporting' covering a total of three areas: Environmental factors ("ecology"), social factors ("social") and governance factors ("governance").[3] In June 2022, the European Commission, the Council and the European Parliament agreed in the trilogue procedure on a text which substantially takes over the contents of the Commission proposal.[4] In part, however, the proposal has also been developed quite a bit. The changes agreed in June 2022 concern, for example, a link between CSRD and the EU Supply Chain Directive in a parallel legislative process.[5] At the same time, the provisions of the CSRD-E (2021) were extended beyond the content of the reporting obligations, even beyond the Commission proposal. A reduction in the reporting burden is envisaged for small and medium-sized enterprises (Art. 19a (5) and (5a), Art. 29c CSRD-E (2022)). The position and tasks of the European Financial Reporting Advisory Group (EFRAG) have been clarified; the requirement of independence from lobby groups and stakeholders has been explicitly included.[6]

[1] For this purpose, for example: Baumüller, Josef/Alice Niklas/Christina Wieser, The Future of European Sustainability Reporting, 2021;
[2] Below, this proposal is to be referred to as "CSRD-E (2021)".
[3] Meetings of: Baumüller, Josef/Oliver Scheid, The draft Corporate Sustainability Reporting Directive (CSRD) - presentation, critical assessment and implications for German companies, PIR 2021, 202; Ekkenga, Jens/Carsten Schirrmacher/Björn Schneider, Open questions on legal control of sustainable entrepreneurship, NJW 2021, 1509; Fink, Christian/Thomas Schmotz, The proposals of the European Commission on the revision of the CSR Directive, Journal for International and Capital Market Accounting (KoR) 2021, 304; Hommelhoff, Peter, primary defects in the CSRD proposal and their elimination, The operation, 74 (2021), 2437; Sopp, Karina/Josef Baumüller, Towards European standards for non-financial reporting? (Part 1), Journal for International and Capital Market Accounting (KoR) 2021, 254; Sopp, Karina/Josef Baumüller, Towards European Standards for Non-Financial Reporting? (Part 2), Journal for International and Capital Markets Accounting (KoR) 2021, 322.
[4] This text is to be referred to as "CSRD-E (2022)".
[5] European Commission, Proposal for a Directive of the European Parliament and of the Council on the due diligence of companies with regard to sustainability, 23 February 2022, COM(2022) 71 final.
[6] Concerns about the formalised involvement of a private institution in the EU legislative process are set out in: Nettesheim, Martin, Sustainability Reporting: On Union compliance with the CSRD standardisation procedure, 2022.

During the political negotiations of the EU institutions on the CSRD-E (2021), EFRAG submitted the draft sustainability standards provided for in Art. 19b (1), Article 49 (3a) CSRD-E (2021) (or Art. 29b CSRD-E (2022)).[7] On 29 April 2022, EFRAG gave the opportunity to comment on the documents submitted by 8 August 2022 ("public consultation"). In addition, discussion events were organised ("outreach events"). The basis of public participation is a "Cover Note for Public Consultation" which explains the structure of the submitted drafts and the procedure.[8]

EFRAG presents a concept of European sustainability reporting standards based on a total of 13 parts. According to EFRAG's ideas, the general sustainability reporting requirements should be formulated in two basic documents (ESRS 1 - General Principles; ESRS 2 - General, strategy, governance and materiality assessment disclosure requirements). For environmental factors, EFRAG will then provide five documents (ESRS E1 - Climate change; ESRS E2 - Pollution; ESRS E3 - Water and marine resources; ESRS E4 - Biodiversity and ecosystems; ESRS E5 - Resource use and circular economy). For social factors four documents are provided (ESRS S1 - Own workforce; ESRS E2 - Workers in the value chain; ESRS E3 - Affected communities; ESRS E4 - Consumers and end-users). The area of governance factors is to be covered by two documents (ESRS G1 - Governance, risk management and internal control; ESRS G2 - Business conduct). These documents are each accompanied by further papers in which EFRAG presents the "basis for conclusions" (BC).[9] EFRAG considers the application guidances attached to the reporting standards to be of binding normative quality. The "basis for conclusions" are not attributed to the reporting standards and therefore have no binding effect in principle; however, it is foreseeable that they are not irrelevant for the interpretation of the standards.

The documents submitted comprise a total of 753 PDF pages.[10] Of this, 395 pages of normative standards[11] and 358 pages are included on the "basis for conclusions" submitted by EFRAG[12]. Depending on the classification of sub-points, the EFRAG sets different reporting requirements between 1,200 and 2,000 overall. The detailed nature of the efforts to assess the business situation, organisational structures and decisions are impressive. The documents presented show once again that the EU wants to be the world's most powerful and most influential sovereign territory in any case from a

[7] Hereinafter referred to as ESRS ("European sustainability reporting standards").
[8] The "Cover note" contains six attachments (Appendix I: Navigating the ESRS: ESRS index (mapping of ESRS / disclosure requirements / application guidance) including in table 4 the reconciliation between the Working Papers and the ESRS Exposure Drafts; Appendix II: CSRD requirements for the development of sustainability reporting standards and their coverage by the ESRS Exposure Drafts; Appendix III: SFDR Principal Adverse Impacts in the ESRS; Appendix IV: TCFD Recommendations and ESRS reconciliation table; Appendix V: IFRS Sustainability Standards and ESRS reconciliation table; Appendix VI: Acronyms and glossary of terms).
[9] The "Basis for conclusions" (BC) were made public on 31 May 2022.
[10] The page numbers given here refer to the complete documents.
[11] The length of the documents in detail: ESRS 1: 49 p.; ESRS 2: 39 p.; ESRS E1: 44 p.; ESRS E2: 24 p.; ESRS E3: 18 p.; ESRS E4: 39 p.; ESRS E5: 20 p.; ESRS S1: 65 p.; ESRS S2: 23 p.; ESRS S3: 21 p.; ESRS S4: 20 p.; ESRS G1: 17 p.; ESRS G2: 16 p.
[12] The length of the "basis for conclusions" in detail: ESRS 1: 38 p.; ESRS 2: 25 p.; ESRS E1: 47 p.; ESRS E2: 21 p.; ESRS E3: 14 p.; ESRS E4: 46 p.; ESRS E5: 18 p.; ESRS S1: 49 p.; ESRS S2: 24 p.; ESRS S3: 23 p.; ESRS S4: 26 p.; ESRS G1: 14 p.; ESRS G2: 13 p.

regulatory point of view. While a decade ago the target was formulated to make the EU the most competitive economy in the world, today it seems to be a matter of highly effective regulatory governance. There is no doubt that some sectors will benefit greatly from the fact that companies will be subject to as comprehensive reporting obligations as possible - the market for ESG consulting has exploded in recent years. However, the costs incurred by companies by imposing as finely tuned reporting obligations as possible are not reflected in the reporting standards submitted. There is nothing more than a meaningless commitment to maintaining the adequacy of reporting burdens in the proposals.

EFRAG plans to submit the ESRS it drafted to the European Commission after the deadline for submitting comments. The European Commission has to adopt delegated acts on the basis of the drafts submitted by EFRAG pursuant to Art. 49 (3a) CSRD-E (2021) and Art. 29b CSRD-E (2022).

II. Formulation of the question and procedure

CSRD provides that the European Commission adopts the reporting standards as delegated acts under Art. 290 TFEU. The European Commission can only adopt delegated acts effectively if it moves within the secondary delegation and respects primary or secondary law. On the one hand, the following study deals with the question whether the standards developed by EFRAG are compatible with the requirements of EU primary law. EU primary law sets out the requirements that the European Commission must observe when adopting delegated acts, in particular by virtue of the principle of interpretation of the competence granted in CSRD in accordance with primary law, but also by setting absolute and non-deferred limits of delegated legislation.

On the other hand, the study deals with the question of the extent to which the ESRS prepared by EFRAG meet the requirements of the CSRD-E (2021) or CSRD-E (2022). The European Commission must not adopt any standards (prepared by EFRAG) within the framework of delegated legislation which are not within the scope of the CSRD. The primary and secondary law levels are intertwined, not least because the CSRD contains criteria and specifications that mirror the primary law requirements (e.g. necessity).

The study focuses on sustainability reporting in the area of *social factors.* Here, it deals primarily with the obligations formulated by EFRAG in ESRS S1 and ESRS S2. This is not possible without also looking at the general principles (ESRS 1 and ESRS 2) - both levels are intertwined.

B. Normative Requirements for Sustainability Standards pursuant to Art. 19b (1) CSRD-E (2021) or Art. 29b CSRD-E (2022)

The requirements to be observed by the European Commission in the exercise of the delegated legislative power set out in Art. 49 (3a) CSRD-E (2021) or Art. 29b CSRD-E (2022) shall be described in detail below. If the European Commission were to exceed the legislative framework it has been given or if the substantial requirements of primary law were disregarded, the reporting standards adopted by it would be unlawful. EFRAG should only develop reporting standards which can be adopted by the European Commission in a legally permissible manner.

I. Requirements under primary law

The sustainability standards adopted by the European Commission must comply with the requirements of primary law. The following requirements are of particular importance[13]:

1. Competence limits of the EU

The EU has limited competences (principle of limited authorisation (Art. 5 (1) TEU).[14] It must not take any action beyond the limits of its competences. The adoption of a legal act beyond the competence of the EU would be illegal, thus rendering the adopted act ineffective. For the interpretation and application of CSRD, this means that the European Commission must not only observe the requirements and limitations that can be found in Art. 19a and Art. 19b CSRD-E (2021) and Art. 19a and Art. 29b CSRD-E (2022) when adopting the sustainability standards. For its part, the standards formulated in CSRD must be interpreted in such a way that the EU does not exceed its limits of competence (requirement of interpreting the CSRD in conformity with primary law). An interpretation of the clauses in the CSRD, which is indefinite in terms of wording, which would lead to the EU moving outside the limits of the competences of the Union as defined by EU primary law would be impractical. It would also be illegitimate to exceed the European Commission's institutional competences in its capacity as a delegated lawmaker. In the interpretation and application of the clauses contained in the CSRD, telos and objectives of the Treaty must also be applied. This means that an interpretation of the provisions of CSRD which is contrary to the objective of the provisions of the Treaty must be omitted. In the area of sustainability reporting on social factors, "negative" competence standards, i.e. contractual provisions, which explicitly exclude legal harmonisation on the part of the EU, are also of particular importance. In assessing the legal conformity of the standards developed by EFRAG, it is therefore always necessary to keep an eye on Art. 153 TFEU.

The European Commission must take these limits into account for the use of Art. 290 TFEU if it makes use of Art. 19b.1 CSRD-E (2021) or Art. 29b (1) CSRD-E (2022).

[13] Further requirements are mentioned at each relevant point (e.g. below C. I. 4).
[14] Oppermann, Thomas/Claus D. Classen/Martin Nettesheim, Europarecht, 9th ed. 2021, Section 11 I.

2. EU fundamental rights and values

The European Commission is also obliged to make use of Art. 19b (1) CSRD-E (2021) or Art. 29b (1) CSRD-E (2022) in a manner that respects the fundamental rights of the EU and the values of the EU.[15] The adoption of sustainability standards, which showed a lack of respect for the EU's fundamental legal obligations, would be inadmissible. Thus, the European Commission would at the same time violate the values of the EU in Art. 2 TEU. It would be contrary to the value of the rule of law in particular if the European Commission adopted sustainability standards which would be incompatible with principles of legal certainty and proportionality. These include respect for fundamental rights of freedom and equality.

