

Template for comments on draft ESRS Delegated Act

The draft delegated on European Sustainability Reporting Standards (ESRS) comprises: the main text of the legal act; twelve draft standards (annex I); and a glossary of abbreviations and defined terms (annex II).

The twelve draft standards in Annex I are:

Group	Number	Subject
Cross-cutting	ESRS1	General Requirements
Cross-cutting	ESRS2	General Disclosures
Environment	ESRS E1	Climate
Environment	ESRS E2	Pollution
Environment	ESRS E3	Water and marine resources
Environment	ESRS E4	Biodiversity and ecosystems
Environment	ESRS E5	Resource use and circular economy
Social	ESRS S1	Own workforce
Social	ESRS S2	Workers in the value chain
Social	ESRS S3	Affected communities
Social	ESRS S4	Consumers and end users
Governance	ESRS G1	Business conduct

Each standard is divided into numbered paragraphs. Each standard also has an appendix A containing “application requirements” which are numbered as AR 1, AR 2 etc. Some standards also contain additional appendices.

To facilitate analysis of comments, respondents are kindly requested to use the simple template below when sending their comments.

Name of respondent/responding organisation: ShareAction

1. General comments (4000 characters max)

ShareAction welcomes the publication of the draft Delegated Act on the European Sustainability Reporting Standards by the European Commission and appreciates the opportunity to provide feedback.

Sustainability reporting is critical for ensuring that companies provide information on the risks and impacts they have on environmental, social and governance matters, which increases transparency and provides clarity to investors.

This being said, we want to express our concerns about the significant changes made by the European Commission to the technical draft presented by EFRAG and the overall lowering of the level of ambition compared to what was agreed by the co-legislators when defining the CSRD. These concerns are consistent with those raised by the Alliance for Corporate Transparency. We believe the new set of reporting standards will not bring about the desired comparability, reliability, and quality of data which have been set as the objectives of the CSRD.

Considering the centrality of the reporting standards to the implementation of the EU sustainable finance agenda and transformation of the economy to meet the objectives of the EU Green Deal, we call on the European Commission to maintain the integrity of the ESRS as a full set of standards and prevent some standards being prioritised over others.

We call on the European Commission to revise certain aspects of the draft ESRS to ensure CSRD objectives are met and will channel investments towards sustainable business practices. If not amended, there is a high risk of confusion by preparers, supervisory authorities, investors and stakeholders, and undermining CSRD's intention to fix bad reporting practice.

We also recommend addressing potential regulatory incoherence between existing EU regulation and the draft ESRS. The proposed changes will reduce the ability of financial market participants to meet the mandatory reporting obligations of the Sustainable Finance Disclosure Regulation (SFDR), the Benchmark Regulation, and Pillar 3 disclosure requirement. In doing so, the ESRS would fail to address the gaps it was initially mandated to solve by the European Commission.

We recommend the following aspects of the draft Delegated Act to be modified:

1. To preserve a core set of mandatory ('always-to-be-reported') metrics, including at a minimum greenhouse gas emissions for all companies and key own workforce metrics for companies with more than 250 employees. These are universally material and there is an essential need to ensure high quality and comparable data. Making all disclosure requirements subject to materiality assessment will create an additional burden for companies.
2. To withdraw the decision to make certain biodiversity and non-employee workers reporting requirements voluntary. Voluntary reporting on biodiversity transition plans and impact metrics would dangerously postpone the evaluation of biodiversity-related risks and opportunities by companies, increasing the risk of greenwashing and undermining the ability of investors to mitigate the impact of their investments. Voluntary reporting on non-employee workers' conditions could create major loopholes and affect market employment practices.
3. To include the 'always-to-be-reported' clause for datapoints in existing EU legislation, particularly the principal adverse impact (PAI) indicators mandated by the SFDR. The majority of the mandatory disclosures proposed by EFRAG correspond to the PAI indicators defined in the SFDR Regulatory Technical Standards. Making their disclosure subject to materiality assessment will make it more burdensome for financial market participants to comply with their SFDR obligations.
4. To remove the additional two-year phasing-in for companies with less than 750 employees for standards on biodiversity (ESRS E4) and social information (S2, S3, S4), especially since it is in contrast with the minimum disclosure requirements in the CSRD.

2. Specific comments on the main text of the draft delegated act

In this section we further develop our arguments listed above and provide additional data:

1. The materiality approach and mandatory (always-to-be-reported) metrics

As mentioned in the previous section, we do not endorse the Commission's proposal to remove the requirement for undertakings to always report on a core set of topical disclosures and data points, which is in contrast with the technical advice provided by EFRAG.

Not having a core set of mandatory disclosures and instead subjecting them to materiality assessment increases reporting complexity and administrative burden, lowers the quality and comparability of disclosures on universally material data, and does not bring benefits to preparers or users. It also creates room for discretionary behaviours and gaps in data.

