

Q&A on CSRD and ESG reporting within the EU

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With the ever-increasing focus on sustainability and transparency in business within the EU, the implementation of compulsory CSRD and ESG reporting is set to apply to a broader range of companies. Birgit Kraml and Jela Mohr, contract partner and ESG Manager at Wolf Theiss in Vienna, answer this Q&A providing insight into the nature of this obligation.

What are the concrete legal framework conditions in Austria regarding the implementation of EU regulations on the CSRD (Corporate Sustainability Reporting Directive) obligation and ESG?

The Directive came into force in 2022 and must be implemented into national law by the Member States within 18 months. A corresponding draft law is currently being prepared. The reporting obligation – starting in 2024 for companies already covered by the NFRD (Non-Financial Reporting Directive) - cannot be weakened by the Member States.

Are there any relevant national differences between Austria and other EU countries?

There is currently no Austrian implementation of the CSRD Directive, but it is to be expected that Austria will build on the NFRD or NaDiVeG (Nachhaltigkeits- und Diversitätsverbesserungsgesetz).

What legal consequences can be expected if the CSRD obligation is ignored, if false information is provided in reporting?

Violations of reporting obligations can give rise to civil liability for the responsible parties (especially board liability). False statements can also lead to legal action under the Unfair Competition Act. In this context, the EU has also drafted a Green Claim Directive, which will sanction greenwashing. Green faking may even be considered a criminal offence. The deliberate, inaccurate or incomplete presentation of material information on the asset, financial and earnings situation is already sanctioned under criminal law. A legislative extension of this offence to sustainability information would therefore be conceivable. Furthermore, according to the CSRD, the liability of auditors for inadequate audits of financial statements also includes inadequate confirmation of sustainability reporting.

Where do the responsibilities lie within companies?

A "say on ESG" is currently not planned. The company's sustainability policy is a management matter, but as an essential business policy it is also subject to the approval of the supervisory board. It is the responsibility of the Executive Board to implement meaningful reporting processes in order to fulfil the CSRD requirements. Although the accounting and controlling department is responsible for handling the key figures, the executive board will ultimately be held responsible and liable. The supervisory board only has a monitoring and control function, such as for assessing whether climate risks have been adequately considered in terms of double materiality (inside-

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out/outside-in). It is also responsible for the basic examination of whether a sustainability report is to be prepared and whether the reporting regulations have been applied appropriately.

The companies affected by this reporting are precisely defined by the EU. Can companies that are not covered simply ignore the whole issue of CSRD / ESG?

Even if the circle of directly reporting companies is clearly limited, CSRD also has an indirect effect on suppliers along the upstream value chain and on customers. Reporting companies have to obtain relevant data and information from suppliers, or at least make an effort to do so, and take this into account within their sustainability reports. Companies operating along the value chain will therefore have to provide the relevant data on their own initiative in order to remain attractive and thus competitive for business partners.

Capital market-oriented SMEs (Small and Medium-sized Enterprises) would still have a little time to deal with the issue. Why should they deal with it anyway?

Although capital market-oriented SMEs are still (temporarily) exempt from the legally obligatory sustainability reporting, there are other factors to consider, particularly in the banking and finance sector. Expectations and requirements in the ESG area are increasing. When granting loans, banks are already increasingly looking at compliance with specific sustainability criteria.

The European Sustainability Reporting Standards (ESRS) have already been published. Are these standards the latest version and can they be used as a basis for reporting?

They serve as a guide, although concrete elaborations are currently taking place. On 9 June 2023, the European Commission published the draft delegated act for Set 1 of the ESRS. Comments on the draft can be submitted until 7 July 2023.

ESG is often equated with sustainability - how important are the factors "S" for Social and "G" for Governance?

The term sustainability was first included in the Maastricht Treaty in 1993, although at that time the term was still restricted to sustainable economic development. Only in subsequent EU treaties was it made clear that sustainable economic growth also implies the protection and improvement of the environment. Sustainability is to be understood as a comprehensive term.

ESG, in other words, environmental, social and governance, are basically also seen as a single entity. Without governance, concrete procedures and processes in the company, which ensure that it acts sustainably and in compliance with environmental goals, but also deals with issues such as inclusive working environment, diversity, transparency and equality, it will be difficult for the company to comply with the environmental "E" and social "S" criteria. As part of CSRD reporting, information on "S" means opportunities, diversity and working conditions (including wages, work-life balance, etc). Compliance with human rights, fundamental freedoms and democracy must be included. "G"-factors to be disclosed include the role of the highest corporate bodies in the development and implementation of the internal sustainability policy, corporate ethics and culture (including combating corruption and bribery), lobbying activities and political commitment, payment practices, etc.

Even the Taxonomy Regulation, whose primary focus is on achieving environmental goals, requires compliance with minimum standards in the area of human and labour rights ("S"), as well as with regard to preventing and combating bribery and corruption, tax fraud and unfair competition practices ("G").

With the introduction of the Directive on Corporate Sustainability Due Diligence, it is expected that the "S" factor will become even more important as companies will have to ensure the compliance with fundamental rights along their whole supply chain. The German Supply Chain Act has entered in force on 1 January 2023 and also affects Austrian suppliers, at least indirectly. Every large company (currently with more than 3000 employees in Germany, and more than 1000 employees as of 2024) must ensure that its suppliers adhere to certain standards and observe human rights and environmental due diligence obligations.

The supply chain is seen as another lever in terms of the transition to a climate-neutral and green economy.

The reporting must be very detailed. Isn't there a danger that a manufacturing company will have to publish information from production that allows competitors to draw conclusions about processes or recipes for example? Or that environmental or climate "atrocities" become public that have been covered up until now. The same applies to the value chain, where details about suppliers and even customers are to be published - a sensitive issue for a producer of explosives, ammunition or weapons. What can be done about it legally?

In principle, sustainability reports do not contain the type of concrete information that would allow for conclusions to be drawn regarding, for example, recipes. However, if a company has specific concerns in this regard, it is advisable to obtain legal advice.

What is already a point of discussion and still needs to be observed, is Europe's continued competitiveness, given that compliance with the strict criteria is also required of suppliers outside the EU. If the EU withdraws from certain countries (as is already partly the case, for fear of otherwise failing to meet the due diligence requirements of the supply chains) other countries, such as China in particular, might appropriate these markets without any respect for human rights or environmental goals.

What services does Wolf Theiss offer Austrian companies on the subject of CSRD?

Wolf Theiss supports companies comprehensively in all areas of sustainability and ESG. The sustainability report must actually be lived, and companies must ensure that their processes and contracts are in line with it. Wolf Theiss supports clients in the drafting of contracts but also in their development and the development of their projects, as well as in ESG due diligences, where, in the case of an acquisition, we examine to what extent the target complies with ESG standards and, if applicable, taxonomy-compliant. Of course, we also provide support in all matters relating to liability issues and the avoidance of such issues.

About Wolf Theiss

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