SOME THOUGHTS ON THE NEW EU-DIRECTIVE ON CORPORATE SUSTAINABILITY REPORTING

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Sustainability is on everyone´s lips. It is also increasingly influencing Union legislation. Recently, the Corporate Sustainability Reporting Directive came into force. The Directive also contains requirements regarding sustainability reporting on social issues. These are concretised by the specific disclosure requirements developed by the European Financial Reporting Advisory Group (EFRAG). This article takes a critical look at the Directive and in particular its content with regard to labour law issues, but also at the role of EFRAG in substantiating the reporting obligations of companies.

Key words: Corporate Sustainability Reporting Directive; the "social dimension" of sustainability reporting; International Labour Standards; delegated acts, EFRAG

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1. INTRODUCTION

On 5 January 2023 the so-called Corporate Sustainability Reporting Directive (CSRD) entered into force.[1] The Directive significantly expands mandatory sustainability disclosure requirements for companies operating in the EU and will replace the current Non-Financial Reporting Directive (NFRD).[2] Most of the provisions of the Directive are aimed at amending or supplementing Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.[3] This Directive had been amended even before the deadline for its transposition by the NFRD which introduced a requirement on undertakings to report information on, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.[4] This "non-financial reporting"[5] is now being expanded considerably. The new Directive will need to be implemented by member states within 18 months.

This paper will deal with the new law by focusing on sustainability reporting with regard to social issues. First, the background and purpose of the new Directive as well as the legal context will be briefly introduced (II.). Then, the way in which concrete reporting standards arise for companies on the basis of the Directive will be presented (III.). Subsequently, the substantive requirements of the Directive are presented on the basis of two examples (IV.) and then critically discussed (V.). The article ends with a brief discussion of some basis questions that arise in connection with the Directive (VI.).

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1 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

2 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

3 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

4 Cf. also Directive (EU) 2022/2464, Recital 7.

5 Cf. on the (not uncontroversial) term Directive (EU) 2022/2464, Recital 8.

2. BACKGROUND, PURPOSE AND CONTEXT

The obligations of companies for sustainability reporting are increasingly being expanded worldwide and an end to this development is not in sight. Recently, lawmakers in California proposed two bills that would require companies to report their greenhouse gas emissions across the supply and value chain and report on their climate-related risks, in line with leading standards that have long been used by large companies on a voluntary basis.[6] On the other hand, there are also "setbacks" every now and then. For example, Attorneys General from a number of Republican-leaning U.S. states filed a lawsuit against the Biden administration to stop the implementation of a new law that would allow climate and ESG factors to be taken into account in private, employer-sponsored retirement plans.[7] Nevertheless, it is highly likely that sustainability reporting is here to stay and will grow. And there is no need to look to the U. S., as no one other than the European Union is claiming the pioneering role for itself in this area. The Commission's Action Plan "Financing Sustainable Growth" already states quite immodestly: "Europe is well-placed to step into the role of global leader and, in doing so, can become the chosen destination for sustainable investments, such as low-carbon technologies."[8] The CSRD should be an important step in this direction.

In the new law it is recognised that the interest in corporate sustainability information has increased due to perceived opportunities, but also risks, with respect to the relevant legal environment, including labour law. Recital 11 of the Directive states the following in this regard: "There has been a very significant increase in demand for corporate sustainability information in recent years, especially on the part of the investment community. That increase in demand is driven by the changing nature of risks to undertakings and growing investor awareness of the financial implications of those risks. (…) There is also

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6 *California Bills Would Give Investors, Consumers and Other Stakeholders Key Information About Companies' Greenhouse Gas Emissions*, Wallstreet Online, 30.1.2023, https://www.wallstreet-online.de/nachricht/16494817-california-bills-would-give-investors-consumers-and-other-stakeholders-key-information-about-companies-greenhouse-gas-emissions (5.2.2023).

7 *Attorneys general from a number of Republican-leaning U.S. states announced that they have filed a lawsuit against the Biden administration to stop the implementation of a new law that would allow climate and ESG factors to be taken into account in private, employer-sponsored retirement plans*, CNN, 27.1.2023, https://edition.cnn.com/2023/01/27/investing/biden-esg-lawsuit/index.html (5.2.2023).

