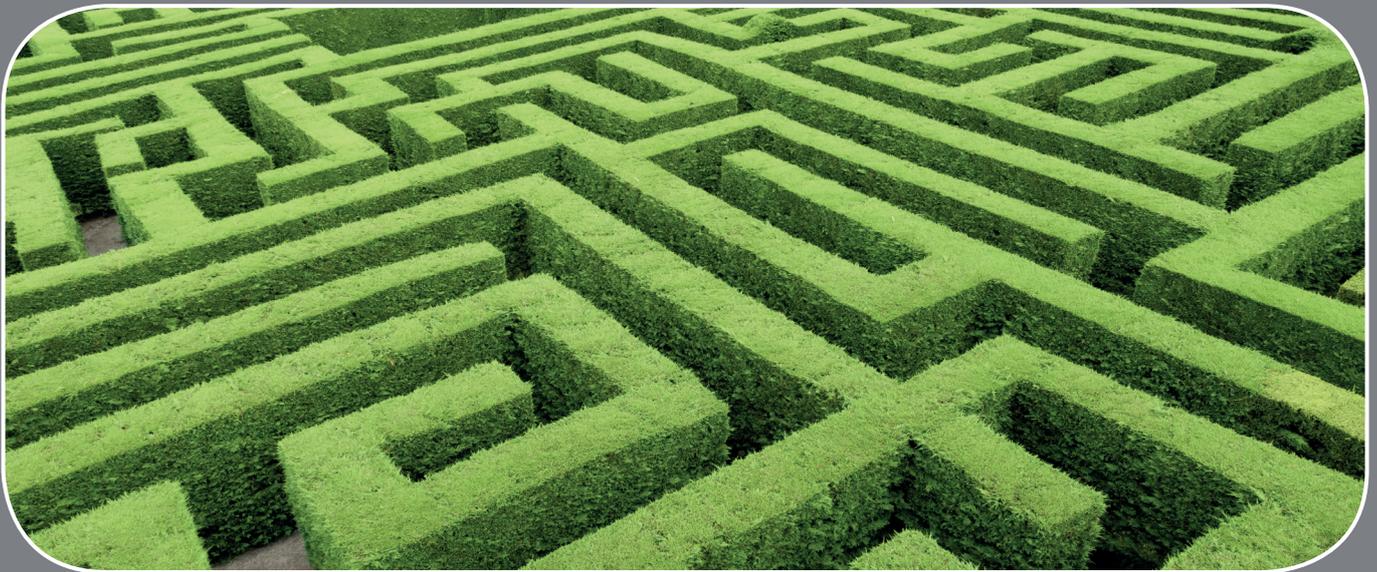




Foundation for
Family Businesses

Sustainability-Reporting under the CSRD: Standard Setting and its Conformity with EU Law

Summary of Main Findings



Summary of Main Findings

The procedure for setting European sustainability reporting standards as laid down in the European Commission's proposal for a Corporate Sustainability Reporting Directive (CSRD proposal) runs counter to primary EU law in a number of ways. The European Commission's delegation of legislative power violates the materiality requirement of Article 290 of the Treaty on the Functioning of the European Union (TFEU) in terms of the setting of standards for intangible capital and corporate governance. What is more, the European Financial Reporting Advisory Group (EFRAG) is afforded a privileged position in the legislative process, something which is not consistent with the principle of democracy underpinning EU law. Giving individual private bodies privilege in the exercise of EU sovereignty is contrary to Articles 10 and 11 of the Treaty on European Union (TEU).

CSRD proposal, delegated act, European sustainability reporting standards and the role of EFRAG

1. On 21 April 2021, the European Commission presented a proposal for a directive that envisages major changes in the EU Accounting Directive ("CSRD proposal"). The proposal introduces environmental, social and governance disclosure requirements that would oblige the companies under scope to report in compliance with European sustainability reporting standards. It identifies large numbers of matters on which companies will be held accountable. It requires companies "to report information necessary to understand how sustainability matters affect them, and information necessary to understand the impact they have on people and the environment" (principle of double materiality, p. 13 of the proposal).
2. The CSRD proposal sets out that the European sustainability reporting standards shall be adopted by the European Commission in the form of a delegated act pursuant to Article 290 of the TFEU. It stipulates that the Commission shall take account of technical advice that the European Financial Reporting Advisory Group (EFRAG) will develop provided this has been developed using proper due process. Before adopting the standards, the European Commission is also required to consult a specific group of EU institutions.
3. EFRAG is a private institution established under Belgian law. Its original purpose was to advise the European Commission on adopting international accounting standards. After the European Commission made a policy decision to grant EFRAG a privileged position in the development of draft European sustainability reporting standards, EFRAG initiated a reorganisation process that was expected to be completed by March 2022.
4. The rules on the delegation of power set out in the CSRD proposal are incompatible with the EU Treaties in several respects.