The CSRD sees in Art. 19a (3) (4) CSRD-E (2021) or Art. 19a (3) (3) CSRD-E (2022) that EU member states standardise exceptions for certain companies if the publication of information would seriously damage the company's business situation.[16] This takes up and processes by itself a central issue of fundamental rights already in the directive. Further concerns of fundamental rights must be considered when interpreting unclear legal terms (e.g. Art. 19a (3) (2) CSRD-E (2021): "reasonable"; Art. 19a (3) (3) (CSRD-E (2021): "reasonable")). Of course, they must be taken into account by the European Commission when adopting the delegated acts provided for in Art. 19b (1) CSRD-E (2021) or Art. 29b (1) CSRD-E (2022). The European Commission is prohibited to apply Art. 19b (1) CSRD or Art. 29b (1) CSRD-E (2022), which leads to conflicts with EU fundamental rights. In particular, this must avoid a disproportionate burden on freedoms and interests protected by fundamental rights.

3. Principle of proportionality

According to Art. 5 (4) TEU, the EU is prohibited from any act incompatible with the principle of proportionality. The obligation to respect the principle of proportionality is not just a political concern. It is a genuine and judicial legal obligation, as the ECJ stresses in constant case law.[17] If companies would be required to publish information whose disclosure is not suitable or necessary for the achievement of the objectives of CSRD, there would be a violation of Art. 5 (4) TEU. The same would be the case if the reporting burden were inappropriate in the light of the objectives pursued by CSRD.

4. Adequate legal certainty

EU law requires that the sustainability standards adopted by the European Commission have been determined with adequate legal certainty. The enactment of excessively indefinite standards would not only violate the rule of law (Art. 2 TEU), but would also be contrary to basic law requirements (Art. 51 (1) GRCh (Charter of Fundamental Rights of the European Union)). Violations of fundamental rights which are not based on a law (determined with adequate legal certainty) are excluded in bad faith. The

[15] For this purpose, for example: Oppermann, Thomas/Claus D. Classen/Martin Nettesheim, Europarecht, 9th ed. 2021, Section 17.
[16] See recital 29a of the CSRD-E (2022).
[17] ECJ, judgement of 11 December 2018, margin no. C-493/17, Weiss et al, ECLI:EU:C:2018:1000.

degree of necessary legal certainty depends on the specifics of the regulatory field, the subject-matter of the regulation and the type of regulation. The addressees of the legal text adopted by the EU must be able to identify with sufficient certainty what behaviour is legally required for them.

II. Secondary legal requirements

The CSRD sets a framework for the European Commission, which cannot be exceeded in exercising the delegated legislative power established in Art. 19b (1), Article 49 (3a) CSRD-E (2021) or Art. 29b CSRD-E (2022). The content requirements formulated by the EU legislator in the CSRD bind the European Commission. If the European Commission were to ignore this, its action would be politically illegitimate and legally invalid. The legal framework drawn up by CSRD is broad, but not unlimited for reasons of the principle of legal certainty under primary law.

The specific requirements that the CSRD makes to the European Commission in the exercise of the delegated legal power are not described abstractly at this point of the investigation - this would be based on a commentary on CSRD. Instead, they are treated *in concreto* at the relevant location.

C. Legal deficits and defects in the EFRAG drafts

The subsequent review of the drafts developed by EFRAG is focused on four fields. A first section should deal with fundamental structural problems: It is shown here that EFRAG did not properly or in any case did not process important general requirements of CSRD according to the purpose (also in the field of social factors) (hereinafter I.). The following section shows that EFRAG has not attempted to appropriately process the human rights, fundamental freedoms, democratic principles and other standards mentioned in the CRDS as an independent social factor, they seem to be randomly brought into play (hereinafter II.). The drafts drawn up by EFRAG also exceed the framework drawn up by CSRD in some areas (hereinafter III). The review will then show that EFRAG has significant problems in implementing those reporting obligations in CSRD, which adhere to the Company's normative standards of conduct. Here are various drafts in which EFRAG develops its own normative standards beyond CSRD in an impermissible manner (hereinafter IV). In the last section of the review, general primary legal deficits, in particular with regard to the principle of legal certainty, fundamental rights and the principle of proportionality, are shown (hereinafter V.).

I. Basic structural problems

1. Legally mandatory codes of conduct and sustainability reporting

The standards prepared by EFRAG do not at any point reflect the fact that it makes a central difference for the sustainability assessment of an entity's actions whether this entity is forced to behave in a certain way by EU or Member State regulations (and in this respect has no room for manoeuvre) or whether it is a free entrepreneurial decision. The standards presented by EFRAG impose reporting requirements in areas where the entity is legally bound - the reporting entity may be assessed positively or negatively for complying with legal obligations without this correlation being apparent.

The reporting requirements drafted by EFRAG also fail to show that EU and Member State law preserves reporting requirements in many places, the repetition of which in sustainability reporting standards may lead to disproportionality (Art. 5 (4) TEU). Here too, more is not always better: Redundant reporting obligations do not bring about any regulatory gain.

2. Structural deficits

a) Reporting levels in the CSRD: Empirical description of the situation, assessments, description of corporate decisions and accessory information.

The sustainability standards to be issued by the European Commission according to Art. 19b (1) CSRD-E (2022) or Art. 29b (1) CSRD-E (2022) must reflect a total of four information dimensions. The requirements arising for corporate reporting from Art. 19a (1) and (2) CSRD-E (2021) or the corresponding provisions in the CSRD-E (2022) extend to elements of an empirical description of the situation, to corporate assessments, to practical descriptions of corporate decisions and to accessory information.

At the centre of the directive is the obligation of the company to describe the situation and situation in which it finds itself with regard to sustainability aspects. This *empirical representation* extends

- to an (empirical) *description* of the entrepreneurial meaning and orientation patterns on which corporate governance is based ("brief description of the company's business model and strategy (Art. 19a (2 a) CSRD-E (2021); slightly changed Art. 19a (2 a) CSRD-E (2022));
- to the (empirical) *description* of the main actual or potential negative effects that arise as a result of the business activity and the value chain (Art. 19a (2 e) (ii) CSRD-E (2021); slightly modified Art. 19a (2 e) (ii) CSRD-E (2022)[18]).

Against the background of the resulting meaning and orientation patterns, a *value-added forward-looking assessment* is to be made. It includes:

- the description of the "most important risks to which the company is exposed in connection with sustainability aspects" (Art. 19a (2) f) CSRD-E (2021), Art. 19a (2 f) CSRD-E (2022));
- the assessment of the opportunities associated with the model and strategy (Art. 19a (2 a) (ii) CSRD-E (2021); identical: Article 19a (2 a) (ii) CSRD-E (2022));
- an assessment of the "resistance capability of the business model and strategy" (Art. 19a (2 a) (i) CSRD-E (2021); identical: Article 19a (2 a) (i) CSRD-E (2021)).

[18] In the trilogue version, the provision is: "the principal actual or potential adverse impacts connected with the undertaking's own operations and with its value chain, including its products and services, its business relationships and its supply chain, actions taken to identify and track these impacts, and other adverse impacts which the undertaking is required to identify according to other EU requirements on undertakings to conduct the due diligence process."

The Directive also provides that the company must report on *the corporate decisions* taken by management (actual dimension):

- a description of the sustainability objectives set by the company (Art. 19 (2 b) CSRD-E (2021); changes: Art. 19 (2 b) CSRD-E (2022));
- a description of the company's sustainability policy (Art. 19a (2 d) CSRD-E (2021); identical: Art. 19a (2 d) CSRD-E (2022));
- a brief description of how sustainability concerns are taken into account and anchored in the business model and strategy (Art. 19a (2 a) (iii)[19] and (iv) CSRD-E (2021); slightly changed: Art. 19a (2 a) (iii) and (iv) CSRD-E (2022));
- a description of any measures to prevent, mitigate or remedy actual or potential negative effects and describe the success of these measures (Art. 19a (2 e) (iii) (CSRD-E (2021); slightly modified in Art. 19a (2 e) (iii) (CSRD-E (2022));
- a description of the progress made with regard to its sustainability objectives (Art. 19a (2 b) CSRD-E (2021); largely in line with CSRD-E (2022)).

Institutional and procedural reporting obligations are ultimately at a completely different level. They concern

- the description of the role of the administrative, performance and supervisory bodies in the context of sustainability aspects (Art. 19a (2 c) CSRD-E (2021); slightly changed in Art. 19a (2 c) CSRD-E (2022) and supplemented by Art. 19a (2 d) CSRD-E (2022));[20]
- the description of the due diligence process implemented in the company with regard to sustainability aspects (Art. 19a (2 e) (i) CSRD-E (2021); slightly modified in Art. 19a (2 e) (i) CSRD-E (2022); Art. 19a (2 e) (ii) CSRD-E (2022)).

This analytical order of the reporting obligations formulated in the CSRD is recommended because a company can only perform the forward-looking valuation required by Art. 19a (2 a) (i) and (ii) CSRD-E (2021) and Art. 19a (2 f) CSRD-E (2021) only if it has previously determined empirically where current business activities are currently or potentially adverse effects. A specific description of the sustainability goals and the corporate sustainability policy as well as an explanation of how sustainability concerns are anchored in the business model can only be achieved if empirically worked out where there are sustainability problems.[21] If you want to formulate specific objectives, this can only be done in the light of the description of the specific situation.

b) The counter-contradictory structure of the EFRAG reporting standards

Contrary to this logic, EFRAG builds up the presented reporting standards. It will first commit the companies to the report on sustainability policies (ESRS S1-1) before it

[19] Below, the representation only extends to the social factors in (iv).
[20] This new clause establishes an incentive structure reporting obligation.
[21] So also UNGP, Commentary on No. 18: "The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved."

comes to the determination and presentation of the current situation (and the "negative effects") that are recognisable here (from ESRS S1-9 et seqq.). It also wants to commit the company to the report on the management of negative effects (ESRS S1-4), before it is clear at all how the situation in the company is in terms of negative effects affecting employees. The reporting standards require the company to disclose the "policies", "targets", "action plans" and "resources" (ESRS S1-S6), before reporting on "performance measures" (ESRS S1-7 and S1-8) and the specific conditions in the company ("working conditions" (ESRS S1-9 to S1-15); "equal opportunities" (ESRS S1-16 to S1-20); "other work-related rights" (ESRS S1-21-26)).

This structural problem is also evident in ESRS 2 - General, strategy, governance, and materiality assessment, where also "interaction of impacts and the undertaking's strategy and business model" should be reported (ESRS 2 - DS2- SBM 3), before the "materiality assessment of sustainability impacts, risks and opportunities" is dealt with (ESRS 2 - DS 2-IRO 1 et seqq.). It seems logical in any case not plausible to first disclose the interaction of business model and impact before it is clear at all how negative effects have to be determined and what negative effects the activity of a company actually has.

The drafts of the EFRAG do not only have logical problems on this point. This series of reports will present companies with the difficulty that they have to report on the management of its material impacts on own workforce (ESRS S1-1) without having already been presented (and the report addressees are known) to what extent material impacts occur in the company.

The lack of order, which is noticeable in the drafts of EFRAG, is due to *the* fact that the legislator already mixes empirical, value-added, action-setting and institutional accessory report topic in Art. 19a (2) CSRD-E. However, the EFRAG is not strictly oriented towards the structure of Art. 19a (2) CSRD-E (2021), but chooses another structure which is not convincing from the point of view of coherence.