8 Communication from the Commission Action Plan: Financing Sustainable Growth, Brussels, 8.3.2018, COM(2018) 97 final, p. 12.

growing awareness of the risks and opportunities for undertakings and for investments resulting from other environmental issues, such as biodiversity loss, and from health and social issues, including child labour and forced labour." It is true that interest in the markets is increasing. At the same time, sustainability reporting has become a strategic imperative for the companies concerned as they face more and more pressure from investors, regulators, employees and other stakeholders to embed the issue not only at board level but also at operational levels in the company.[9] There is also evidence that sustainability reporting increases company value.[10]

As far as social issues in particular go, the European legislator is trying to place the provisions of the Directive into the legal framework that already exists in this respect. In addition to the Social Development Goals of the UN (to which all relevant efforts are ultimately directed), the instruments to be mentioned here are, in particular, the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the OECD Due Diligence Guidance for Responsible Business Conduct and related sectoral guidelines, the Global Compact, the International Labour Organization's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the ISO 26000 standard on social responsibility, and the UN Principles for Responsible Investment.[11] This alone must attract the attention of labour lawyers, because sustainability reporting promises to become a valuable instrument for the enforcement of international labour standards[12], whereby, if one wants to put it casually, the capital market would take on the role of the judge. Apart from this, it is also interesting to note that workers' representatives are involved in the concrete sustainability reporting by a company. According to the new Directive, "the management of the undertaking shall inform the workers' representatives at the appropriate level and discuss with them the relevant information and the means of obtaining and verifying sustainability information. The workers' representatives' opini-

9 For example, in many companies there are now sog. Chief Sustainability Officers. Cf. Pagitsas, C., *Chief Sustainability Officers at Work – How CSO´s Build Successful Sustainability and ESG Strategies*, Apress, Washington, 2022.

10 Ioannou, I.; Serafeim, G., *The Consequences of Mandatory Corporate Sustainability*, Reporting Harvard Business School Research Working Paper No. 11-100, 1.5.2017, https://ssrn.com/abstract=1799589.

11 Directive, Recital 45.

12 Cf. also Waas, B., *How to Improve Monitoring and Enforcement of International Labour Standards?* in: Halonen, T.; Liukkunen, U. (eds.), *International Labour Organization and Global Social Governance*, Springer, Cham, 2021, pp. 79 – 95. Available also at SSRN: https://ssrn.com/abstract=3842840 (5.2.2023).

on shall be communicated, where applicable, to the relevant administrative, management or supervisory bodies".[13] The same applies to the management of the parent undertaking.[14]

3. SUSTAINABILITY REPORTING STANDARDS AS DELEGATED ACTS

In the new Directive it is stated that "the Commission shall adopt delegated acts in accordance with Article 49 supplementing this Directive to provide for sustainability reporting standards. Those sustainability reporting standards shall specify the information that undertakings are to report (…) and, where relevant, shall specify the structure to be used to present that information".[15] The Directive, in other words, provides a certain framework, which the concrete sustainability reporting standards then fill out. As far as the "social and human rights factors" are concerned that companies will have to disclose, the Directive mentions the following: (i) equal treatment and opportunities for all, including gender equality and equal pay for work of equal value, training and skills development, the employment and inclusion of people with disabilities, measures against violence and harassment in the workplace, and diversity; (ii) working conditions, including secure employment, working time, adequate wages, social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements, the information, consultation and participation rights of workers, work-life balance, and health and safety; (iii) respect for the human rights, fundamental freedoms, democratic principles and standards established in the International Bill of Human Rights and other core UN human rights conventions, including, among others, the fundamental conventions of the International Labour Organization, the European Convention for the protection of Human Rights and Fundamental Freedoms, the European Social Charter,

13 Art. 19a (5) of Directive 2013/34/EU.

14 Art. 19a (6) of Directive 2013/34/EU. See in this regards also Recital 9 on the background ("If undertakings carried out better sustainability reporting, the ultimate beneficiaries would be individual citizens and savers, including trade unions and workers' representatives who would be adequately informed and therefore able to better engage in social dialogue.") and Recital 14 ("The lack of sustainability information provided by undertakings also limits the ability of stakeholders, including civil society actors, trade unions and workers´ representatives, to enter into dialogue with undertakings on sustainability matters.").

