THE CORPORATE SUSTAINABILITY REPORTING DIRECTIVE AND THE EU MEMBER STATES: SEARCHING FOR EFFECTIVENESS IN SOME NATIONAL POLICIES FOR TRANSPOSITION – A COMPARATIVE ANALYSIS

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ABSTRACT

This paper critically analyses the transposition implications of the Corporate Sustainability Reporting Directive (CSRD) in three Member States: Germany, Italy and Spain. This directive primarily tries to widen the basis of subjects for whom it will be mandatory to report on non-financial information; it also unsuccessfully tries to simplify the reporting scheme and procedure. This study aims to raise awareness on the potentially dangerous heterogeneity that might arise within the European Union if the CSRD is transposed in forms differing greatly from each other. Moreover, the paper intends to open a discussion in order to identify, in a comparative perspective, pros and cons of the methods used for each national transposition, as a process which of course is expected to take several years. Based on the findings, conclusions on the purpose of the papers will be drawn. The CSRD needs to be transposed ex art. 288 TFUE by every Member State before 6 July 2024. The paper will use content analysis to scrutinise, from a comparative perspective, the national transpositions of the CSRD on different levels. First, the analysis will focus on the difference between the 'limited assurance' and 'reasonable assurance'. Second, some remarks will regard the subjects involved in the reporting, that will differ greatly in the three legal orders. Third, the use of tools to ensure public consultation and involvement of at least primary stakeholders shall be examined. This paper aims to address a gap existing in literature on the various possible forms of the implementation of this Directive and on the consequent inconsistencies that may arise, especially with regard to the assurance. The CSRD prescribes a 'limited assurance' done by a statutory advisor or audit firm but pushes for a gradual shift towards the 'reasonable assurance' already foreseen for financial reporting.
Keywords: non-financial reporting, CSRD, stakeholders, assurance, national transposition.

1 INTRODUCTION

The Corporate Sustainability Reporting Directive (CSRD) [1] is the European Directive 2022/2464 that entered into force on 5 January 2023. As the name itself suggests, the focus of this directive is on sustainability reporting. In particular, this directive aims at strengthening the reporting requirements and at broadening the scope of the undertakings subject to such mandatory non-financial reporting requirements. It consequently aims at enhancing transparency and reducing environmental and social risks.

The journey towards the CSRD has not been an easy one. As a matter of fact, the events that led to the adoption of the EU Directive 2022/2464 are several and each of them contributed to a better understanding of the gaps in legislation to be filled to provide rapid responses to the urgency imposed by the effects of climate change.

A significant step towards sustainability reporting was made with the Non-Financial Reporting Directive (NFRD) [2] in 2014. However, this directive was considered to be inadequate to meet the goals for the transition of the EU to a sustainable economy and society. Several gaps and deficiencies had been identified under different aspects and, even though the Commission published non-binding guidelines in 2017 for reporting on non-financial

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information [3] and in 2019 for improving the quality of reporting on climate related information [4], the situation did not improve. To quicken the transition to sustainable development, the European Union adopted the EU Action Plan on Financing Sustainable Growth in 2018 [5], the Disclosure Regulation, the Taxonomy Regulation, and the Sustainable Finance Disclosure Regulation (SFRD).

Despite these significant efforts to improve non-financial reporting, the existing framework was inadequate [6]. This led to the necessity of developing and approving a new instrument, capable of addressing and filling those gaps [7]. In April 2021 the Commission presented a proposal [8] for a new directive on corporate sustainability reporting, which was approved and published in the Official Journal of the European Union in 2022. It eventually entered into force in 2023 under the name CSRD. EU Member States are now given time until 6 July 2024 to transpose this EU directive into their national systems [9]–[11]. In the meantime, the first set of European Sustainability Reporting Standards (ESRS) was approved with a Delegated Act by the European Commission in July 2023 and finally adopted in October 2023. The European Sustainability Reporting Standards (ESRS) were developed by the European Financial Reporting Advisory Group (EFRAG) and their creation involved a public consultation also with experts both from academia and from other private standards setters.

It is now fundamental to provide a comparison between the scope of the NFRD [12], [13] and the CSRD to better understand the impact the latter will have on undertakings.

With regard to companies that are required to report, while under the NFRD only large public interest entities (listed companies, banks, and insurance companies) with more than 500 employees were required to report, under the CSRD not only listed companies but all large companies defined as those meeting two out of the following three criteria are required to report: more than 250 employees, more than 40 million euros turnover, more than 20 million euro of total assets. Also subsidiaries of non-EU groups are required to report. As a consequence, the number of companies that need to comply with the requirements increased dramatically from the 11,600 under the NFRD to the 49,000 under the CSRD.