3. Level of information

a) Criterion of necessity

The CSRD-E commits companies to provide information that enables financial market players, stakeholders and members of the public (hereinafter: report addressees or merely addressees) to understand the "sustainability-relevant effects of the company's activities" and the "impact of sustainability aspects on the business development, performance and position of the company". The CSRD-E is based on the idea that the addressees of the sustainability reporting should get an idea of why they are "sustaining" by taking beneficial or harmful actions ("nudging"). The published information is intended to enable the report addressees[22] to get an idea of the company and draw conclusions from this. It is addressed to a general public, be it in the field of financial assets, whether as a customer or employee, or as a member of the general public. The standards to be formulated by the European Commission pursuant to Art. 19b (1) CSRD-E must ensure that the sustainability-relevant information enables observers to form a sound and correct judgement.

Art. 19a (2) CSRD-E (2021) or Art. 19a (2) CSRD-E (2022) formulates a clearly structured programme which information must be provided by the companies covered by CSRD. The reporting obligation is limited in content. It covers "information necessary to understand the company's impact on sustainability matters", as well as "information necessary to understand how sustainability matters affect the company's development, performance and position". The Directive does not require full representation or comprehensive transparency, but limits the information to what is *necessary.* Not every kind of interesting information is to be provided, but only that which is *indispensable* for an assessment of the position of the company against the background of the double materiality criterion.

According to the principle of CSRD, companies must not be required to report on information that is *not necessary* to enable observers to assess the company's sustainability. The necessity criterion is more stringent than a mere criterion of necessity. It is not enough that information appears generally interesting or politically relevant for the valuation of the company.[23] CSRD differs from other reporting systems with the necessity criterion. For example, the GRI standards go partly beyond the scope of CSRD, but then allow an assessment of the relevance of the report (GRI 3: Material topics 2021: "Prioritisation of the most significant impacts for reporting").

[22] The issue is about the public as a whole.

[23] Therefore, problematic: ESRS S2 AG90 p. 2: "Additionally, providing a breakdown of employees by region gives insight into regional variations." It is unclear where there is a link to sustainability concerns here.

The necessity criterion is processed legally and appropriately by EFRAG neither in the reporting standards itself nor in the "basis for conclusions". The EFRAG does point out on several occasions that the drafts drawn up should not become an excessive burden for companies. The specific explanation of why the developed standards *are individually* necessary in order to enable the addressees to assess sustainability is still missing. EFRAG should not have confined itself to maintaining a correlation between sustainability issues and the reporting obligations it has drawn up; instead, it should have explained to what extent the specific reporting requirements it has developed were 'necessary' *each individually* in order to enable an adequate sustainability assessment by report addressees. This would have required explanations on the necessity (possibility of selecting less burdensome reporting obligations?) and on the appropriateness of the obtained information against the background of the company's burden?). That is not the case at all. The EFRAG seems to have been based on its knowledge interests from the onset: It does not explain why the specific obligations are necessary from the perspective of the report addressees. It also does not deal with the necessity and appropriateness in detail: The drafted standards do not provide for corrections in the sense of a case-by-case necessity test.

If the European Commission were to adopt sustainability standards on the basis of Art. 19b (1) CSRD-E, which do not show in every specific case why they are necessary for a sustainability assessment, these standards would be incompatible with the requirements of EU primary law (Art. 5 (4) TEU) and the necessity criterion of CSRD.

b) Graduated requirements for information density

CSRD provides for different levels of information across the reporting levels. In some areas, CSRD only requires a "brief description"; in others, a "description" is mentioned.[24] This is a relevant difference for lawyers. The CSRD also frequently talks about the need to provide information that is "relevant".[25] These specific requirements must be reflected in the standards.

Thus, the reporting obligations set out in Art. 19a (2) CSRD-E (2021) or Art. 29a (2) CSRD-E (2022) are not borne by the notion that companies must disclose any information that may be relevant to ecology, social environment or governance. The directive does not aim at a quantitative radicalisation of the level of information, but rather formulates a limited normative framework for the content and scope of reporting, which in turn has reclassified levels. It is not a question of requesting as much information as possible from companies; the directive is satisfied (although for reasons of proportionality (Art. 5 (4) TEU)) with a different wording, but always appropriate, depending on the reporting field.

EFRAG's drafts do not indicate that the tiered requirements of the Directive ("brief description"/"description" etc.) have been processed. In any case, they seem to be partly backed by the idea that more and more is better. They are supported by a claim of completeness which, on the one hand, impresses in its perfection and detail, but on

[24] Cf. Art. 19a (2a) CSRD-E (2021) (corresponding to CSRD-E (2022)) with Article 19a (2b-f) CSRD-E (2021).
[25] Art. 19a (2 g) CSRD-E (2021) (corresponding to CSRD-E (2022)): "indicators relevant to the disclosures referred to in a)-f)".

the other, does not meet the differentiating requirements of CSRD and the nuances and gradings expressed therein. The standards drafted by the EFRAG seem to be supported by the basic idea that the environmental transformation that is pursued most effectively can be driven by the burden on companies as comprehensive as possible. It cannot be seen even at a single instance that EFRAG differentiates between "brief descriptions" and more detailed "descriptions". The standards drafted by EFRAG are ultimately based on a quantitative concept ("as much information as possible") which is foreign to CSRD. It is interesting that the EFRAG synapse shows that all the requirements of CSRD are depicted somewhere in the EFRAG rules;[26] however, it is not stated that all principles and rules postulated by EFRAG are sufficient and necessary to implement the requirements of the Directive. Moreover, the CSRD fails to recognise that more information on its part may hinder transparency (information overload).

If the European Commission were to adopt sustainability standards on the basis of Art. 19b (1) CSRD-E, which do not show that the different requirements for information density have been taken into account, these standards would be ineffective in this respect.

c) Normative requirements for recourse to reference works

Pursuant to Art. 19b (3) CSRD-E (2021) (according to Art. 29b (3) CSRD-E (2022)), the European Commission has to "take into account" a large number of reference works when adopting the reporting standards, in particular the work of the global standardisation initiatives for sustainability reporting and existing standards and framework for responsible entrepreneurial action, for corporate social responsibility and for sustainable development. Appropriate "consideration" means that the European Commission must take into account the extent to which these reference works may be of importance in the separate reporting context of CSRD and to what extent they "adjust" functionally there. In contrast, a correct approach to the "consideration" criterion would not exist if the European Commission sought to create the broadest and strictest reporting obligation in each area that is found somewhere in one or some of the reference works.

The standards drafted by the EFRAG do not clearly indicate how the "consideration" criterion has been understood. At any rate, there seems to be a view at some points that it is necessary to choose the broadest and most stringent reporting standard in the reporting fields, which is found in one of the reference works. This explains why the EFRAG once refers to the GRI, once to the UN Global Compact, to the OECD guidelines or the UNGP without a pattern being recognisable or declared. It is only evident that an effort is made to find a reference somewhere for the reporting obligation that the EFRAG considers to be correct. As a result, the draft submitted by EFRAG also contains reporting standards that are *not* found in the majority of reference works. This arbitrariness in dealing with and using reference works does not meet the requirements formulated by CSRD with the concept of "consideration".

[26] ESRS S1 BC p. 12-13, p. 15-19.

4. Description of the main negative effects (Art. 19a (2 e) (iii) CSRD-E)

a) Concept of negative impact on a sustainability factor

The CSRD strategy focuses on the concept of the actual or potential negative impact on one of the reporting or sustainability factors ("negative impact") (Art. 19a (2 e) (ii) CSRD-E (2021) or Art. 29a (2 e) (ii) CSRD-E (2022)).[27] This concept not only outlines the content of the reporting obligations. The due diligence tools[28] provided for in the Directive also enable the Company to identify and respond to such effects. However, the approach in the Directive is not more detailed in spite of its centrality. Nor does the Directive's considerations describe when such effects exist.[29]

It is obvious that not every contact with the goods, interests or values described in a sustainability factor can already constitute a "negative impact". A meaningful legal application of the term is only possible if benchmarks are developed to ascertain when a "contact" with a sustainability factor turns into a "negative impact". There is nothing to be found in the reporting standards submitted by the EFRAG.

If the European Commission were to adopt reporting standards that oblige the company to publish non-specific information on situations and conditions without any reference to a disadvantageous decision, action or measure of the company, this would not be covered by CSRD. According to the Annex to the Directive, decisions, actions and measures are not subject to reporting. If the European Commission would not respect this difference in standards pursuant to Art. 19b (1) CSRD-E (2021) (according to Art. 29b (1) CSRD-E (2022)) and force the companies to report on the extent to which they have used (or not used) possibilities for improvement, it would exceed its mandate; the corresponding standards would be unlawful.

b) Negative effects and positive promotion actions

It is laid down in the basic concept of CSRD to place the damaging action of a company at the centre of the reporting obligation. This basic concept must be illustrated in the reporting standards pursuant to Art. 19b (1) CSRD-E (2021) or Art. 29a CSRD-E (2022). For the area of social factors of interest here, this means: The reporting obligation must therefore cover all decisions, actions and measures of the company that have a negative impact in the area of social factors. It may also provide the due diligence provisions (Art. 19a (2 e) (i) CSRD-E (2021) or Art. 29b (2 e) (i) CSRD-E (2022)) and the avoidance or elimination efforts of the company (Art. 19a (2 e) (i) CSRD-E (2021) or Article 29b (2 e) (i) CSRD-E (2022)).[30]

The relationship between entrepreneurial action and an adverse effect is obvious (and can therefore be made the subject of a reporting obligation) without any problems, for example when it comes to accidents at work or malfunctions. It is also obvious when

[27] A corresponding wording can be found in Art. 29a (2 e) (ii) CSRD-E (2022).
[28] For this purpose, III. 2. e).
[29] Cf. in particular, considerations of recitals 26-31.
[30] ESRS 1 - General Principles 1 Appendix C (No. 17): "Due diligence requires that action is taken to address negative impacts that have been identified. In the case of a potential impact, the company should take action to prevent it wherever it is possible, or, where this is not feasible, to mitigate the risk of it occurring and the extent of harm that could result."

the company takes active measures that unequally treats employees or other stakeholders, or if they are denied equal opportunities. The purpose of reporting may also be the question of whether the company has taken decisions, actions or measures that adversely affected the diversity of the company.

In contrast, the concept of the guideline would be beyond the scope of Article 19b.1 CSRD-E (2021) or Art. 29b CSRD-E (2022) if the failure to promote sustainability was reconstructed as a "negative impact". It is not an "actual or potential negative impact" when a company is inactive, especially with regard to improving the quality of life or work of stakeholders. It is a border case, where a company fails to take measures that promote or increase "diversity". In this case, the extent to which these measures are necessary for establishing equal treatment or creating equal opportunities should be decisive. If this is not the case, failure can also not represent a "negative effect".

The standards formulated by EFRAG may ignore this correlation because they seem to reconstruct entrepreneurial inaction as a "negative impact". However, this remains unclear: EFRAG does not seek to delineate actions that cause negative effects from situations where an obligation to promote or improve the business is imposed.[31]

c) Restriction of reporting obligation to the "most important" negative effects

Pursuant to Art. 19a (2 e) (ii) CSRD-E (2021) or Art. 29a (2 e) (ii) CSRD-E (2022), the reporting obligation must be limited to the "most important" negative effects. It can be seen from the provisions of CSRD that the description does not need to refer to any "negative impact" that arises from the entrepreneurial activity. The reporting obligation can therefore only cover decisions, actions or measures of the company which have a particular negative impact in a *qualitatively comparative sense*.

The standards submitted by EFRAG do not process the "most important" negative effects. EFRAG also does not explain why the sub-requirements it has listed under the individual reporting requirements should each have the "most important" negative effects. This is a particularly serious deficiency in the submitted drafts.

The standards would only comply with CSRD requirements if (1) prioritisation were to be introduced and the relevant standards were uncovered; (2) companies were required to use the benchmark for reporting; and (3) to limit themselves to the "most important" impact. Without prioritisation, the feature of "significance" cannot be complied with.