15 Art. 29b (1) of Directive 2013/34/EU.

and the Charter of Fundamental Rights of the European Union.[16]

The task of developing concrete reporting standards falls to the so called European Financial Reporting Advisory Group (EFRAG).[17] The new Directive explicitly refers to the role of EFRAG and also requires the Commission to consult with a number of institutions such as the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) before adopting concrete sustainability reporting standards.[18] Obviously, the core competence of these institutions is not in the area of social issues. It is therefore all the more noteworthy that EIOPA has also commented on the SSRS S1 Own Workforce standard, which will be presented in more detail below, and has called for a clear definition of the "employment relationship".[19] EFRAG is a private body established under Belgian law. Its original purpose was to advise the EU Commission on the adoption of international accounting standards.[20] Only later EFRAG was also tasked with developing standards for sustainability reporting.[21] In June 2020 the European Commission issued a request for technical advice mandating EFRAG to undertake preparatory work for possible EU non-financial reporting standards in a revised Non-Financial Reporting Directive. EFRAG responded by restructuring its activities and, above all, by trying to build up the necessary expertise in the limited time available. Originally, the elaboration of standards was carried out within EFRAG by the so-called

16 Art. 29b (2)(b)(i) – (iii)) of Directive 2013/34/EU. See also Recital 49 further specifying the information that undertakings should disclose on social factors.

17 See for general information on EFRAG: https://www.efrag.org/About/Facts#subtitle1 (5.2.2023).

18 See, in particular, Art. 29b and 49 of Directive 2013/34/EU.

19 EIOPA, *Opinion to the European Commission on EFRAG´S Technical Advice on European Sustainability Standards*, 26.1.2023, p. 13 *et seq.*, https://www.eiopa.europa.eu/system/files/2023-02/EIOPA%20Opinion%20to%20the%20European%20Commission%20on%20EFRAG%27s%20technical%20advice%20on%20ESRS.pdf.pdf (6.2.2023).

20 In this regard, the relationship between the European Commission and EFRAG is set out in the so-called Working Arrangements between the European Commission and EFRAG. The first thing they describe is EFRAG's role. According to the Working Arrangements. EFRAG is "a body independent of the Commission and of the International Accounting Standards Board (IASB) that is appointed as the technical advisor of the Commission in the context of the development and adoption of international accounting standards in the Union".

21 See Recital 39. Cf. in this regard also: https://www.efrag.org/News/Project-476/Reports-published-on-development-of-EU-sustainability-reporting-standards (6.2.2023).

European Lab Project Task Force on preparatory work for the elaboration of possible EU non-financial reporting standards (PTF-NFRS). This body is now called the Project Task Force on European sustainability reporting standards (PTF-ESRS). Among many others, PTF-ESRS also includes persons from the circles of the social partners. Interim drafts were presented by EFRAG in April 2022.[22] Following a public consultation[23], in November 2022 revised drafts were then submitted to the Commission. In the process, the standards were significantly streamlined. For example, the number of disclosure requirements was reduced from 136 to 84 and the number of quantitative and qualitative data points from 2,161 to 1,144.[24] Under the new Directive, the Commission will have to publish a first set of standards (including the standards relating to social matters) as delegated acts – and thus as mandatory within the EU – in June 2023.[25] So there is considerable pressure of time.

4. A (SOMEWHAT) CLOSER LOOK AT SUSTAINABILITY REPORTING STANDARDS

The overall package of Sustainability Reporting Standards consists of a total of twelve sets. Two of these are of a general and horizontal nature. They fix requirements for the design and presentation of sustainability requirements (ESRS 1) and define sustainability- and sector-independent reporting requirements (ESRS 2). The remaining ten target the three dimensions of sustainability, i.e. environment (ESRS E1-E5), social (ESRS S1-S4) and governance (ESRS G1).