With regard to the scope of the requirements, while the NFRD only referred to environmental protection, social responsibility and treatment of employees, human rights, anti-corruption and bribery, diversity on company boards, the CSRD added also the following: disclosure of information about intangibles (including social, human and intellectual capital), additional forward looking information, reporting that is consistent with the Sustainable Finance Disclosure Regulation and the EU Taxonomy, and the double-materiality concept.

With regard to assurance, previously it was not even required, whereas under the CSRD it is mandatory. In particular, a limited assurance is foreseen, which is expected to be expanded in the future to the reasonable assurance required for financial reporting.

Due to the fact that CSRD does not provide specific requirements on certain fundamental topics, such as, among others, the sanctionary regime, the assurance and the audit, yet, Member States have to take their own decisions while waiting for delegated acts of the EU to regulate such sectors. The fact that Member States are let not only with such freedom and flexibility – which is inherent to the instrument of the directive – but also with the burden of transposing the directive in a potentially wrongful or inharmonious manner, creates the risk of a high heterogeneity among Member States, which could lead to serious consequences.

This paper aims at raising awareness on the potentially dangerous heterogeneity that might arise. In particular, it focuses on three main topics in which this lack of harmonisation [14] might have the most powerful negative effects: assurance, audit, and public consultation. A brief section on the enforcement regime and the sanctions is added at the conclusion of this paper.

2 METHODOLOGY

This paper adopts content analysis to securitise the national transpositions of the CSRD. This analysis is done from a comparative perspective, which means that different States are taken into consideration, in this case Germany, Italy and Spain. The drafts of their national legislations transposing the EU Directive 2022/2264 are compared on different levels. First of all, the paper focuses on the assurance level, in particular stressing the difference in the adoption of a limited assurance or of a reasonable assurance. The second level regards the auditing and the subjects involved in it. The third level compares the differences in the use of public consultation instruments to ensure that at least primary stakeholder are involved in the transposition process.

3 HETEROGENEITY IN ASSURANCE, AUDIT AND PUBLIC CONSULTATION

In non-financial reporting before and in sustainability reporting now, we are used to read about heterogeneity under different respects. First, with regard to heterogeneity in definitions. Second, in referring to the huge number of organisations that claim legitimacy in sustainability reporting. Third, with reference to the diversity of reporting requirements among the most influential standards setters, i.e., EFRAG, GRI, ISSB (at European level), leading to different reporting choices. Fourth, with regard to the diversity in the objectives of standard-setting operations.

This paper acknowledges these issues and takes them as prerequisite to develop considerations on another type of heterogeneity: the heterogeneity that might arise in the case in which Member States transpose in their national legislations the CSRD in ways that differ greatly from one another [15]. In particular, this paper focuses on three Member States: Germany [16], Italy [17], [18] and Spain [19].

First of all, it is important not to omit that in the last decade, Member States are more inclined to transpose the bare minimum and not to add anything ‘extra’ to what is mentioned in the directive. This is due to avoiding the risk of incurring sanctions or to be sued before the ECJ [20], [21]. This trend can be seen also in the case of the CSRD [22]. As a matter of fact, from the comparison of the published drafts of the three Member States there are no extreme differences. However, those identified deserve to be discussed and investigated further to understand the possible effects that might surface if the drafts are approved as they are as final provisions in the national legislations.

3.1 Heterogeneity in assurance

With regard to assurance, the CSRD states that ‘a progressive approach to enhancing the level of the assurance required for sustainability information should be considered, starting with an obligation on the statutory auditor or audit firm to express an opinion about the compliance of the sustainability reporting with Union requirements based on a limited assurance engagement’. Consequently, a limited assurance level is prescribed at the moment but a gradual approach from limited assurance to reasonable assurance is suggested by the CSRD itself. A reasonable assurance is not imposed by the CSRD yet, even if we could have expected so given the urgency for a more impactful and useful instrument in terms of sustainability reporting, capable of filling the gaps left by the previous directive. The decision for a softer type of assurance is mainly due to the high costs that the reporting undertakings would have to face in case of a reasonable assurance since is more costly than the limited one.

It is also essential to mention that the CSRD only generally refers to the concept of ‘limited assurance’ without providing specific information or requisites to be followed to be compliant with this type of assurance. Namely, the EU Commission announced that it will adopt principles of sustainability reporting compliance attestation for the limited assurance within 1 October 2026 and for the reasonable assurance within 1 October 2028. The complexity for States in defining what limited assurance means and in identifying the requisites to be compliant with is evident and the consequences of this complexity both in terms of wrongful transposition of the directive and in administrative and judiciary terms in the respective legal systems cannot be underestimated.