5. Limitations on the description of impacts in the value chains

In the version of the Commission proposal, Art. 19a (3) (2) CSRD-E (2021) proposes that the company's sustainability report should also contain "information on the company's value chain, including information on its own activities, products and services, its business relationships and its supply chain". However, the proposal contained the restriction that the reporting obligation should only relate to information to the extent that they are "reasonable". Art. 19a (3) (1) CSRD-E (2022) is now talking about companies having to provide the said information to the extent that this

[31] For this purpose, cf. below III. 4. c) and d).

requirement is “applicable”. However, in the (new) recital 46, CSRD-E (2022) continues to refer to the principle of proportionality of primary law.[32]

The reporting standards submitted by EFRAG do not reveal that EFRAG has dealt with these restrictive conditions. There is also no specific reference in the relevant “basis for conclusions” to the fact that EFRAG has processed the adequacy clause contained in Art. 19a (3) (2 CSRD-E (2021) (or the underlying principle of proportionality from Art. 5 (4) TFEU).

Nor is it apparent in the reporting standards presented by EFRAG that the differentiated roles and responsibilities have been taken into account in the “co-employment” constellations. The categories introduced by EFRAG do not represent the legal and economic conditions in the modern world of work. Employees who are attributable to the category of non-employees are not employees and are therefore beyond the influence of the employer. Sustainability reporting standards that do not adequately reflect how the employment relationships are structured in value chains do not comply with the requirements of CSRD.

Finally, EFRAG does not recognise that it is aware of the tensions arising from the fact that reporting companies have to commit their contracting partners in the value or supply chains to detect and provide internal information. Depending on the design, such agreements may have restrictive effects.

6. Asymmetry of reporting on negative effects and corporate opportunities (Art. 19a (2 a) (ii) CSRD-E and Art. 19a (1 e) (iii) CSRD-E)

CSRD is based on the basic decision of asymmetric reporting. Companies have to report comprehensively on the main adverse effects of their actions on sustainability issues. On the contrary, the company has to report (only) within the framework of the description of the business model and its corporate strategy on the opportunities arising from a sustainable business model and a sustainable strategy. The reporting in this respect must be limited to a “brief description”. In particular, the Directive does not provide for symmetry between reporting on business decisions that harm and promote sustainability. Anyone who compares Art. 19a (2 a) (ii) CSRD-E (2021) with Art. 19a (2 e) (iii) CSRD-E (2021) recognises rather an asymmetry with regard to the level of detail of the reporting obligations.

[32] There is a restrictive specification: “Standards shall specify disclosures on value chains that are proportionate and relevant to the scale and complexity of the activities, and the capacities and characteristics of undertakings in value chains, especially those of undertakings that are not subject to the sustainability reporting obligations pursuant to this Directive. Standards shall not specify disclosures that would require undertakings to obtain information from small and medium-sized undertakings in their value chain that exceeds the information to be disclosed according to the sustainability reporting standards for small and medium-sized undertakings.”

This asymmetry is not reflected in EFRAG's standards. EFRAG's reporting standards address negative and positive effects as well as risks and opportunities consistently. EFRAG also consistently assumes that the reporting obligation on the "company opportunities" must have the same weight as the reporting obligation on "negative effects" (example: ESRS S2-6 (No. 37)). This equation is found in dozens of (partial) reporting obligations, as well as in the "application guidance" and in the "basis for conclusions". This is obviously incompatible with CSRD in this form. In this respect, the drafts submitted by EFRAG do not properly reflect the requirements of CSRD in principle and consistently. The reporting standards would only comply with CSRD requirements if the company had to report on the opportunities in the context of the presentation of its business model; the report on individual social factors would only have to focus on negative impacts and risks.

EFRAG also claims that the risk of a negative effect may be compared with a potential positive development (e.g. ESRS 2 - DR 2- IRO 1-3, ESRS S2-6 (No. 40)). This is also a tangible and weighty deviation from the concept of CSRD.

In some cases, the EFRAG drafts go beyond that. In ESRS S2-6 (No. 40), the company is required to report on "how the actions it has planned or is implementing to pursue material opportunities ... are expected to achieve the opportunities". The EFRAG is also not within the scope of CSRD. Although this provides that the company has to report on the measures it has taken to identify, prevent or eliminate the "most significant actual or potential negative effects". There is no mention of a comprehensive reporting obligation on "material opportunities" which is detached from the description of the business model.

It cannot be opposed to this that it is in the business interest to be able to report on good. In principle, companies cannot be required by the European Commission to do something that is not provided for in the Directive, regardless of whether this is in their own interest (actual or alleged). The justification of reporting obligations, which are not provided for in CSRD as such, cannot be justified by the argument that relevant publications are also in the interests of the companies. Once the CSRD has been adopted, this decision is generally reserved for companies - subject to the fundamental presentation of the business model. Some argue in favour of the assumption that the obligations that go beyond the requirements of the Directive to report on *sustainable* decisions may be intended to force competition among companies, in the consequence of which companies, which are reluctant, are disadvantaged (and subsequently suffer disadvantages). If the legislator does not provide for a "race to the top" or "beauty contest" in the field of promoting sustainability issues, the European Commission cannot enforce it.

The drafts drawn up by the EFRAG do not properly represent this asymmetry laid down in the Directive. If the European Commission were to adopt standards based on Art. 19b (1) CSRD which do not represent this asymmetry, it would exceed the framework drawn by CSRD.

II. Determination and processing of human and fundamental legal standards

The provisions of CSRD provide that the social factors also include the human and

fundamental rights standards listed in Art. 19b (2 b) (iii) CSRD-E (2021) or Art. 29b (2 b) (iii) CSRD-E (2022). The relevant regulation of CSRD is unhappy because the contracts and documents listed above are mainly instruments addressed to states and subject to the obligation of states. They do not have any direct obligations to the detriment of private individuals. The regulation of CSRD has not been successful either insofar as it is already unclear in its approach to the extent to which the observance of "democratic principles" is to be implemented in companies. The CSRD's regulatory technique is based on new developments in human rights policy, which understands human rights as (amorphous) goods, which must be protected not only against everyone, but also claims for realisation and promotion against everyone and all. However, there is no criticism of CSRD here.

These circumstances give rise to a particularly careful and particularly prudent approach to the human rights-related social factors. This point shows a complete failure in the draft reports submitted by EFRAG. The reporting standards developed by EFRAG do not deal with the question of which specific requirements arise from the tools for companies listed in Article 19b (2 b) (iii) CSRD-E (2021) or Article 29b (2 b) (iii) CSRD-E (2022). This would have required a careful and specific investigation of the extent to which the standards listed there are basically directed against companies, and which specific normative behavioural expectations are then derived from sustainability aspects. EFRAG has not carried out such a (recognisable) investigation. Instead, the "basis for conclusions" refers to individual provisions of the tools referred to in Art. 19b (2 b) (iii) CSRD-E (2021) or Art. 29b (2 b) (iii) CSRD-E (2022), while others remain unmentioned.[33] At no point, the requirements of CSRD and the draft reports submitted by EFRAG differ structurally as far as the handling of Art. 19b (2 b) (iii) CSRD-E (2021) or Art. 29b (2 b) (iii) CSRD-E (2022).

In some areas, it is also observed that human rights standards are deformed and altered. Thus, the AEMR speaks of the "right to a standard of living adequate for the health and well-being of himself and of his family" (Art. 25 No. 1 UDHR (Universal Declaration of Human Rights)). EFRAG deforms this wording and makes it a claim (against an enterprise) to provide an "adequate standard of living, rest and leisure" (as ESRS S1 BC20). The International Pact on Economic, Social and Cultural Rights protects "rest, leisure and reasonable limitation of working hours" (as also ESRS S1 BC21), but there as an obligation of states, not directly from companies. On this point, EFRAG does not show respect for the regulatory structure of the human rights tools to which CSRD refers, but rather transforms treaties and human rights tools that bind states into a corporate human rights system.

A misleading modification of human rights standards is also carried out elsewhere. The revised European Social Charter used by EFRAG provides for principles 9 and 10 of the states' obligations (Art. 9: Right to vocational counselling; Art. 10: state guarantee of a right to vocational education). EFRAG makes this a *duty of the company* to "workforce training" and "workforce development" (ESRS S1-3 (No. 29)).

Such modifications, changes and extensions of human rights standards are clearly outside the mandate in accordance with Art. 19b (1) CSRD- E (2021) or Art. 29b (1)

[33] EFRAG points out that human rights extend to "the full range of types of negative impacts on people that can occur: economic, social, cultural, civil and political" (ESRS S1 BC8).

CSRD-E (2022). If the European Commission were to incorporate these proposals into the delegated act, it would cross the borders it has drawn.

III. Overstretching the framework drawn by CSRD

The reporting standards adopted by the European Commission through delegated legislation must be within the framework set by CSRD.[34] If the European Commission were to exceed this framework, it acted illegally. EFRAG drafts that are not within the scope of CSRD cannot be accepted by the European Commission.

1. Reporting obligations beyond social factors: "entity-specific disclosure" (ESRS S1-6 (No. 45-48))

The EFRAG reporting standards initially exceed the framework set by CSRD by imposing reporting obligations on the company beyond the social factors listed in the CSRD.

EFRAG also claims that the company should impose reporting obligations beyond the ESRS reporting standards. According to ESRS 2 no. 78-81, the company is obliged to examine "which material impacts, risks and opportunities are not covered by ESRS and shall give rise to entity-specific disclosure". This unspecific obligation is transformed into a specific reporting obligation for the area of social factors in ESRS S1-6 (Nos. 45-48). In the relevant "basis for conclusions", it is said that the social factors also include social issues such as "job satisfaction" (ESRS S1 BC10[35]).

This reporting obligation is incompatible with Union law in various respects.

EFRAG ignores the structure of CSRD if it assumes that it is able to commit companies to a report on "impacts" and "risks" that are not reflected in the ESRS. The requirements formulated in Art. 19b (2) (2 CSRD-E (2021)) (corresponding to CSRD-E (2022) circumscribe and define those reporting subjects to which the reporting of the companies in the areas of "environmental factors", "social factors" and "governance factors" must extend.

These requirements are final; they cannot be extended by further reporting fields (beyond ESG). Referred to in Art. 19 (2) (2 CSRD-E (2021) or Art. 29b (2) CSRD-E (2022), the three basic fields of ecology, social affairs and governance of specific topics are not final ("in particular"), with the result that the European Commission has the power to define specific reporting items in the context of the specification of the preambles. However, it is clear from the CSRD that it is the European Commission that must define the objects of reporting. The corporate reporting obligation can only cover items that the European Commission has specified in a report in detail. The CSRD does

[34] Cf. above B. I. 1.

[35] BC10 reads: 'Additional social issues include the advancement of skills, knowledge and job satisfaction, which are commonly included in the concept of 'human capital', defined by the Capitals Coalition as 'the knowledge, skills, competencies and attributes embodied in individuals that facilitate the creation of personal, social and economic well-being.'

not allow the reporting standards to leave open (in whole or in part) what the corporate reporting obligation must focus on, in order to then, in a next step, impose the obligation on the company to identify reporting items that it considers relevant. In other words: The European Commission has the power to specify the adverse effects and risks referred to in Article 19a (2e) (ii), f) CSRD-E (2021). However, it cannot refrain from specification and introduce the category of a non-specific "entity-specific disclosure". The attempt to oblige the companies to do so exceeds the powers under Art. 19b (1) CSRD-E (2021) or Art. 29b (1) CSRD-E (2022).