4.1. Standards on "Own Workforce" and "Workers in the value chain"

In the present context, the standards relating to workers obviously deserve special interest. These are divided into two parts: ESRS S1, entitled "Own Workforce", deals with the company's own staff.[26] ESRS S2, entitled "Workers

22 Cf. https://www.efrag.org/Activities/2105191406363055/Sustainability-reporting-standards-interim-draft (6.2.2023).

23 Cf. https://www.efrag.org/lab3 (6.2.2023).

24 See Müller, S., *EFRAG reduziert die Offenlegungspflichten in den ESRS-Entwürfen deutlich*, Haufe.de, News, 24.11.2022, https://www.haufe.de/finance/jahresabschluss-bilanzierung/efrag-verabschiedet-esrs-entwuerfe_188_580220.htmlG (6.2.2023).

25 Art. 29b (1) of Directive 2013/34/EU.

26 EFRAG, *Draft European Sustainability Reporting Standards, ESRS S1 Own Workforce*, November 2022, https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FSiteAssets%2F13%2520Draft%2520ESR-

in the value chain", focusses on the workers of companies that are part of the supply chain with which the reporting company is associated.[27] As far as the former set of standards is concerned and only these are to be looked at a little more closely here, they explicitly aim to "specify disclosure requirements which will enable users of the sustainability statements to understand the undertaking's material impacts on its workforce, as well as related material risks and opportunities, including: (a) how the undertaking affects its own workforce, in terms of material positive and negative actual or potential impacts; (b) any actions taken, and the result of such actions, to prevent, mitigate or remediate actual or potential negative impacts; (c) the nature, type and extent of the undertaking's material risks and opportunities related to its impacts and dependencies on its own workforce, and how the undertaking manages them; and (d) the financial effects on the undertaking over the short-, medium- and long-term time horizons of material risks and opportunities arising from the undertaking's impacts and dependencies on its own workforce". In order to meet this objective, the Standard also requires "an explanation of the general approach the undertaking takes to identify and manage any material actual and potential impacts on its own workforce in relation to the following social, including human rights, factors or matters: (a) working conditions, including: i. secure employment; ii. working time; iii. adequate wages; iv. social dialogue; v. freedom of association, the existence of works councils and the information, consultation and participation rights of workers; vi. collective bargaining, including the rate of workers covered by collective agreements; vii. work-life balance; and viii. health and safety; (b) equal treatment and opportunities for all, including: i. gender equality and equal pay for work of equal value; ii. training and skills development; iii. employment and inclusion of persons with disabilities; iv. measures against violence and harassment in the workplace; and v. diversity; (c) other work-related rights, including: i. child labour; ii. forced labour; iii. adequate housing; and iv. privacy." Finally, the objective of the [draft] Standard is also to ensure the reporting requirements enable undertakings to disclose alignment with international and European human rights instruments and conventions, including the International Bill of Human Rights, the UN

S%2520S1%2520Own%2520workforce%2520November%25202022.pdf (6.2.2023).

27 EFRAG, *Draft European Sustainability Reporting Standards, ESRS S2 Workers in the Value Chain*, November 2022, https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FSiteAssets%2F14%2520Draft%2520ESRS%2520S2%2520Workers%2520in%2520the%2520value%2520chain%2520November%25202022.pdf (6.2.2023).

Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and ILO fundamental conventions among others.[28]

In terms of content, the requirements go quite far. The disclosure requirements are divided into three groups: "General disclosures", "Impacts, risks and opportunities management" and "Metrics and targets". Under "Impacts, risks and opportunities management", for example, the company has to inform, and indeed to inform in some detail, about "Policies related to own workforce", "Processes for engaging with own workers and workers' representatives about impact", "Processes to remediate negative impacts and channels for own workers to raise concerns" and "Taking action on material impacts on own workforce, and approaches to mitigating material risks and pursuing material opportunities related to own workforce, and effectiveness of those actions".

