MINISTRY OF INDUSTRY, BUSINESS AND FINANCIAL AFFAIRS

NOTE

27. september 2022

Technical Annex supplementing the Danish consultation response of august 8, 2022, regarding the draft standards to the Corporate Sustainability Reporting Directive.

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As announced in the Danish Government's response of August 8, 2022, to EFRAG's public hearing on the draft standards to CSRD the Danish Government would supplement the consultation response with additional technical comments.

If further elaboration is needed, the Danish Ministry of Industry, Business and Financial Affairs is at your disposal.

General Aspects and Cross-cutting standards

Firstly, Denmark strongly calls for alignment with the current work on international sustainability standards as large European companies often are acting on the global market, hence also reporting internationally. It is important to **avoid duplication of the reporting obligations** for the European Companies, who may be met with reporting requirements when acting outside the EU. Convergence between the ESRS and the International Sustainability Standards currently being prepared by the International Sustainability Standards Board (ISSB) is therefore of high importance. Hence, we encourage the EFRAG to work closely together with the ISSB, to ensure better alignment within the frames of the Directive.

Secondly, the Danish Government finds that **several disclosure requirements contain key information, which must always be considered material.** This is information which directly can be linked to the mandatory disclosure requirements as set out in the Sustainable Finance Disclosure Regulation (SFDR). An example of information that is necessary for financial market participants to receive from the companies in the scope of CSRD is information relating to the Principal Adverse Impact (PAI) indicators (as set out in the delegated regulation to SFDR), especially information about GHG emissions, in order for financial market participants to fulfill their disclosure requirements under SFDR. **For such information the Rebuttable Presumption should not apply.**

Thirdly it should be underlined that it is of **key importance that the standards are value creating** both for the users of sustainability information and the companies reporting. It is important to ensure that the disclosure requirements achieve the overall goal while allowing the reporting companies and authorities a swift and efficient implementation as well as avoiding information overload for investors, consumers and other stakeholders from too much data. Reporting on relevant ESG KPI's is essential for a fair, balanced and understandable report and this will positively contribute to transparency.

Finally, we strongly encourage EFRAG to strengthen the guidance on the materiality definitions and the rebuttable presumption.

Reporting on due diligence

There appears to be an inconsistency between the due diligence process described in the draft ESRS and the due diligence process as currently being negotiated as part of the Corporate Sustainability Due Diligence Directive (CSDDD). Considering that the negotiations on the CSDDD are still ongoing, we recognize that it is a challenge to ensure the necessary alignment. However, it is key that the due diligence process as described in ESRS 1 para. 85-91 and Annex C under ESRS 1 (and elsewhere), is aligned with the due diligence process described in article 5-11 of the CSDDD. **It is crucial that the due diligence process is aligned to ensure that the ESRS does not preempt the content of CSDDD**. The reporting standards should constitute a meaningful last step of a company's due diligence process, which is communicating about its policies, processes, and results. It should not dictate the substance of material due diligence requirements that are still being negotiated.

In this context it is important that alignment is ensured first and foremost between the ESRS and the CSDDD, rather than between the ESRS and the OECD Guidelines on Responsible Business Conduct. It is a priority of the Danish Government to align CSDDD with the OECD guidelines as much as possible – however, if the due diligence process in the CSDDD ends up diverging from the OECD guidelines, we should prioritize alignment between the EU regulations, so that companies are not required to conduct two different due diligence processes. If companies are required to adjust

their due diligence procedures and setup as a result of diverging EU legislation, this should be taken into account when EFRAG conducts the planned cost-benefit analysis of the standards.