It would also be contrary to the rule of law (lack of legal certainty) and inappropriate (infringement of the principle of proportionality) to force companies to report on a field in which CSRD and the implementing regulations adopted pursuant to Art. 19b (1) CSRD have not formulated any material requirements. EFRAG intends to assign to the companies in ESRS 2 (No. 78), ESRS S1-6 (No. 45-48) a responsibility for the normative assessment of its own activities and its consequences which is incompatible with the rule of law requirements under Art. 2 TEU. The burden of developing standards to determine whether or not a corporate decision or practice is sustainable cannot be imposed on companies.

These findings force the conclusion that the concept of "entity-specific disclosure" developed by EFRAG is contrary to the CSRD requirements.

The specific reporting obligations linked to this are also incompatible with CSRD. Thus, the EFRAG has created a category that is not shown in the CSRD. If the European Commission were to adopt this category, it would exceed its legislative competence pursuant to Art. 19b (1) CSRD-E (2021) (corresponding to CSRD-E (2022)).

2. Reporting obligations on support measures (e.g. ESRS S1-5 (Nos. 39, 40); ESRS S2-5 (Nos. 31-36))

The standards formulated by EFRAG set out specific reporting obligations on corporate support measures, which do not find any basis in the CSRD.

In ESRS 2 DR 2-IRO 3 (No. 78 et seqq.) documentation is required, which initiatives the company has taken, "when the undertaking has or will put in place initiatives to modify its strategy and business models". The possibility of a company not taking initiatives is not provided for. Thus, the standards impose an obligation to act which is incompatible with CSRD.

In ESRS S1-5 (No 39 (b)), the Company is required to report whether it has "additional initiatives or processes" with the primary purpose of delivering positive impacts for its workforce. There is no provision for such a *specific* reporting obligation on support measures in the CSRD. If EFRAG assumes that CSRD forces the company to promote this, it would also disregard the content of the CSRD, which does not impose any normative obligations at the expense of the company. In ESRS S1-5 (No. 40 (b)) EFRAG seems to assume that it is an obligation "to achieve positive impacts for its own workforce".

In ESRS S2-5 (No. 31 (b), No 32), the company is required to report on "positive

impacts for value chain workers". Contrary to its use in CSRD, the term "impact" is used here to rewrite the company's funding measures. In the CSRD there is no basis for a reporting obligation on specific funding measures. The fact that the standard developed by EFRAG speaks of positive impacts does not alter this. EFRAG is mistaken in the assumption that CSRD reporting obligations were aimed at "to deliver improved outcomes in workers' lives."

EFRAG, in principle, seems to ignore the fact that CSRD does not provide for a general reporting obligation on whether and how the company has improved the company's internal situation in the area of social factors. For the most part, CSRD does not provide for the standards developed by EFRAG to formulate business funding obligations directly or indirectly. It is therefore inadmissible to call on the company to account, within the scope of reporting, why it has *not* improved a situation. According to common parlance, a negative impact on sustainability issues can only be said if an action by the company adequately results in a deterioration of a good or condition that is the subject of a sustainability concern. In contrast, "actual or potential negative effects" cannot be said when it comes to why the company has not taken measures to improve a good quality or condition.

In Art. 19a (2e) (iii) CSRD-E (2021) or Art. 29a (2e) (iii) CSRD-E (2022), CSRD-E (2022) sets out an obligation to report on actual or potential injury acts, their identification and termination, and the elimination of consequences. It does not stipulate that the company will be required to report unspecifically on whether and how it can improve or has improved a particular situation in the area of social factors. The company is never forced to justify its decisions. According to the basic system of CSRD, the report addressees should draw the conclusions of the company's presentation.

3. Reporting obligations on corporate sustainability goals (ESRS S1-4 (Nos. 32-38))

The CSRD provides in Art. 19a (2b) CSRD-E (2021) or Art. 19a (2b) CSRD-E (2022) that the company reports on the self-sufficient sustainability objectives. CSRD also provides that the company will provide a brief description of the business model, including the question "how the company takes into account the interests of its stakeholders ... in its business model and strategy" (Art. 19a (2a) (iv) CSRD-E (2021) or Art. 19a (2a) (iv) CSRD-E (2022)).

EFRAG provides in ESRS S1-4 that the company should not only report on the results-oriented objectives it has set with regard to the reduction of negative effects and the management of material risks (ESRS S1-4 (No. 32(a) and (c); No. 33)). EFRAG also extends the reporting obligation to the criteria "advancing positive impacts on its own workforce" and "managing opportunities related to its own workforce" (ESRS S1-4 (No. 32 b) and (c)). The company must report on the procedures in which it determines the objectives, and in this context it must also report whether and how these objectives are defined with the involvement of employees or employees' representatives (No. 37).

The standards developed by EFRAG are not within the framework laid down by CSRD. This applies first to the extent that EFRAG claims to be able to determine which objectives the company must report on (ESRS S1-4 (No. 36)). The CSRD shows that the company has the freedom to decide for itself which goals it sets. Within the

scope of this power, the company can also formulate sustainability targets that are not found in ESRS S1-4 (No. 36). The reporting standard drawn up by EFRAG also differs from CSRD, because ESRS S1-4 (No. 36) on the one hand contains topics, which cannot be found in the CSRD ("fair wages"; "access to social security"), on the other, other topics of CSRD are being overlooked by EFRAG. EFRAG does not state any reason for this.

Moreover, the standards developed by EFRAG in ESRS S1-4 (Nos. 32-38) suffer from the rule of law and coherence problems, because the concept of "positive impact" in the field of many social factors is completely unclear. Is it a "positive impact" when the company reduces the number of hours per week (without wage compensation)? What does "positive impact" mean when the company has succeeded in eliminating harm to equality and equal opportunities and establishing a state in which violations of the prohibition of discrimination no longer occur? Is there a state that is better than equality? EFRAG suggests in ESRS S1-4 (No. 32) that a distinction between the reduction of "negative impacts" and the effect of positive impacts is possible in the area of social factors. It also seems to be of the opinion that, in the area of social factors, which involve a normative ban on discrimination, a situation that is better than equal treatment and equal opportunities can be established. This is theoretically and practically infeasible.

With the concept of "positive impacts" in the area of social factors, EFRAG uses a concept that is incompatible with the rule of law requirements of Art. 2 TEU due to its ambiguities; this applies in particular to the social standards "equal treatment and equal opportunities" and "human rights".

4. Inclusion of reporting fields beyond the CSRD framework

EFRAG also develops reporting standards that go beyond the scope of CSRD.

a) Accommodation (ESRS S1 No. 2 (c) vi; ESRS S1 29 (c)).

CSRD provides that companies must be informed of the *working conditions*. The points listed in Art. 19b (2b) (ii) CSRD-E (2021) or Art. 29b (2b) (ii) CSRD-E (2022) are not exhaustive. Reporting standards may also request information on other and non-specifically listed working conditions. However, the reporting standards developed by EFRAG go beyond this.

EFRAG assumes that it complies with the standards of sustainable corporate activity to provide housing to employees (ESRS S1 (No. 2(c) (vi)); ESRS S1 (No. 29(c))). There is no basis for this in the CSRD. According to general understanding, the concept of "working conditions" does not extend to living outside of work. Moreover, a reporting obligation on accommodation issues would also be disproportionate. EFRAG seems to imply that it increases the sustainability of the company's activity to the extent that the company provides business accommodation. It seems to be committed to the normative ideal that a company operates most sustainably if it also provides accommodation to all employees. The policy does not provide any basis for this assessment of company or factory settlements. If EFRAG were to assume that CSRD contains a normative principle according to which a sustainable company has to take care of the housing of

employees (which seems to be the case), it would misunderstand the framework set by CSRD.

If the EU were to claim to adopt regulations concerning the company's housing of employees, it would violate the limits of competence drawn to it (Art. 153 (1) TFEU). This must be taken into account when exercising the delegated power of law-making established in the CSRD (Art. 290 TFEU).

The fact that corresponding reporting standards may be found in the reference works of other standard developers is irrelevant in this context because they are not subject to the normative bindings resulting from Art. 290 TFEU, Article 19b (2b) CSRD-E (2021) or Art. 29b (2b) CSRD-E (2022) for EU standardisation. The reference to other reference works cannot justify an excess of competence.

b) Social security (ESRS S1 (No. 2 (a) (vi)); ESRS S1-15 (Nos. 75-78))

A further extension of the reporting standards on the reporting requirements laid down in the CSRD is based on the standards developed by the EFRAG in the field of social protection.

The standards developed by EFRAG postulate that companies have to report on the social security of their employees (ESRS S1 No. 2(a) vi; ESRS S1-15 (No. 75-78)). EFRAG does not differentiate between the protection provided by the company and the state-guaranteed protection. CSRD does not provide any basis for a reporting obligation that extends to state social protection. In a worse way, it cannot be understood why the *sustainability of the business activity* should be assessed according to whether the state provides social security or not.

The reporting obligation developed by EFRAG also suggests that companies are politically or ethically obliged to provide social security (ESRS S1-15 (No. 76)). EFRAG suggests that employees who are not covered under social law are "especially vulnerable to major social risks". The use of such descriptions may result in pressure on companies, but at least an ethical expectation for companies. The mandate of the European Commission pursuant to Art. 19b (1) CSRD-E (2021) and Art. 29b (1) CSRD-E (2022) is thus exceeded. In addition, the expectation formulated with this is incorrect in terms of content: Especially when good social protection is provided by the state, there is no reason for the company to repeat this protection.

Moreover, when companies are fully obliged to report on the social protection of their employees, the boundaries between the corporate sphere of responsibility and the area of state decision-making policy (outside the decision-making sphere of the company) will be blurred. The standards developed by EFRAG seem to imply that the company bears a responsibility in an area that is normally under state jurisdiction in the EU countries. The EFRAG thus formulates a normative claim which cannot be established either in CSRD or in EU law.

Against the reporting obligations developed in ESRS S1 (No. 2(a) (vi)) or ESRS S1-15 (Nos. 75-78) the distribution of competences between EU and EU member states can also be cited. Pursuant to Art. 153 (1c) TFEU, the EU must restrict itself to supporting activities in the field of social security and social protection of workers; in this respect,

acts can only be adopted by means of a special legislative procedure (unanimity in the Council) (Art. 153 (2) (3) TFEU). The evaluations of Art. 153 TFEU show that regulations in the field of social security and social protection are so sensitive that they can only be adopted if the whole of the EU member states bears them. The use of delegated legislation and the adoption of regulations, which are only legitimised by the European Commission, proves to be particularly problematic in this area.

It should be noted only peripherally that the above considerations could not be remedied by a reference to the reference works of other standard developers: These do not operate within a framework that results from Art. 290 TFEU and Art. 19b (2b) CSRD-E (2021) or Art. 29b (2b) CSRD-E (2022) for EU standardisation.

c) Improvement of the health of employees (ESRS S1-10 (No. 58-61))

The CSRD requires companies to report on negative impacts in the area of "health and safety".

The standards developed by EFRAG go beyond CSRD to the extent that EFRAG believes that companies also have to report on measures to improve the health of their employees (ESRS S1-10 (No. 59): "... promote health amongst the undertaking's employers"). There is no basis for this reporting obligation in the CSRD. Furthermore, EFRAG would, impermissibly, read into CSRD a normative standard if it claimed to have an obligation on companies not only to prevent damage from employees, but also to actively promote the improvement of the health of its employees. Such an obligation of the company does not follow from human rights and fundamental rights.