4.2. Two Examples of Relevant Reporting Standards

Two examples may be illustrative for the disclosure requirements under "Metrics and targets"; Disclosure Requirement S1-7 on "Composition of the Workforce" and Disclosure Requirement S1-8 on "Collective Bargaining and Social Dialogue".[29]

a) Composition of the Workforce

According to S1-7, "the undertaking shall describe key characteristics of non-employee workers in its own workforce".[30] The objective of this requirement is, among other things, "to provide insight into the undertaking's approach to employment, including the scope and nature of impacts arising from its employment practices".[31] The required disclosure shall include "a disclosure of the total number of non-employee workers in own workforce, i.e. either individuals with contracts with the undertaking to supply labour ("self-employed workers") or workers provided by undertakings primarily engaged in "employment activities" (NACE Code N78)[32], including a description of: i. the most

[28] ESRS S1, p. 6 (para 8).

[29] See also Appendix B: Application Requirements. This appendix is an integral part of the [draft] ESRS S1 and "supports the application of the requirements", ESRS S1, p. 28.

[30] ESRS S1, p. 14 (para 53).

[31] ESRS S1, p. 14 (para 54).

[32] This is about the so-called *Nomenclature statistique des activités économiques dans la*

common types of non-employee workers and their relationship with the undertaking; and ii. the type of work they perform".[33] Moreover, "when reporting its employment relationship with the most common types of non-employee workers in its own workforce[34], the undertaking shall provide a general description as to whether it engages them directly (as self-employed contractors) or indirectly through a third party. The undertaking is not required to report the type of worker, contractual relationship, and work performed for every worker who is not an employee".[35]

b) Collective Bargaining and Social Dialogue

This brings us to the second topic. According to S1-8, "the undertaking shall disclose information on the extent to which the working conditions and terms of employment of its own workforce are determined or influenced by collective bargaining agreements and to the extent to which its employees are covered in social dialogue in the EEA at the establishment and European level".[36] With regard to collective bargaining, the required disclosure shall include the following information: "(a) the percentage of total employees covered by collective bargaining agreements; (b) for employees not covered by collective bargaining agreements, a description of whether the undertaking determines their working conditions and terms of employment based on collective bargaining agreements that cover its other employees or based on collective bargaining agreements from other undertakings; and (c) a description of the extent to which the working conditions and terms of employment of non-employee workers in their own workforce are determined or influenced by collective bargaining agreements, including an estimate of the coverage rate".

With regard to social dialogue, the required disclosure shall include the following information: "(a) the global percentage of employees covered at the establishment level by workers' representatives, reported at the country level

Communauté européenne (NACE) Revision 2 on the classification of economic activities, published by Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains Text with EEA relevance. NACE Code N78 (Employment activities) consists of "Activities of employment placement agencies" (78.1), "Temporary employment agency activities" (78.2) and "Other human resources provision" (78.3).

33 ESRS1, p. 14 (para 55).

34 This is the passage that EIOPA stumbled upon in its opinion (see fn. 17).

35 ESRS S1, p. 14 (para 57).

36 ESRS S1, p. 14 (para 58).

for each EEA country in which the undertaking has significant employment; and (b) the existence of any agreement with its employees for representation by a European Works Council (EWC), an Societas Europaea (SE) Works Council, or an Societas Cooperativa Europaea (SCE) Works Council".

5. DISCUSSION

The reasonableness of the reporting standards just presented as examples cannot be discussed in detail. Instead, only a few points will be raised here, which may help to determine their meaningfulness. German law will be used as a basis.

5.1. Composition of the Workforce

With regard to the reporting standard on the composition of the workforce, it is undeniable that it can be of interest to know to what extent a company employs own workers or covers its needs otherwise. However, the devil is in the detail. This is particularly striking when a company uses other companies to carry out certain tasks. For example, when looking at German law, it is often extraordinarily difficult to distinguish the (civil law) contract for work and services (*Werkvertrag*)[37] from temporary agency. This is not least due to the fact that, according to the law, certain instructions can also be issued to the other party on the basis of the former contract. Accordingly, instructions to the contractor (or his or her employees) that are issued by the customer must be distinguished from those instructions that lead to the qualification of the relationship as temporary agency work. According to case-law, the instructions in the context of a civil law are result-oriented and limited to the work to be performed. The right to issue instructions under labour law, on the other hand, is regarded as being person-related as well as process- and procedure-oriented.[38] As much as this distinction may seem plausible at first glance, it is also clear that the courts still find it extremely difficult to distinguish between the permissible outsourcing of business activities and the concealed hiring out of employees, which requires a permit. In all of this, it can be observed in practice

[37] See section 631 of the Civil Code (*Bürgerliches Gesetzbuch*): "(1) By a contract for work and services, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration. (2) The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service."