While it is important to align the due diligence process proposed with the draft ESRS and the due diligence process in CSDDD, this raises another concern regarding different scopes of the CSRD and the proposed CSDDD. It is currently unclear whether the draft ESRS reporting requirements regarding due diligence could in practice constitute a widening of the scope of the CSDDD – since companies, that are not covered by the CSDDD would be required to perform due diligence if they are covered by the CSRD. **It is therefore important that the ESRS remains a requirement on transparency and does not constitute material due diligence requirements.**

While considering the interconnectivity of the CSRD, ESRS and CSDDD, it is important that EFRAG keeps in mind the enforceability of the regulations. Supervisory authorities enforcing the CSDDD must be able to conduct a meaningful control and investigation based on the reporting made by the companies using ESRS. Although there is a general statement on due diligence in ESRS 2 DR 2-GOV 5, due diligence remains an integrated part of the different topical standards. If it is unclear which parts of the management report will reflect the due diligence requirements under the CSDDD, this could prove a challenge for the supervisory authorities when conducting their control and investigations.

Another challenge in this regard is that the ESRS integrates both risk, impact and opportunities into the same disclosure requirements throughout standards. From the perspective of the supervisory authority charged with controlling the due diligence processes of companies under the CSDDD, this combination could prove burdensome since this control would only focus on negative impacts and risks. The draft ESRS does not seem to provide the needed clarity to be an effective tool for the enforcement of the CSDDD. With this in mind **we suggest that the XBRL tagging is designed to ensure that the reporting required by CSDDD is easily located.**

Environmental standards

Regarding the draft standards on environment issues, we have a general concern with regards to inconsistency with EU environmental legislation which can lead to confusion and overlapping reporting requirements. We

acknowledge that the environmental legislation is comprehensive and still developing in some of the important areas which to a great extent covers the double materiality of environmental impacts.

It is therefore of outmost importance that the standards are coherent with the requirements and the wording in EU environmental legislation such as the revised Industrial Emission Directive, Regulation on reporting of environmental data from industrial installations and establishing an Industrial Emissions Portal, the Urban Waste Water directive and the current Regulation on reuse of water as well as consistent with extended producers responsibility, chemical legislation, waste legislation and general environmental legislation. We look forward to seeing updated versions, which ensure this coherence.

At the same time, the **draft standards** and the related documents **should be updated with the political commitments from the EU's 8th Environmental Action Programme** – i.e. that the Union's material and consumption footprints should significantly decrease to bring them into planetary boundaries as soon as possible, including through the introduction of binding EU 2030 reduction targets.

We would also like to support a streamlining of the environmental standards and draw your attention to the interlink between the standards; for example, the link between ESRS DR E2-5 – Substances of Concern and Most Harmful Substances (para. 39-41) and ESRS DR E5-6 Waste. We believe that the same requirements should apply for chemicals of concern and most harmful substances, irrespective of whether the substances leave the undertaking via air, water, soil, as products/services or as (hazardous) waste. Hence, **the requirements in ESRS DR E2-5 should also apply for (hazardous) waste.**

Regarding CO_2 emission, we welcome the inclusion of scope 3 GHG-emissions into the ESRS E1. Scope 3 GHG emissions often constitute the vast majority of companies' total emissions. It is essential that scope 3 emissions are included in the disclosure requirements and are subject to the measurable targets required (ESRS DR E1-3). Moreover, scope 3 GHG emissions are within the undertakings' sphere of influence. We are of the opinion that **disclosure requirements on GHG emissions should not be rebuttable** given that it is one of the Principal Adverse Impact (PAI) indicators set out in the delegated regulation to SFDR. Thus, it is essential for

financial market participants to receive information from the investee companies about their GHG emissions in order to comply with the disclosure requirements under SFDR.

Below we have listed our comments in relation to the understanding of the current text or suggestion for clarification to the disclosure requirements in question:

- ESRS E5 AG 3 (c) requires the undertaking to describe how the undertaking will implement the requirements of the EU Circular Economy Action Plan (CEAP). Since we do not see CEAP entailing specific requirements for companies it is not possible for companies to report on how they implement such requirements. Therefor the disclosure requirement should be removed.
- DR E5-2 (AG 11) requires that *"…the undertaking needs to demonstrate that the increased circular material use rate is additional…*" The concept of additionality should be explained, and there should be more precise guiding on how to demonstrate additionality.
- DR E5-5 (AG 25) requires that the disclosures include "*a) the total weight and percentage of materials that come out of the undertaking's products and services production processes, including packing that have been designed for: durability, reusability repairability, [etc].*"
  Relevant concepts are laid out in ESRS E5 AG 25, iii-ix. However, definitions are unclear. Therefore, there should be more accurate guidance and definitions concerning the terms listed in iii-ix.
- DR E5-4 and DR E5-5, Industrial symbioses are not mentioned directly in the text. It should be clarified whether activities relating to industrial symbiosis are encompassed in the terms reuse e.g.