1.a. Increasing the complexity of reporting

Most of the disclosure requirements classified by EFRAG as mandatory are aligned with the PAI indicators defined in the SFDR Regulatory Technical Standards. Not having this mandatory set of disclosures will hamper investors in their ability to access relevant data from investee companies and make it more complex and challenging for them to comply with their obligations under the SFDR.

1.b. Undermining quality and comparability of universally material disclosure

A number of specific metrics – specifically Greenhouse Gas Emissions and core ‘own workforce’ data (for companies with over at least 250 employees) – are universally material and thus should not be subject to the entity’s own materiality assessment. These metrics constitute crucial data referring to the extent of the undertaking’s actual and potential impacts and risks.

While it may be argued that as the metrics are universally material, companies will disclose them following a materiality assessment, in practice it is clear this is not the case. Companies routinely fail to provide fundamental datapoints, regardless of their materiality. For example, in the 2022 cycle of the Workforce Disclosure Initiative:

- Almost a quarter (23 per cent) of companies did not provide the number of permanent employees in the company’s direct operations.
- A fifth (20 per cent) did not provide the percentage of employees covered by collective bargaining agreements for all locations in the direct operations and even more failed to provide this data on the basis of each significant operating location (41 per cent gave no information here).
- Over two fifths (41 per cent) of companies did not provide their gender pay gap.

Each of these topics are clearly material for organisations from all sectors and geographies, but significant gaps remain. It is therefore clear that many companies will not report material datapoints unless they are made mandatory.

More broadly, reporting practice on these metrics is uneven. Limited assurance of materiality assessment (as initially foreseen by the CSRD) is unlikely to yield improvements. On climate, research provides evidence that current disclosures of Scope 1 and Scope 2 GHG emissions, many of which are assured, are incomplete precisely due to the application of the materiality principle. With regard Scope 3 GHG emissions, the calculation methodology requires companies to identify and report only on the significant categories of emissions. Applying another materiality assessment, in addition to the required determination of significant categories, does not add value.

With regard to own workforce data, an additional concern is that ESRS allows for tacit omission of data points in the disclosures that are subject to materiality assessment. Given current practice, it is not reasonable to expect that limited assurance will facilitate critical evaluation of materiality assessment at such detailed level. Regardless, the omission of individual data points - whether due or not - will undermine the comparability of disclosures and will not yield clear benefits.

In reality, mandatory (always-to-be-reported) indicators on these universally material topics would actually streamline reporting for companies. Specifically, a core set of mandatory metrics would:

- Provide companies with clear common requirements, so they can focus efforts on producing high quality disclosures and developing policies and actions to address the impacts, dependencies and risks, rather than focusing unnecessarily on assessing the materiality of disclosure requirements;
- Prevent confusion on the purpose of the double-materiality assessment as a tool to identify and assess entity-specific material impacts, risks and opportunities, which remains a relatively new concept in reporting with a limited track record;
- Reduce the burden on auditors and ensure the quality of the audit of the sustainability information, which is a new exercise for the profession. Through mandatory indicators, auditors will be able to fulfil their responsibilities more effectively by focusing on the completeness and accuracy of information. This is particularly relevant given that the level of assurance will remain limited in the first years of reporting, the ESRS do not prescribe behaviour or actions for adequate assessments, such as affected stakeholder engagement, and there are currently very diverse practices.

We believe the proposed Delegated Act unnecessarily deviates from the technical advice provided by EFRAG and call on the Commission to at least make the following key metrics mandatory:

- Gross Scopes 1,2,3 and Total GHG emissions (E1-6 in ESRS E1)

- The following disclosure requirements for the undertakings with more than 250 employees:
 - Characteristics of employees (S1-6 in ESRS S1)
 - Characteristics of non-employee workers in the undertaking's own workforce (S1-7 in ESRS S1)
 - Collective bargaining coverage and social dialogue (S1-8 in ESRS S1)
 - Adequate wages (S1-10 in ESRS S1)
 - Social protection (S1-11 in ESRS S1)
 - Gender pay gap (S1-16 in ESRS S1)

The Commission should also retain the requirement from the EFRAG technical advice for **companies to disclose a brief explanation when they determine that an entire topic is not material for them as to why that topic is not considered material**. This requires, in practice, to revert to the approach taken by EFRAG's advice in ESRS 2 4.1 Disclosures on the materiality assessment process, Disclosure Requirement IRO-1 and 2. This will help to ensure at least minimum transparency on a company's conclusions on non-material topics.

2. The loopholes created by introducing several voluntary indicators

We do not support the Commission's approach to make certain disclosure requirements voluntary, including a large part of the biodiversity standard (E4) and information regarding conditions of non-employee works in own workforce (S1). Voluntary indicators will not create good practice, as the Commission hopes. In fact, they will cause the opposite.

Making disclosure requirements or data points voluntary on matters that are material for a significant share of companies – such as reporting on biodiversity impact metrics and working conditions of non-employee (i.e. primarily agency) workers - creates loopholes and increases greenwashing risks. This is in complete contradiction with the European policy objectives to tackle greenwashing through the recently published ESG ratings regulation proposal and the ongoing work of the European Supervisory Authorities to define greenwashing.