Moreover, the references used by EFRAG shall not bear the reporting standard: The OECD Guidelines (2011) (Chapter V. 4 c) only mention the need for companies to take appropriate steps to ensure health in their workplaces ("to ensure occupational health in their operations").[36] Neither does ILO Convention 161 provide for an unspecific subsidy requirement; instead, this convention protects against impairments at the workplace and provides for an extremely differentiated and graduated regulation system. Here, too, there is again a generous and creative use of references to human rights standards.

d) Improvement of the general living situation of the employees (e.g. ESRS S1-5 (Nos. 39 (b), 40 (b)); ESRS S2-5 (No. 32))

The standards developed by EFRAG go beyond the framework drawn up by CSRD insofar as companies are assigned the responsibility for improving the living conditions of employees.

The standards developed by EFRAG postulate that CSRD ultimately aims to improve the quality of the employees' lives (e.g. ESRS S1-5 (No. 40): "Recognising that ... the ultimate aim is to deliver improved outcomes in workers' lives"). Similarly, EFRAG states in ESRS S2-5 (No. 32) that "to deliver improved outcomes in workers' lives". This assessment is made by EFRAG as the basis for reporting obligations (e.g. ESRS

[36] EFRAG refers in its "basis for conclusions" without differentiation to "OECD GL (2011) Ch. V".

S1-5 (No 39 (b), No. 40 (b)); ESRS S2-5 (Nos. 31, 32). In ESRS S2-5 (No. 34 (b)) the EFRAG speaks of the concern of "capacity-building". In ESRS S1 BC16, the question of "how undertakings contribute positively to improved social outcomes for own workers" is made the subject of the reporting obligation.

There is no basis for this in the CSRD. EFRAG ignores CSRD's objective when it sees this policy as a legal instrument designed to encourage the company to improve the quality of life of its employees. Instead, CSRD is agnostic on this point: It leaves it to the report addressees to draw political and economic conclusions.

The standards developed by EFRAG also do not properly reflect the CSRD requirements. The social factor "work-life balance" mentioned in CSRD only refers to the agreement of work and private life, but does not in any way cover the general quality of life. In addition, EFRAG does not define and specify what is meant by "work-life-balance" - the legal deficits exist. EFRAG means being able to restrict itself to family related leaves - this makes the CSRD criterion one-sided and incomplete.

Moreover, there is no basis in the OECD Guidelines[37] for the reporting standard developed by EFRAG. Instead, the standards provide (among other things) that companies have to deal with the negative effects of their activities. The guidelines speak unspecifically about that companies should contribute "to economic, environmental and social progress with a view to achieving sustainable development".[38] Such vague and unclear wording cannot be made the basis of a normative requirement for reasons of the rule of law, according to which companies are obliged to improve the lives of the employees.

EFRAG's principles 19, 20 and 22 of the UN Guiding Principles on Business and Human Rights[39] do nothing at all for the normative position developed by EFRAG.

EFRAG seems to assume that companies have a responsibility to ensure that the people they employ (can) enjoy a good life. CSRD does not provide any basis for this normative assumption. Neither does the human rights and fundamental rights listed in Art. 19b (2b) (iii) CSRD-E (2021) or Art. 29b (2b) (iii) CSRD-E (2021) address the state, companies do not undertake to ensure the general quality of life of their employees. How could that happen? EFRAG is constructing a normative standard that is not found in CSRD or EU law.

The EFRAG's attempt to extend the reporting obligation of the companies to the general living situation of the employees and to construe an (alleged) responsibility of the companies in this respect also violates certain requirements and would mean a disproportionate commitment of the companies incompatible with Article 5 (4) TEU. Finally, there is an insurmountable contradiction with the evaluations of Art. 153 TFEU, which does not provide for the EU's powers here.

[37] EFRAG refers to "OECD II. A., IV", "OECD DD Guidance II 3.1" and "OECD II.A- 1" (ESRS S1 BC p. 16).
[38] OECD II. A-1.
[39] ESRS S1 BC p. 16.

5. Impermissible reporting obligation

Such an unplanned and disproportionate obligation in CSRD is if EFRAG wants to oblige the company to follow up and correct past reports without this being clearly defined and limited in terms of content (ESRS 1 - General Principles - 4.4. (No. 114 et seqq.)).

IV. Reporting requirements in the field of normative standards

1. Normative standards of conduct and implementation in reporting obligations

CSRD provides that the company must provide information in the reporting fields specified in the Directive that meet certain information interests of the users of the report. On the one hand, it is about empirical situations and circumstances. With regard to the social factors of interest here, the following empirical situations and circumstances are addressed in particular: Training and qualification, employment and inclusion of people with disabilities, measures against violence and harassment in the workplace (Art. 19b (2b) (i) CSRD-E (2021) or Art. 29b (2b) (i) CSRD-E (2022)); working conditions, working hours, social dialogue, existence of works councils, collective bargaining, work-life balance and health and safety (Article 19b (2b) (ii) CSRD-E (2021) or Article 29b (2b) (ii) CSRD-E (2022)).

On the other, CSRD aims to provide information to assess whether the company complies with specific normative standards. Examples of this category are: Equal treatment and equal opportunities, including gender equality and equal pay for equivalent work, diversity (Art. 19b (2b) (i) CSRD-E (2021) or Art. 29b (2b) (i) CSRD-E (2022)); adequate wages, freedom of association, workers' rights to information, consultation and participation (Art. 19b (2b) (ii) CSRD-E (2021) or Art. 29b (2b) (ii) CSRD-E (2022)); respect for human rights, fundamental freedoms, democratic principles and standards (Art. 19b (2b) (iii) CSRD-E (2021) or Article 29b (2b) (iii) CSRD-E (2022)).

In the CSRD-E these two categories of report topic are mixed without differentiation and not distinguished.

Many of the most recently mentioned normative standards are highly uncertain and need to be specific. In the case of some standards, it is already at the starting point unclear what they mean at all (e.g.: "Respect of democratic principles" in an enterprise). In many of the last mentioned standards, no consensus can be established as to what they mean in the specific case: Even among people who feel committed to the values of Art. 2 TEU, there may be major divergences in the assessment of the question of what equality of opportunity means in the company or what appropriate wages are.

The EU legislator is legally free to make such normative standards the basis for sustainability reporting. However, the European Commission is failing to use the adoption of reporting standards to make its particular interpretation of the (undefined) normative standards generally binding. The European Commission would exceed its competences if it raises the claim to be able to define the normative standards

formulated in the CSRD-E vaguely. If it were to specify in the standards proposed in Art. 19b CSRD-E (2021) or Art. 29b CSRD-E (2022) what these standards (should) mean, it would operate political legislation cladded as delegated legislation. If the European Commission were to formulate its own normative guidelines on the basis of Art. 19b (1) CSRD-E, it would go beyond the scope of competence set to it. The standards would have been "ultra vires" adopted and invalidated. The sustainability standards must not be enrolled in a regulatory objective that goes beyond the information task set out in Art. 19a (1) in conjunction with Art. 19a (2) CSRD-E.

Even more so, the European Commission would exceed its powers if it formulated normative standards of conduct in the sustainability standards, which are not even included in the CSRD. The standardisation procedure must not be used or misused to directly submit new material normative standards of conduct to companies. The European Commission may have the political will to force companies to review their business practices, thus leading to the path of sustainability. However, this would exceed Article 19b (1) CSRD-E.

2. Improper development of its own normative standards of conduct by EFRAG

The reporting standards on social issues developed by EFRAG suffer from the fact that EFRAG formulates normative guidelines at various points that are not in the CSRD. This is particularly true when it comes to reporting obligations relating to social factors which have a normative dimension. The formulation of such standards is outside the mandate of EFRAG. If the European Commission were to adopt it, it would obviously exceed the limits of Art. 19b (1) CSRD-E (2021) or Art. 29b CSRD-E (2022). The following principles and standards should be mentioned in this context:

a) Remuneration (ESRS S1-14 (No. 70-74))

The CSRD-E mentions that the company has to report whether its business activities have a negative impact on the principle of "equal pay for work of equal value" (Article 19a (2b) (i) CSRD-E (2021) or Article 29b (2b) (i) CSRD-E (2022)). The reporting standards developed by EFRAG differ in several respects:

Firstly, the standards developed by EFRAG are not based on the principle of "equal pay for equal work," but unspecifically on the "fair wage" (ESRS S1-14 (Nos. 70-74)). There is obviously a difference between a standard that focuses on the reciprocity of performance and remuneration and the equality of pay between employees and a standard that unspecifically asks about the "fairness" of the wage.

Secondly, the standards presented by the EFRAG breach the principle that the reporting standards adopted by delegated legislation must not modify or supplement the normative values contained in the CSRD[40].[41] EFRAG claims to be able to determine what wage fairness is. In the "application guidelines" which are understood as authoritative and binding guidelines, EFRAG claims to be able to make statements on

[40] An amendment would also be an amendment.
[41] In this regard, cf. B. II. above.

this matter (ESRS S1 AG 140-141).[42] This is a clear and profound excess of competence far beyond the mandate established in Art. 19b (1) CSRD-E (2021) or Art. 29b (1) CSRD-E (2022). EFRAG's claim to make statements in this regard even exceeds the limits of the competence of the association which the EU has drawn up, which does not cover any question of remuneration under Art. 153 (5) TFEU. If the European Commission were to enact the standards formulated in ESRS S1-14 (Nos. 70-74), ESRS S1 AG 140-141, a manifest breach of competence would be observed.

Thirdly, the standards drafted by EFRAG also depart from the requirements of the CSRD insofar as it is postulated without sufficient normative basis that the reporting point formulated in Art. 19b (2b) (i) CSRD-E (2021) or Art. 29b (2b) (i) CSRD-E (2022) refers to the entirety of employees. EFRAG is based on a group-specific understanding of a provision that can be understood with good reasons rather as a regulation relating to the individual employment relationship. Thus, the EFRAG exceeds its competences: It is not called to give preference to an interpretation of CSRD before another.

Fourthly, EFRAG postulates the relevance of information on the ratio of pay between wage groups and state median pay without any basis in CSRDE. The same applies to EFRAG's claim to have companies reported on how the relationship of particularly well paid employees ("highest paid individual") to median is represented.[43] There is no need to justify that questions of the relative pay structure have no direct connection with the principle of "equal pay for equal work" formulated in Art. 19b (2b) (i) CSRD-E (2021) or Art. 29b (2b) (i) CSRD-E (2022). Nor do Art. 19b (2b) (ii) CSRD-E (2021) or Art. 29b (2b) (ii) CSRD-E (2022) do not cover this reporting point. In particular, in the sensitive area of remuneration, individualised, and thus, allocable data is required; the resultant interference with personal rights and privacy guarantees is not recognizable by the EFRAG. It is not clear whether EFRAG uses populism in this area that wants to scandalise certain relations of equality or inequality.

The reporting standards formulated in ESRS S1-14 (Nos. 70-74), ESRS S1 AG140-141 are therefore incompatible with CSRD. If the European Commission were to pass it in this way, it would exceed its powers.

b) Private protection (ESRS S1-16 (Nos. 116-118))

Similar efforts by EFRAG to develop own normative standards of behaviour can also be observed in the field of privacy protection.

The CSRD does not expressly stipulate that issues of privacy can be made the subject of a reporting obligation. It seems permissible, however, to understand the social factor "working conditions" in such a way that it also concerns the respect and protection of the private interests of employees in the company.

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[42] See ESRS S1, AG Introduction to AG1 (p. 32): "This appendix is an integral part of the (draft) ESRS S1 Own workforce. It describes the application of the requirements set for in paragraphs 12-118 and has the same authority as the other parts of this (draft) standard."
[43] ESRS S1-17 (No. 84a): "the ratio of the annual total compensation ratio of the highest paid individual to the median annual total compensation for all employees (excluding the highest-paid individual)".