Finally concerning the environmental standards, **we see a need for more precise definitions and guidance** to help companies disclose the required information in relation to ESRS E5 about resource use and circular economy.

Social standards

Regarding the social standards, we find that there is a **challenge with the scope of *own workforce* in ESRS S1** as it risks causing confusion by covering both the undertakings' "*employees*" and "*non-employees*". In practice companies may not have the same data available for non-employees as for employees. In addition, "*non-employees"* covered by ESRS S1 is a

mix of workers engaged in "*employment activities*" (NACE Code N78) and "*self-employed workers*" who supply labor based on individual contracts with the undertaking or external arrangements such as agency workers. This could lead to interpretation issues regarding non-employees, i.e. to what extent they would be considered as own employees, causing co-employment risks to the undertaking. A solution could be, that "*Non-employees*" are excluded in ESRS S1 and instead reported under ESRS S2 – Workers in the Value Chain.

In addition, it is important that only information, which is available for the undertakings and that cannot be associated with individuals are required, in order that there will only be disclosure requirements which can be fulfilled in **accordance with the General Data Protection Regulation (GDPR)**.

As regards the proposals concerning "*fair remuneration*", "*social dialogue*", "*collective bargaining coverage*" etc., it should be underlined that according to the Danish labor market model the social parties are responsible for regulating wage and working condition through collective agreements without interference from the state. Thus, there is no legislation on average working hours, minimum wage and reporting obligations in this regard or on social dialogue, collective bargaining coverage etc.

The Danish social security system is based on the principle of universalism and is tax financed and thus much different from systems in many other EU member states. Considerations concerning different national social security systems should be taking into consideration in relation to comparability.

It should be stressed that "fair remuneration" which is a new EU concept, falls under the competence-based exception of Art. 153 (5) TFEU ("pay"). Furthermore, EFRAG should be made aware of the difficult negotiations concerning the draft minimum wage directive. Appendix A, defined terms, should be in accordance with EU definitions according to EU instruments and no new terms should be introduced, e.g. on wage, pay, fair wage etc. The definition of "fair wage" (DR S1-14 – Fair remuneration), should be aligned with the terminology "adequate wages" used in the CSRD article 29 (2), litra b (ii). This would also be in alignment with the terminology used in the Directive on adequate minimum wages. The definition of "fair wage" in Appendix A, refers to the European Pillars of Social Rights principle 6 with benchmarks of 60 % of the gross median wage and 50 % of

gross average wage. The same calculation applies to "adequate wage" as defined in the Directive on minimum wages (recital 21).Thus, the definition of "fair wage" in Appendix A, should be amended to "adequate wage" to ensure consistency between ESRS and the CSRD as well as EU definitions deriving from legislative acts.

Governance standards

The disclosure requirements on governance raises several concerns. We therefore strongly underline the importance of **aligning the standards with CSRD**. It seems to be necessary as our analysis of the governance standards shows inconsistency with the legal basis for several disclosure requirements. **Several disclosure requirements seem to expand the scope for existing reporting requirements** in the accounting directive or other sector regulations as they are currently only applicable for listed companies (either as soft law or hard law). Delegated acts cannot add, delete or modify anything in the basic act, and can thus not expand the scope. Other requirements seem to have no connection to sustainability, and some have no legal basis in the directive. In the following, we have listed a (non exhaustive) list of disclosure requirement, where we highlight the need for revisiting:

ESRS 2 General, strategy, governance and materiality assessment

- DR 2-SBM 2 – Views, interests and expectations of stakeholders

The disclosure requirement is supplemented in AG 30, that requires the companies to provide a description of the interests, views and expectations of their relevant key stakeholders. This includes for example the stakeholders' current views of the company's strategy and business model(s) and, if, how and what steps it has taken to amend its strategy and business model(s) to address interests, views and expectations.