All the three States taken into consideration adopted the limited assurance in their drafts, as the CSRD prescribed. The only difference lies on the fact that while Germany [16] and Italy [17], [18] decided to wait for delegated acts of the EU Commission on the matter to implement a reasonable assurance, Spain does not mention the waiting for this acts giving in this way the impression that the implementation of a reasonable assurance could happen nationally even before or without EU acts. The main difference however consists in a regulation (additional to what is prescribed in the CSRD) made by Germany that requires the limited assurance to be done in a separate assurance report [16], [23]–[28]. This is a relevant decision because it implies and gives the impression that the German State recognises the sustainability report to be distinguished – also formally – from the annual report. This represents a first important step to give more importance to sustainability reporting and to the future implementation of a reasonable assurance. Despite this positive aspect, this regulation determines higher costs for German firms than for Italian and Spanish firms for which such separation is not prescribed.

3.2 Heterogeneity in audit

With regard to the audit, the three States took different decisions in their drafts, a part from the fact that all three of them follow literally the possibility given by the CSRD to use financial auditors to do the audit related to sustainability aspects without questioning the issues of potential conflicts of interest and of lack of expertise and knowledge in environmental and social aspect of financial auditors. Despite this only common point, Germany, more than Italy and Spain, pushed for the training and employment as auditors of specific sustainability auditors. Namely, the draft modifies some norms in the German auditors’ regulation to ensure higher expertise of auditors with regard to sustainability. First of all, Länder (German States) are pushed to use another auditor rather than the usual financial auditors employed for the annual reports as clearly stated in Article 43 part 3 of the ‘Bilanzrichtlinie’. Secondly, an ad hoc exam and apprenticeship period is foreseen to be implemented modifying the WPO-E for the creation and training of the figure of real sustainability auditors, who will then be registered in a specific register for sustainability auditors [16], [23]–[28]. Spain did something similar to Germany, but less structured by also allowing auditors different from usual financial auditors but complying with specific requirements set in law 22/2015 [19], [29], [30]. Italy, on the other hand, did not establish any provision for non-financial auditors but only extended the vigilance power of the CONSOB to all listed entities subject to the CSRD [17], [18].

After the financial crises of 2008, the EU Audit Directive was amended to require Member States to identify a competent authority to oversee auditors [31]. This should be applied also in the transposition of the CSRD since it also represents an opportunity to raise issues of responsibility in front of the designated competent authority. This topic will be analysed more in depth in the paragraph regarding the sanctions and the enforcement regime.

3.3 Heterogeneity in public consultation

With regard to public consultation [32], while Germany and Italy [33] accepted comments until 19 April 2024 the first and 18 March 2024 the second, Spain opted for a preliminary public consultation with a deadline on 3 March 2023. From the received comments, the draft had been developed and is currently waiting for approval [34].

Even though it is not possible to verify in this moment all those who provided comments on the Italian and German draft, some of the primary stakeholders have published their comments [35], [36]. For example, the 'Associazione Nazionale Commercialisti', the Italian association of financial accountants rendered available to the public its comments on the draft by publishing them on their webpage [37].

The information and consultation on rights of trade unions and workers' representatives is a key issue in the transposition of the CSRD. As a matter of fact, the CSRD states that 'Member States should ensure that sustainability reporting is carried out in compliance with workers' rights to information and consultation. (…) Their (workers' representatives) opinion should be communicated, where applicable, to the relevant administrative management or supervisory bodies' [38]. Despite the importance of such transparency towards workers and their involvement, there is no reference to their comments in the timeframe selected for public consultation. Moreover, the CSRD does not specify how the right to the involvement of workers should be implemented in practices. It is consequently expected that Member States transpose the Directive in their national legislation by explicitly specifying who should be consulted (or who was consulted in the phase of public consultation) and the timeframe and modalities through which this consultation took place. Furthermore, Member States should explicitly reference in their transposition legislation the following key EU Directives and their respective national transpositions: Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees; Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council; Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees; Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

The CSRD is not the first directive to be implemented in an inharmonious way. Also the transposition of the NFRD was characterised by various differences in the implementation of sustainability-related regulations in corporate practices. Of course, the CSRD is more strict than the NFRD in providing rules and requirement for its transposition but, as already mentioned, many aspects still have to be regulated, and, in the meantime, States have the power to establish their own ad hoc provisions even though always bearing in mind the objective of the directive.