Of course, it would be possible to let the companies report whether the legally binding requirements of the GDPR are complied with and whether violations occurred. However, the EFRAG standards go beyond the provisions of EU law on data processing and privacy protection (Art. 7 and Art. 8 GRCh, GDPR) and deviate from it. EFRAG thus appears to assume that the company must process data not only lawfully, but also "fairly", however without being clear what this means (ESRS S1 AG 31 (f) (i.)) and to what extent there is a reference to the principle of fairness of the GDPR (Art. 5 (1) (a) GDPR). Due to the procedural requirements and transparency obligations, the monitoring mechanisms and the sanctions regime of the GDPR, the requirements of the EFRAG also appear to be disproportionate (Art. 5 (4) TEU). EFRAG also provides that an entity must report on whether it has "minimised" the impairment of privacy (ESRS S1 AG 31 (f) (iv.): "and the employer must minimise the intrusion on the privacy of workers"). Such a normative standard does not comply with the GDPR. Nor is a requirement of minimising the impairment of privacy laid down in Art. 8 GRCh, nor in Art. 7 GRCh. EFRAG introduces its own normative standard, which cannot be enshrined either in CSRD or in other EU law. A comparison of the EFRAG in ESRS S1-16 and the associated "application guidelines" makes it clear that EFRAG also has a peculiar normative idea of appropriate data processing in the company that goes far beyond the GDPR (e.g. ESRS S1 AG 31 (f) (vii.)).

EFRAG here claims to formulate standards of privacy and data protection that go beyond the GDPR and GRCh. Companies should not report to what extent they comply with the GDPR, but on the extent to which their decisions comply with EFRAG's material ideas. If the European Commission were to enact such reporting obligations, it would exceed its mandate.

c) Improvement of qualification level (ESRS S1-9; ESRS S1 AG 77-78)

CSRD provides that the company has to report on whether and how it applies equal treatment and equal opportunities in the field of training and skills development of employees (Art. 19b (2b) (i) CSRD-E (2021) and Art. 29b (2b) (i) CSRD-E (2022)).

The EFRAG takes up this topic in ESRS S1-9 (No. 55-57). This is where the reporting requirements specified by CSRD are exceeded. EFRAG does not only require the company in ESRS S1 AG77 to report on measures to ensure equal treatment and equal opportunities in the area of employee skills development. The company is required to report on "identified material skill gaps and training needs" (ESRS S1 AG77 (a)). EFRAG assumes that it has to be a goal of the company "to ensure that own workforce talent develops to meet the strategic objectives of the undertaking". ESRS S1 AG16 mentions "skills development plans". With this evaluation of the corporate policy and objectives, EFRAG is ignoring the nature of CSRD, which contains any normative evaluation of entrepreneurial behaviour and does not impose any entrepreneurial obligations of conduct (or prudential rules). Accordingly, the requirements in ESRS S1 AG78, which deal with "skills gaps", are also incompatible with CSRD.

The EFRAG cannot rely on human rights documents for the development of its normative guiding idea. The revised European Social Charter used by EFRAG provides for principles 9 and 10 *of the states' obligations* (Art. 9: Right to vocational counselling; Art. 20: state guarantee of a right to vocational education). EFRAG makes this a *duty of the company* to "workforce training" and "workforce development". Once

again, the free use of human rights standards is noticeable.

A duty to detect 'skills gaps' would also violate the personal rights of the employees concerned and the principle of proportionality.

The guidelines developed by EFRAG in the reporting standards and the accompanying application guidance, which are intended to require the same authority and binding power as the standards[44], go beyond the reporting framework drawn up by CSRD and violate the CSRD. The European Commission would exceed the legislative mandate established in the CSRD if it made the obligation contained in ESRS S1 AG 77 (a), AG 78 as the subject of the reporting standards. Such an obligation would significantly go beyond Art. 19a (2a) (ii) CSRD-E (2021) or Article 29b (2a) (ii) CSRD-E (2022).

d) Range of the "social dialogue" (ESRS S1-24 (No. 110(d))

CSRD provides that the reporting obligations may extend to the "social dialogue" as well as to "tariff negotiations and involvement of employees" (Art. 19b (2b) (ii) CSRD-E (2021) or Art. 29b (2b) (ii) CSRD-E (2022)). The reporting standard developed by EFRAG provides in this context a normative definition with lack of competence.

EFRAG claims in ESRS S1-24 (No. 110 (d)) to be able to determine in which cases the employees of a company have a right of information and consultation. It lists five categories which are not found in the current EU labour law or national legal systems in this version. When formulating the reporting standards, the EFRAG does not have the power to define the cases where employees have the right to consult. Ultimately, EFRAG is trying to formulate labour law requirements in the reporting standards, which is outside its authority.

The reporting obligation formulated in ESRS S1-24 No. 110 (d) covers an area outside of Art. 114 TFEU.[45] Provisions on the rights and interests of workers cannot be adopted on the basis of Art. 114 TFEU (Art. 114 (2) TEU), but must be adopted in a special legislative procedure pursuant to Art. 115 TFEU. The aforementioned reporting obligation is disproportionate because it is not clear to what extent the addressees of the reporting obligation are dependent on knowing the extent to which employees have a right to information and consultation in the aforementioned five categories in order to assess the sustainability of a company and its business model.

e) Due diligence channels for employees (ESRS 2 (No. 36-38); ESRS S1-2 and S1-3)

CSRD provides that the companies describe their due diligence processes implemented with regard to sustainability aspects (Art. 19a (2e) (iii) CSRD-E (2021) or Art. 29a (2e) (i) CSRD-E (2022)).[46] This is understood by the fact that the company also has to

[44] ESRS S1, AG Introduction to AG1 (p. 32).
[45] The draft CSRD-E is based on Articles 50 and 114 TFEU. Both provisions are intended to achieve the single market.
[46] In this regard: EFRAG: ESRS 1 - General Principles 1 Appendix C (No. 17): "Due diligence requires that action is taken to address negative impacts that have been identified. In the case of a potential impact, the company should take action to prevent it wherever it is possible, or, where this is not feasible, to mitigate the risk of it occurring and the extent of harm that could result."

report on whether it has given employees the opportunity to comment as part of the due diligence process. The CSRD wants to provide information on whether the company has implemented procedures and processes, through which the potential or current data subjects have the opportunity to inform the company managers of this.

EFRAG has implemented this reporting concern in ESRS S1-2 and ESRS S1-3 in the reporting standards. However, it differs from CSRD to the extent that the communication fields referred to in ESRS S1-3 (No. 29) do not comply with Art. 19b (2b) CSRD-E (2021) or Art. 29b (2b) CSRD, without any reason being apparent. The topic "training" and "skills development", which CSRD wants to have dealt with under the aspect of equal treatment and equal opportunities are assigned by EFRAG to the "working conditions". EFRAG speaks of "fair wages" without any basis for this in the CSRD. The topos of social security mentioned by EFRAG are not mentioned in CSRD.

A clear deviation from the requirements of the Directive is also found in the reporting standards developed by EFRAG insofar as EFRAG claims that the views and positions of the employees must influence the entrepreneurial assessment of the strategy and the business model (ESRS S1 AG4: "... their views shall inform the undertaking's assessment of its strategy and business model."). The EFRAG thus significantly shifts the salary of Art. 19a (2e) (i) CSRD-E (2021) or Art. 19a (2e) (i) CSRD-E (2022)[47]: It transforms a provision that would like to give employees the opportunity to express their views on the negative effects that are relevant to sustainability, into a provision that provides for a *co-determination of the employees*, beyond mere negative effects. Thus, the EFRAG formulates a normative concern that is not designed as such in the CSRD. CSRD does not stipulate that employees need to be involved in the formulation of the corporate strategy and the definition of the business model. This also applies in those areas where employees can present aspects relevant to sustainability. The formulation of this principle, for which EFAG cannot call a normative basis, clearly goes beyond the requirements contained in CSRD.

Moreover, the reporting standards submitted by EFRAG exceed the framework drawn up by CSRD to the extent that they require in ESRS S1-3 (No. 31) that the company *must justify itself in the event that* it does not provide for any complaint mechanisms. CSRD does not provide that reporting standards force the company to justify its behaviour. Instead, the valuation of the entrepreneurial behaviour should be left to the report addressees.
ESRS S1-3 (No 31) exceeds the framework drawn by CSRD; the European Commission could not adopt such content effectively on the basis of Art. 29b CSRD-E (2022).

Article 153(1e) TFEU makes it clear that the EU must restrict itself to a supporting activity in the area of information and consultation of workers. Art. 153 TFEU is assessed that in these areas the EU must confine itself to contributing to policies developed by the EU member states and which are politically legitimised. The EU has so far lacked political (legitimation) capital to develop a fully independent policy. Thus, sustainability standards that do not reflect this evaluation are in a tense

[47] The provision has been slightly modified in the trilogue procedure without affecting it here.

relationship to Art. 153 TFEU.

3. Transition to group-related information

The reporting obligations elaborated by the EFRAG also manifest a further strategy in dealing with normative standards. EFRAG claims to be able to address social factors such as "equal treatment" and "equal opportunities" (including gender equality and equal pay) (Art. 19b (2b) (i) CSRD-E (2021) or Art. 29b (2b) (i) CSRD-E (2022)[48]) by requiring companies to provide empirical information on the treatment of groups. However, such information does not allow a sound assessment of the existence of equal treatment and equal opportunities.

a) Reporting obligations on empirical conditions without direct significance for the social factors (e.g. ESRS S1-7, ESRS S1-8, ESRS S1-19)

ESRS S1-7 provides that the companies describe "key characteristic of employees". This includes, for example, the headcount, the number of permanent and temporary staff or the number of full-time or part-time employees. The information should be differentiated by gender. However, this information does not directly or indirectly indicate whether equal treatment or equal opportunities exist in the company. Contrary to EFRAG's assertion, these figures do not allow "to provide insight into the undertaking's approach to employment, including the scope and nature of impacts arising from its employment practices". This would only be different if one hinted on the lack of normative idea that equal treatment and equal opportunities can be determined on a group-by-group basis. However, CSRD does not reveal that it wants to avoid a human rights and person-oriented understanding of equal treatment and decides for a group-based approach. Such a group-based standard would, for example, be based on the requirement that 50% of the employees are members of one of two sexes in a company. It would also be a mistaken measure to demand that a company has as many full-time employees as possible. The CSRD specifies nothing about this. If EFRAG wishes to express that it considers such standards to be correct, it would go beyond the mandate formulated in Art. 19b (1) CSRD-E (2021), Art. 29b (1) CSRD-E (2022).

The same criticism can be made to the reporting obligations formulated in ESRS S1-8. The information referred to in ESRS S1-19, too, says nothing as such about compliance with the principles of equal treatment and equal opportunities.[49]

The fact that the figures addressed in ESRS S1-7, ESRS S1-8, ESRS S1-20 and others do not allow a statement as to whether there is equal treatment and equal opportunities in a company cannot be disputed by the argument that this information is also addressed in other reference works. Firstly, the authors of reference works such as GRI or SASB do not move within a specified normative framework, as the CSRD suggests: The authors of these reports can freely decide which reporting requirements they formulate. Secondly, the argument that other reference works also request information

[48] Article 19b (2b) (i) CSRD-E (2021) only spoke of equal opportunities.

[49] CSRD speaks of the "employment" and "inclusion" of people with disabilities (Art. 19b (2b) (i) CSRD-E (2021) or Art. 29b (2b) (i) CSRD-E)); in this respect, the normative basis for the reporting status is more sustainable.

which is insufficient and unsuitable for assessing compliance with normative standards cannot be a reason for this being required under Art. 19b (1) CSRD-E (2021) or Art. 29b (1) CSRD-E (2022).