[38] See only Federal Labour Court of 27 June 2017 – 9 AZR 133/16.

that quite a few companies have taken, what is sometimes called, "escape route into contracts for work and services". They often choose the form of this contract even if this type of contract does not actually fit the intended relationship because it involves typical services such as the guarding of company buildings or the maintenance of production machinery. Even in these cases the path to a contract for work and services is not in principle blocked by law. And since the German legislator has made temporary work increasingly less "appealing" – e.g. by introducing a maximum period of temporary employment – it is not to be expected that efforts to escape will stop soon.[39] Some cases may be relatively clear-cut and the companies' intentions to circumvent the rules applicable to temporary agency work may be obvious. On the other hand, there is a considerable "grey area" in which jurisprudence and, even more importantly, the courts have been moving for a long time without a clear compass. Considering this, the disclosure requirement S1-7 seem in any event a little "naïve".

5.2. Collective Bargaining and Social Dialogue

With regard to the second reporting standard, it is equally true that law and legal practice are more complex than one might wish: Germany is one of the countries in which collective agreements are predominantly concluded by associations and for entire sectors. At the same time, it is one of the countries in which collective agreements only apply to those who are "bound by collective agreements" as members of the collective bargaining parties.[40] In other words, collective agreements in Germany do not have an *erga omnes* effect, as is the case in many other countries. The requirement of being bound by a collective agreement through membership of an association also applies to employers. It should be noted, however, that in recent years many employers have converted their existing membership in employers' associations into a "membership without collective bargaining commitment" (*OT-Mitgliedschaft*), which is in principle permissible according to case-law.[41] Although the validity of the association collective agreement depends on the voluntary establishment of membership in an employers' association or trade union, there are ways in which collective agreements can be extended by the state (by means of a declaration of generally binding or on the basis of a specific statutory instrument) to persons who

[39] Cf. only Hamann, W., in: Schüren, P.; Hamann, W., *Arbeitnehmerüberlassungsgesetz*, 6th ed., C. H. Beck, München, 2022, § 1 AÜG, fn. 160 *et seq*.

[40] Section 3(1) of the Act on Collective Bargaining (*Tarifvertragsgesetz*): "The members of the parties to the collective agreement and the employer who is himself a party to the collective agreement are bound by the collective agreement."

[41] Federal Labour Court of 18 July 2006 – 1 ABR 36/05.

are not bound by collective agreements on the basis of membership. A few years ago, the rise of smaller trade unions prompted the legislator to introduce a provision for cases where collective agreements of different trade unions clash in a company. In this case, the collective agreement of the union with the largest number of members in the company is to prevail.[42] Determining this "majority collective agreement" is difficult because a union member is, in principle, protected against having to disclose his or her union membership and the union itself enjoys the right to keep its membership secret. In addition to the application of the collective agreement on the basis of membership, the collective agreement may also be referred to in the employment contract, as a result of which the provisions of the collective agreement become implied terms of the contract. Such references are widespread in practice, not least because employers thereby put union members and non-members on the same footing (and also avoids providing an incentive to join the union). In exercising their contractual freedom, employers and employees can decide whether they want to refer to the relevant collective agreement or to another collective agreement, whether they want to refer to the collective agreement as a whole or only to individual provisions and whether they want to refer – "dynamically" – to either the applicable version of a (specific) collective agreement or, even more broadly, to "the relevant collective agreement". Do the reporting standards do full justice to these realities? Hardly. For example, the question of "whether the undertaking determines their working conditions and terms of employment based on collective bargaining agreements that cover its other employees or based on collective bargaining agreements from other undertakings" will often be impossible to answer with a clear yes or no. With regard to "the percentage of total employees covered by collective bargaining agreements", it may also be of interest what kind of collective agreement is involved (association or company collective agreement), what exactly its legal effect is based on (autonomy through membership or state intervention) and, of course, which subjects are covered by the collective agreement. The question on "the extent to which the working conditions and terms of employment of non-employee workers in their own workforce are determined or influenced by collective bargaining agreements" makes little sense from the outset.