The effect of making disclosures voluntary in legally binding standards is that a company can decide not to disclose relevant information and be shielded from any responsibility if it determines that it has material impacts in an area covered by the voluntary disclosure requirements. This will also discourage investors from incorporating these issues in their own sustainability due diligence and principal adverse impact indicators, as they will not expect companies to provide them with reliable information.

Making disclosure requirements voluntary provides safe harbour for companies to fail to comply with legal requirements. It also rules out applying the requirement to provide entity-specific information on matters not (sufficiently) covered in the ESRS.

We therefore call on the European Commission to remove the voluntary nature of the following disclosure requirements and indicators, and to make their application subject to materiality assessment or standardised criteria in line with the EFRAG technical advice:

- ESRS 2
 - A brief explanation if the company concludes an entire topic (e.g. biodiversity, workers in the value chain, etc) is not material, taking into account that such explanations are not required at the level of sub-topics (ESRS 2).
- ESRS E4
 - Biodiversity transition plan, including reinstating the data points from the EFRAG's technical advice that were removed, taking into account that companies may comply with this disclosure requirement by merely indicating they don't have such a plan (E4-1 in ESRS E4)
 - A biodiversity transition plan sets out a framework for achieving, or at least moving closer to, the goal of having no negative biodiversity impact, making it essential for actively combatting systemic greenwashing and providing other stakeholders, like investors, with necessary information for integrating biodiversity into investment decision-making.
 - Biodiversity impact metrics (E4-5 in ESRS E4), taking into account that making the disclosure of all impact metrics voluntary, rather than subject to materiality, equals exemption from reporting such metrics under all circumstances, including if these metrics are readily available.
 - Disclosure of biodiversity impact metrics is essential for ensuring that companies are addressing biodiversity loss in a science-based, and standardised, way. Withholding this information allows companies to develop biased impact metrics and avoid criticism if the metrics are not science-based or aligned with guidance included in E4-5 in ESRS E4 (point 42).
- ESRS S1
 - Datapoints regarding non-employee (agency) workers, including breakdown of number of non-employees by category and most common type of work performed, collective bargaining coverage and social dialogue, the payment of adequate wages and social protection (S1-7, 8, 10 and 11 in ESRS S1). This is because:

- Agency workers are usually exposed to higher risks than employees and making information on their working conditions voluntary would effectively shield companies from any disclosure obligations, regardless of their circumstances, level or risk and materiality. It can also create incentives for companies to move workers out of direct employment, where there is greater scrutiny of their practices, and into more insecure risky work, where there would be less oversight;
 - Collective bargaining agreement coverage is a fundamental human right, enshrined in international and European law, and disclosures on this should reflect this. It is also a crucial enabling right and so underpins the achievement of other workforce rights and good working conditions, making it a vital datapoint to be disclosed;
 - Given the legalistic nature of many of the issues being covered by these indicators, making them voluntary also enables companies to actively hide some of the areas where they may be most clearly acting in contravention with legal norms and frameworks (and therefore where there are the biggest risks to both the workforce and the company as a result), preventing investors from understanding some of the most pressing sustainability issues – the entire point of the ESRS.
- Breakdown of information on employees for countries in which the undertaking has less than 10% of its total number of employees (alternatively, the Commission could define a different, more flexible rule that would ensure meaningfully disaggregated from geographically highly diversified companies as well disclosures on employee data in high-risk countries).

There is no indication that the disclosure requirements, as formulated by EFRAG, represent a significant reporting burden for companies.

For example, the requirement to disclose whether the company has a biodiversity transition plan could easily be complied with through a brief statement explaining that the company does not have (yet) such a plan in place. Additionally, some other requirements, including characteristics of non-employee workers, are subject to later phasing-in for companies with less than 750 employees, providing them extra time to assess their practices without creating these loopholes in the reporting framework.

Finally, we call on the Commission ensure coherence and consistency with other EU legislation, particularly data points covered by the SFDR, Benchmark Regulation and Pillar 3 requirements of the Banking legislation. This is particularly important with regard to the SFDR. **3. We therefore call on the Commission to reintroduce the 'always-to-be-reported' clause for the PAI indicators mandated by the SFDR, consistent with the CSRD provision that the sustainability standards should at least include the information needed to comply with SFDR**

reporting requirements. 4. We also call on the Commission to remove the additional two-year phasing-in of standards on biodiversity and social information for companies with less than 750 employees, which is in contrast with the CSRD text on minimum disclosure requirements

3. Specific comments on Annex I

Standard	Paragraph or AR number or appendix	Comment
<i>Example: ESRS E3</i>	<i>Para 23</i>	
<i>Example: ESRS S4</i>	<i>AR 15</i>	
<i>Example: ESRS 1</i>	<i>Appendix C</i>	

4. Specific comments on Annex II

Defined term	Comment