It is not clear whether the reporting obligations set out in ESRS S1-7, ESRS S1-8, ESRS S1-20 and others are based on an erroneous idea of equal treatment (equal treatment as equal results), or whether these obligations are justified only because reporting on equal treatment and equal opportunities in line with the EU principle of proportionality required a case-by-case consideration. In any case, the standards formulated by EFRAG are inappropriate in this form.

The result can also be formulated differently: CSRD aims to provide the report addressees with the information *necessary* to develop an understanding of the sustainability impact of the company's activity and an understanding of the impact of sustainability aspects on the business development, performance and situation of the company (Art. 19a (1) CSRD-E (2021); Art. 19a (1) CSRD-E (2022)). The reporting obligations set out in ESRS S1-7, ESRS S1-8, ESRS S1-20 do not permit this assessment either directly or indirectly. The reporting standards submitted by EFRAG fail to comply with CSRD's concerns because they force the production of information that is neither directly or indirectly relevant to sustainability. Group structures in the company say nothing about equal treatment and equal opportunities without further information.

b) Reporting obligations on empirical conditions without any identifiable disadvantage (e.g. ESRS S1-16, ESRS S1-17, ESRS S1-20)

Similar objections can be made against the obligations formulated in ESRS S1-16, ESRS S1-17 and ESRS S1- 20. EFRAG keeps these reporting standards under the heading 'equal opportunities'. These standards are assigned to the "basis for conclusions" Art. 19b (2b) (i) and (iii) CSRD-E (2021). In ESRS S1-16, ESRS S1-17 and ESRS S1-20 group-based reporting obligations on the salary structure and other remuneration components are formulated. The information relating to the standards formulated by EFRAG does not directly or indirectly indicate whether the principles of equal treatment or equal opportunities have been violated. EFRAG also admits this in the "application guidelines".[50]

With regard to the reporting obligations set out in ESRS S1-16, ESRS S1-17 and ESRS S1-20, it is also applicable that a reference to the reporting standards of other organisations cannot outweigh the lack of suitability.

As a precaution, it should be noted that the reporting obligations formulated in ESRS S1-16, ESRS S1-17 and ESRS S1-20 cannot be traced back to Art. 19b (2b) (ii) CSRD-E (2021) or Art. 29b (2b) (ii) CSRD-E (2022). These regulations make it possible to report on "working conditions" and "wages". However, the general rules of CSRD make it clear that no information can be requested in this respect. It is important to

[50] In ESRS S1 AG 146, EFRAG points out that "objective reasons", such as the type of employment or country of employment may explain differences in the salary structure. In this way, EFRAG itself questions the suitability of the reporting figures to be able to provide adequate information on gender equality and equal pay (Art. 29b (2b) (i) CSRD-E (2022)).

enable the addressees of the sustainability reporting to assess whether the company has a *negative impact* on employees. The group-based reporting standards established in ESRS S1-16, ESRS S1-17 and ESRS S1-20 aim to produce information that does not allow meaningful statements in this respect.

V. Legal deficits in the standards developed by EFRAG

1. Uncertainty (e.g. ESRS S1-18 (No. 85-90); ESRS S1-25 (No. 111-115))

Reporting standards must comply with the rule of law requirements for the determination of the obligations imposed on companies. The standards submitted by EFRAG does not comply with these requirements.

In particular, ESRS S1-18 (No. 85-90) is not sufficiently determined. The reporting standards only define abstractly what is "discrimination" (ESRS S1 - Appendix 1: Defined terms). The definition is based on an abstraction level, which does not include clear specifications for the application in specific cases. It is recalled that both the category of 'disadvantaged treatment' and the criterion of the similar situation raise such difficulties in terms of interpretation that it is not possible for the company to apply it with legal certainty and consistency. The term harassment shall be so broad that it also loses any legal certainty (ESRS S1 - Appendix 1: defined terms ("comments or actions that are unwelcome or should reasonably be known as unwelcome")). According to EFRAG, the criticism of the work performance of an employee or the decision to carry a competitor should be regularly "harassment" - whether or not they are entitled. The definition chosen by the EFRAG also includes a further definition which is narrower without clarifying the relationship - there are constitutional problems of coherence here (Art. 2 TEU). More generally, EFRAG's attempts to define highly complex and multi-layered terms or normative standards are often inadequate - whether abstract and general public are so large that no real gain of knowledge is associated with it, whether definitions are chosen that do not conform to the general consensus.

ESRS S1-25 (No. 111-115) also lacks sufficient determination. The obligation to report on "severe human rights issues" does not reveal to which human rights reporting is covered. In particular, no reference is made to the documents listed in Art. 19b (2b) (iii) CSRD-E (2021) or Art. 29b (2b) (iii) CSRD-E (2022). There is also no clarification in the "application guidelines" (ESRS S1 AG167). ESRS S-25 (No. 113) shows that the reporting obligation should extend beyond cases of violation of the principles of the UN Global Compact and the OECD Guidelines for Multinational Enterprises. However, how far it should go remains completely open. ESRS S1-25 (No. 111-115) also shows lack of legal certainty in the rule of law to the extent that it is not defined what is considered a "serious problem". In the "application guidelines" (ESRS S1 AG167) only individual incident types are listed, without however being exhaustive. In addition, some of the listed incidents (e.g. "serious allegations in public reports or the media") are certainly not sufficient to talk about a "serious human rights issue": An "allegation" is not a fact. The formulations in ESRS S1-25 (No. 111-115) and the corresponding application guideline are probably incoherent in this respect. They do not comply with the rule of law of Art. 2 TEU and the principle of proportionality.

The standards developed by EFRAG consistently violate the principle of legal certainty to the extent that they claim the "human rights, fundamental freedoms, democratic principles and standards" referred to in Art. 19b (2b) (iii) CSRD-E (2021) or Art. 29b (2b) (iii) CSRD-E (2022). EFRAG states in the "basis for conclusions": "Human rights (which include labour rights) address the full range of types of negative impacts on people that can occur: economic, social, cultural, civil and political." (ESRS S1 BC8; ESRS S2 BC9). The EFRAG specifically mentions "social issues of health and safety", "privacy" and "non-discrimination". It also mentions "impacts on people resulting from climate change and broader environmental harm" (ESRS S1 BC8; ESRS S2 BC9). Furthermore, the understanding that EFRAG ascribes to the standards referred to in Art. 19b (2b) (iii) CSRD-E (2021) or Art. 29b (2b) (iii) CSRD-E (2022) remains unclear. There is no attempt to systematically categorise; the reference to human rights standards is always random and arbitrary. The assertion that the "full range of types of negative impacts" is relevant to any human rights matter is contrary to the current state of human rights protection, which is not all-encompassing but contains specific rights.

In terms of content, EFRAG's legal understanding of the standards mentioned in Art. 19b (2b) (iii) CSRD-E (2021) or Art. 29b (2b) (iii) CSRD-E (2022) also shows deficiencies. EFRAG claims: Human rights represent a threshold; human rights should be affected when impairments "undermine the basic dignity and equality of individuals" (ESRS S1 BC9; ESRS S2 BC10). Apart from the fact that it is wrong under human rights to assume a contact only when it concerns the "basic dignity" and "equality", it remains open here both which specific legal positions (or "human rights assets") consider EFRAG to be sustainable as well as when a contact turns into a "material impact".

CSRD attaches central importance to the "human rights, fundamental freedoms, democratic principles and standards" in Art. 19b (2b) (iii) CSRD-E (2021) (extended in CSRD-E (2022)). EFRAG's reporting standards contradict that in its lack of legal certainty and understanding of human rights in principle. EFRAG would only have met the requirements of CSRD if it had systematically and specifically addressed the question of (1) which company-related obligations are formulated by the human and fundamental rights documents mentioned in the CSRD,[51] (2) what specific content these obligations have and (3) how it can then be made the subject of a reporting obligation without violating any contrary rights of the company or other stakeholders.

2. Violation of fundamental valuations (e.g. ESRS S1-19 (No. 91-93))

The reporting standards must also comply with the fundamental principles that the EU has committed to (Art. 2 TEU (Treaty on European Union)). Here, too, there are shortcomings.

ESRS S1-19 (No. 91-93) raises the most serious problems in this regard. The reporting obligations laid down therein run counter to the personal rights of the data subjects. Even if the reporting obligations submitted by the EFRAG do not provide for the names of the data subjects, an identification of specific persons will often be possible

[51] This would have required a differentiation between the state and corporate-oriented obligations with horizontal effect.

on the basis of the information provided (in particular: No. 93 (b) and (c)). The debate on data protection has clearly shown how low the requirements are to de-anonymise apparently de-individualised personal information, thus identifying individual subjects. EFRAG does not reveal that it has dealt with this risk.[52] This can be illustrated in particular by the example of reporting obligations on the corporate salary structure.

3. Improper use of presumption rules against companies (ESRS 1 - General Principles 1 p. 14 (No. 57))

Under the rule of law, the use of presumption rules to the detriment of undertakings not provided for in the Directive (ESRS 1 - General Principles 1 p. 14 (No. 57) is prohibited).

[52] This risk is also not seen in ESRS S1 AG 151.

D. Conclusion and summary

The above analysis has shown that the reporting standards developed by EFRAG differ in a number of individual questions from CSRD requirements. EFRAG is not only trying to make Topoi the subject of reporting obligations that are not found in CSRD. It also seeks to extend the corporate reporting obligation beyond the limits imposed by CSRD. EFRAG does not reveal that it has dealt with the content limits of CSRD in terms of the level of information. In part, differentiations directly specified in the wording of CSRD are not taken into account. The handling of human rights standards is unstructured and largely arbitrary; in particular, standards that obligate states are applied to companies without any problematisation.

It is particularly striking how difficult the EFRAG is doing with the specification of reporting requirements aimed at social factors with normative values (equal treatment and equal opportunities). EFRAG consistently focuses on a group analysis, although figures on the position of different groups in a company do not allow direct or indirect statements as to whether there has been discrimination against employees. A negative impact or harm is defined in these cases as setting back a particular group, without it being clear from the CSRD that such a transition from a perspective that places the individual person at the centre to a group perspective is permissible. EFRAG also partly attempts to replace the normative standards formulated by CSRD with its own and to determine its content without being authorised to do so ("wage fairness" instead of "equal pay for equal work").

The standards developed by EFRAG basically suffer from the fact that EFRAG is trying to shift the basic perspective chosen by CSRD. At the heart of CSRD is the concept of the "actual or potential negative impact" on social factors. The EFRAG is attempting to equate "negative effects" with "positive effects" without sufficient normative basis. It remains unclear how a positive effect can be distinguished from a negative impact on equal treatment and anti-discrimination standards. EFRAG believes that CSRD and reporting standards are responsible for promoting or improving companies. But that is not the case: The report addressees should decide how to react to the presentation of the company's situation and policies. It is not the task of EFRAG to define itself what is desirable and what is not.

Finally, it is striking that EFRAG seems to assume that there is a similar relationship between the company and its employees as there is between a company and its natural environment. The standards developed by EFRAG understand the relationship between the company and the employees as a subject-object relationship: the company has a negative impact as well as a "positive impact" on the object "employee". The structure of social relations, in which actions of management with an impact on employees are always influenced by the conditions on the employee side, cannot be understood in the beginning by means of a "subject-object" reconstruction of the relations within the company.

The European Commission would exceed its powers under Art. 290 TFEU if it were to enact the drafts prepared by EFRAG without the need for amendments resulting from the CSRD and EU law.