The term "social dialogue" is understood by the Directive – somewhat idiosyncratically – to mean the representation of workers' interests in the establishment or undertaking by workers' representatives. In Germany, this means works councils (*Betriebsräte*), which can be set up in establishments with at least five employees. The works councils are elected by the employees who are

42 Section 4a of the Act on Collective Bargaining (*Tarifvertragsgesetz*).

entitled to vote. Works councils have nothing to do with trade unions, at least from a legal point of view. They represent the entire workforce, again irrespective of whether these workers are, for example, trade union members or not. However, it should be noted that there is no obligation whatsoever to form works councils. The initiative for this must come from the employees, who are then legally protected in their efforts to elect a works council. In practice, there are repeated reports of attempts by some employers to obstruct the election of works councils (which is a punishable offence). However, the absence of a works council in a company is not necessarily related to such conduct on the part of the employer but could just as well be explained by a lack of interest on the part of the workforce. Against this background, the question on the "global percentage of employees covered at the establishment level by workers' representatives" appears to be only of limited use to say the least (and possibly even likely to lead the reader of the sustainability report down the wrong path).

6. SOME BASIC QUESTIONS

As regards the interim drafts that were presented by EFRAG in April 2022, there was a whole range of criticism expressed during the public consultation mentioned above.[43] For example, the "Own workforce" standard was criticised by some as affecting matters in which the EU lacks competence.[44] The role of EFRAG also met with doubts in the public consultation. In this context, it was argued e.g., with regard to Art. 290 TFEU[45], that its powers had not been sufficiently circumscribed by the Commission.[46]

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43 See fn. 18.

44 See Ramboll, *Analysis of the Feedback Receives in Response to the Public Consultation on Exposure Drafts of the First Set of Draft EDSRS Additional Position Papers*, 14.9.2022, https://efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FMeeting%20Documents%2F22100613393731 00%2FRamboll%20-%20Report%20on%20Qualitative%20Analysis%20of%20additional%20Comment%20Letters%20%2835%29%20received%20instead%20of%20online%20surveys.pdf&AspxAutoDetectCookieSupport=1 (6.2.2023).

45 Art. 290 (1) of the TFEU states the following: "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power."

46 See Nettesheim, M., *Nachhaltigkeitsberichterstattung: Zur Unionsrechtskonformität des CSRD-Standardsetzungsverfahrens*, Stiftung Familienunternehmen, München, 2022, p. 49.

Irrespective of this, one cannot entirely shake off an uneasy feeling about the power of the EFRAG. There is no doubt that the Commission needs to obtain expertise. Nevertheless, from the point of view of legitimacy, there are doubts, because in the end, far-reaching powers to shape the content of reporting standards are transferred to third parties without much in the way of democratic control. The European legislator seems to be aware of the problem, as Recital 40 indicates that "in order to foster democratic control, scrutiny and transparency, the Commission should, at least once a year, consult the European Parliament, and jointly the Member State Expert Group on Sustainable Finance and the Accounting Regulatory Committee on EFRAG's work programme as regards the development of sustainability reporting standards". But to put it mildly, this does not entirely dispel the concerns about the "power of experts".

A similar development is taking place in the area of artificial intelligence regulation. How effective the regulation of so-called high-risk AI systems will be through the planned AI-Act[47] depends primarily on the harmonised standards to be developed. Adherence to these standards is voluntary for providers. However, relying on their own technical solutions would mean specifying the (vague) requirements of the AI-Act at their own risk. In contrast, providers "cannot do much wrong" if they adhere to the standards to be developed, since they can then invoke the presumption of conformity in Art. 40 of the AI-Act. In this respect, too, there are concerns from the point of view of (lack of) democratic legitimacy.[48] Accordingly, it is fair to say that AI regulation and regulation of sustainability reporting equally raise the question of how far we must and may trust experts.