It should be made clear in the standard, that there is no legal requirement for undertakings to include stakeholder's views, interests and expectations in its strategy and business model. The requirement is only to provide transparency on whether stakeholders have had an impact.

- DR 2-GOV 1 – Roles and responsibilities of the administrative, management and supervisory bodies

The disclosure requirement introduces obligations to report on how sustainability is applied by the companies for nominating and selecting mem-

bers of its administrative, management and supervisory bodies. The disclosure requirement should be adjusted in accordance with the requirements after the directive.

G1 Governance, risk management and internal control

- DR G1-1, 14 (g), – Governance structure and composition

We see no reference in the CSRD to a disclosure requirement on Governance structure and composition as required by para. 14 (g), which requires companies to report on how stakeholder groups are represented in their governance structure and composition – Thus, the DR should be deleted.

- DR G1-2 – Corporate governance code or policy

We find that this should only be an optional requirement, as the scope for article 20 a) and b) is not the same as the scope for the ESRS.

- DR G1-3 – Nomination process

We see no requirement for this in the directive.

- DR G1-4 – Diversity policy

We find that this should only be an optional requirement, as the scope for article 20 g) is not the same as the scope for the ESRS.

- DR G1-6 – Remuneration policy

We see no reference to remuneration policy in the CSRD, however after disclosure requirement G1-6 undertakings shall describe the policy used for the remuneration of its administrative, management and supervisory bodies, and whether stakeholders' views (including shareholders) are sought and taken into account, together with any corresponding voting results. This is already partly regulated in the Shareholder Rights Directive II. This disclosure requirement in para. 33 should not introduce new requirements for companies that are not within the scope the Shareholder Rights Directive II.

G2 Business conduct

- DR G2-8 – Beneficial ownership

According to this disclosure requirement, the undertaking shall provide information about its beneficial owners and control structure. This has no legal basis in the CSRD nor link to sustainability. Moreover, a register over beneficial owners already exists.

Concerns regarding company law and corporate governance

The legal basis for several of the disclosure requirements on governance is questionable and are not in line with neither national Danish company law nor with Danish Recommendations on Corporate Governance, being best practice guidelines to companies with shares admitted to trading on a regulated market in Denmark.

Neither Danish Company Law nor Danish Recommendations on Corporate Governance require companies to take into consideration the views, interests and expectations of its stakeholders as described in the standards. However, it is a company law principle that the management must safeguard the company´s interest and it is broadly recognized that the company's interest does not only cover the economic interest of the shareholders, but also includes employees, suppliers, creditors, society etc. Additionally, the Danish Committee on Corporate Governance e.g., recommends that the company adopts policies on the company's relationships with its shareholders, investors and if relevant other stakeholders in order to ensure that the various interests are included in the company's considerations.

Moreover, according to Danish Company Law the board of directors is elected by the shareholders at the general assembly and not by other stakeholders of the company. Finally, the Danish Company Law does not require companies to have sustainability competencies (or other specific competencies) in their board of directors. The composition of the board of directors is for the shareholders to decide.

Additional remarks

It should be noted that our comments are preliminary and do not anticipate the Danish Government's position during the formal adoption of the Delegated Regulation.

SME's

Denmark would like to highlight the importance of the standards for SME's being simplified standards e.g., they must be proportionate and must be able to handle different sectors. Particularly standards for SME's in high-risk sectors should be developed as a priority. If the right setup for non-listed SME's voluntary information on sustainability is established, this will support the purpose of the strategy for sustainable finance, by channeling private investments into the most sustainable companies. To achieve this goal the information must be of the right quality and standards should be made, not only for listed SME's but also for non-listed SME's.

To ensure the usability of the data, it is important that the standards for SMEs, including voluntary standards, are accompanied by an XBRL taxonomy. This is of high importance in relation to the EU initiative European Single Access Point.

Sector standards

Furthermore, we would like to highlight the importance of high-risk sectors being prioritized in the sector-specific standards.