4 EFFECTS OF HETEROGENITY

The inharmonious transposition of the CSRD might create discrepancies in the rules firms have to follow within the European Union, determining in this way disadvantageous or even inequal situations among firms settled in different Member States [39]. These inequalities can be seen under different respects. First, discrepancies in regulations might lead to a decrease (or increase) in competitiveness in case of stricter requirements (or softer requirements). For example, the requirement of separating the sustainability report from the assurance report according to the German draft might increase the costs on German firm to comply with it and consequently make them less competitive with respect to Italian or Spanish firms, for which no such regulation is foreseen. Another potential negative effect can be the delocalisation of firms in EU countries where the sustainably regulations are softer, a kind of forum-shopping that can be seen in other field for example in tax regulations. Last but not least, the increasing sustainability requirements, if not properly thought, organised and clarified from the very beginning could become a bureaucratic burden that could hinder the innovation of firms, which are more concentrated on other aspects.

The effects of heterogeneity are broad in scope and include, among others, issues related to administrative and judiciaries procedure. As a matter of fact, if in the transposition of the directive there are discrepancies both in terms of authorities responsible for the enforcement and in terms of sanctions, it logically follows that the inharmonious national legislations create stronger responsibilities, risks and burdens in some States rather than in others.

5 ENFORCEMENT REGIME AND SANCTIONS

The CSRD does not prescribe anything with regard both the enforcement regime and the sanctions to which not only firms for whom the reporting is mandatory can be subject but also auditors for their wrongdoing in the auditing process.

As previously mentioned, it is the role of Member States to legislate on the matter in the transposition legislations of the CSRD. It is nevertheless clear that States can and probably will take different choices both with regard to the designation of the competent authority to judge, on the one side, the non-compliance of firms with the CSRD and, on the other side, on the wrongdoing of auditors. According to the administrative and judiciary systems, but also to soft-law or customs, the national systems of Member States differ greatly from each other. Consequently, also the transposition legislations of the directive will diverge under theses respects.

The same happens for the sanctions: some States might put them under the umbrella of the administrative field, whereas others might view them as part of civil law or even tort law.

In the case of Italy, the designated 'control authority' over listed firms is CONSOB, whereas for those firms which are not listed no mandatory vigilance or control is prescribed but the discipline of the Italian Civil Code will apply, with its relative remedies. However, the Italian draft also considers the present distribution of competences between CONSOB and the Ministry of Economics and Finance (MEF) for the vigilance, investigative and sanctionary powers [17], [18].

Since in Italy the sustainability report is considered part of the annual financial report, this implies that also the sustainability report is subject to the same transparency duties and sanctions foreseen by the TUF in case of violation of annual financial reporting. This is a particularly heavy measure for SMEs and it would be more appropriate to establish more proportionate sanctionary measures, as explicitly mentioned in the draft itself. In the meantime, however, the situation is the one just described, leading to a disproportion not only between big and small-medium firms in the same country (Italy in this case) but also among other countries, for example Germany.

In the German draft, no detailed information on the sanctionary measures is foreseen, whereas the draft specifies both the presence of an internal vigilance authority 'Aufsichtsrat' and a State authority represented by individual controllers called 'Aufsichtbehörde' [16].

Spain adopts a vigilance regimen similar to the one stablished for financial auditors, which means that it elevates the role of sustainability auditors to the same level of financial auditors but does not subject them to the same regime. However, Spain does not establish properly a system to train sustainability auditors or the requisites to become sustainability auditors. As a consequence, the adoption of an ad hoc sanctionary regime for figures that at the moment do not formally exist appears contradictory and might create many misunderstandings and unclear situations [16], [29], [30].

6 LIMITATIONS

This paper has been wrote based on the drafts published by Germany, Italy and Spain. This means that some of what is mentioned in this paper might be subject to changes in case of modifications of the drafts before the final deadline of 6 July 2024 for the transposition of the CSRD in the three considered Member States.

Another limit of this study regards the lack of available information on public consultation. In particular, there is no State document identifying primary stakeholders and inviting them to comment the draft nor publicly available information on those stakeholders (or other actors) who provided their comments or suggestions on the draft. The only reachable information is the one made voluntarily available on the websites of those organisations who provided comments. It might be possible to assess the modifications made (if any) to the drafts after 6 July but it is not sure whether it will be possible to know who provided the suggestions and, especially, if the most important and affected stakeholders had been actually an properly taken into consideration.

To conclude, there is a general confusion and disorganisation in finding the official documents on the web, which contributes to the limitation of public consultation and to the right of all interested individuals to provide their own view on public policies of future adoption.

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