There is one more concern, this time specific one: The Directive refers to a whole series of international instruments whose provisions it wants to take into account by stipulating corresponding reporting obligations of the companies. However, there is no attempt to explain which specific reporting standard results from which instrument and why. It would have been desirable to make this effort, for example, since the ILO conventions that are referred to in the

47 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Brussels, 21.4.2021, COM(2021) 206 final.

48 See, for instance, Veale, M.; Zuiderveen Borgesius, F., *Demystifying the Draft EU Artificial Intelligence Act*, Computer Law Review International, vol. 22, no. 4, 2021, p. 97: "The high-risk regime looks impressive at first glance. But scratching the surface finds arcane electrical standardisation bodies with no fundamental rights experience expected to write the real rules, which providers will quietly self-assess against."

Directive are aimed at states and not at private individuals. Already with regard to the interim drafts, many commentators pointed out that consistency and coherence with the rules of international law must be ensured.[49] It can hardly be said that the present standards fully meet these demands.

BIBLIOGRAPHY

Ioannou, I.; Serafeim, G., *The Consequences of Mandatory Corporate Sustainability*, Reporting Harvard Business School Research Working Paper No. 11-100, 1.5.2017, https://ssrn.com/abstract=1799589.

Müller, S., *EFRAG reduziert die Offenlegungspflichten in den ESRS-Entwürfen deutlich*, Haufe.de, News, 24.11.2022, https://www.haufe.de/finance/jahresabschluss-bilanzierung/efrag-verabschiedet-esrs-entwuerfe_188_580220.htmlG.

Nettesheim, M., *Nachhaltigkeitsberichterstattung: Zur Unionsrechtskonformität des CSRD-Standardsetzungsverfahrens*, Stiftung Familienunternehmen, München, 2022.

Pagitsas, C., *Chief Sustainability Officers at Work – How CSO´s Build Successful Sustainability and ESG Strategies*, Apress, Washington, 2022.

Schüren, P.; Hamann, W., *Arbeitnehmerüberlassungsgesetz*, 6th ed., C. H. Beck, München, 2022.

Veale, M.; Zuiderveen Borgesius, F., *Demystifying the Draft EU Artificial Intelligence Act*, Computer Law Review International, vol. 22, no. 4, 2021, pp. 97 – 112, https://doi.org/10.9785/cri-2021-220402.

Waas, B., *How to Improve Monitoring and Enforcement of International Labour Standards?* in: Halonen, T.; Liukkunen, U. (eds.), *International Labour Organization and Global Social Governance*, Springer, Cham, 2021, pp. 79 – 95, https://doi.org/10.1007/978-3-030-55400-2.

[49] See Ramboll (fn. 44).

Sažetak

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PROMIŠLJANJA O NOVOJ DIREKTIVI EU-a O KORPORATIVNOM IZVJEŠTAVANJU O ODRŽIVOSTI

Održivost je u fokusu mnogobrojnih rasprava. Ona također sve više utječe na zakonodavstvo Europske unije. Nedavno je stupila na snagu Direktiva o korporativnom izvještavanju o održivosti. Navedena Direktiva sadržava i zahtjeve u vezi s izvještavanjem o socijalnim pitanjima, koji su konkretizirani posebnim zahtjevima za objavljivanje informacija što ih je razvila Europska savjetodavna skupina za financijsko izvještavanje (EFRAG). U ovome radu daje se kritički osvrt na spomenutu Direktivu, osobito u pogledu njezina sadržaja koji se odnosi na radnopravna pitanja, kao i ulogu EFRAG-a u potkrepljivanju obveza korporativnog izvještavanja.

Ključne riječi: Direktiva o korporativnom izvještavanju o održivosti, "socijalna dimenzija" izvještavanja o održivosti, međunarodni standardi rada, delegirani akti, EFRAG

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