*Delegation Rules
incompatible with
EU Treaties*

Violations of the materiality principle/principle of legal specificity

5. EU lawmakers' attempt to delegate the drafting of sustainability standards for reporting on companies' intangible capital to the European Commission concerns key aspects of policy, so it is not consistent with the materiality proviso in Article 290 of the TFEU.
6. Development of sustainability standards for reporting on corporate governance also involves key aspects, at least to some degree, and can therefore not be delegated to the European Commission.
7. The CSRD proposal has shortcomings as regards the specificity of the delegation of power, leading to incompatibility with Article 290 of the TFEU. At least for the sustainability standards for governance, EU lawmakers need to provide more precise specifications in terms of objective and content.

Art. 290 TFEU provides only for a Delegation as regards Non-Material Aspects

EFRAG's privileged position in the legislative process: violation of democratic principles

8. The decision in the CSRD proposal to give EFRAG a privileged position in influencing the EU legislative process is not compliant with Article 10(1) of the TEU. The CSRD proposal provides for a decision-making mechanism that attributes to EFRAG a position that is not compatible with the democratic principles of EU law.
9. EFRAG's privileged position is also incompatible with the principle of democratic equality (Article 2, Article 9 sentence 1 in conjunction with Article 10(1) of the TEU). There are not sufficiently viable reasons for granting a private institution like EFRAG a special position in the EU legislative process. The European Commission could also have the required expertise generated in a way that does not envisage a violation of the constitutional principle.
10. The decision in the CSRD proposal to give EFRAG a privileged position in the process of exercising delegated legislative power is also not compatible with Article 11(1–3) of the TEU. The view held by those drafting the CSRD proposal that reducing the transparency, openness and equal accessibility guaranteed under Article 11(1–3) of the TEU could be justified by the fact that EFRAG conducts a consultation procedure is not constitutionally tenable. The same democratic right to express an opinion pursuant to Article 11(1–3) of the TEU cannot be substituted by a consultation organised by the (privileged) private body.

Involving a Private Institution into the EU Legislative Process runs counter European Constitutional Principles

Proportionality and legal protection

*Principle of
Proportionality
disrespected*

*Legal Action
possible against
EU Rules violating
the Principle of
Democracy*

11. Furthermore, the decision in the CSRD proposal is contrary to the principle of proportionality (Article 5 of the TEU). It runs counter to years of efforts by the European Commission to push back the influence of certain groups and ensure equal accessibility to processes in connection with improving governance structures and lawmaking.
12. Decisions by EU lawmakers which provide for or result in de facto privatisation of the EU's sovereign powers or individual private-sector players being given privileges in the legislative process contrary to democratic principles impact on the "right to democracy", which thus affects constitutional identity pursuant to Article 38(1) and Article 20(2) in conjunction with Article 79(3) of the German constitution ("Grundgesetz") and may therefore be challenged by all Germans in the form of a constitutional complaint.

Publication details

Published by:



Stiftung Familienunternehmen

Prinzregentenstraße 50

80538 Munich

Germany

Phone: +49 (0) 89 / 12 76 400 02

Fax: +49 (0) 89 / 12 76 400 09

E-mail: info@familienunternehmen.de

www.familienunternehmen.de

Prepared by:

Prof. Dr. Martin Nettesheim

Chaired Professor for German Public Law,

European Union Law and Public International Law

Eberhard Karls University of Tübingen

Geschwister-Scholl-Platz 1

72074 Tübingen

Germany

© Stiftung Familienunternehmen, Munich 2022

Cover image: Ekaitz I shutterstock

Reproduction is permitted provided the source is quoted