

German employers' position on the proposal for a directive on disclosure of non-financial and diversity information

BDA position on the European Commission's proposal for a directive amending directives 78/660/EEC and 83/348/EEC as regards disclosure of non-financial and diversity information COM(2013) 207 final

June 2013

Summary

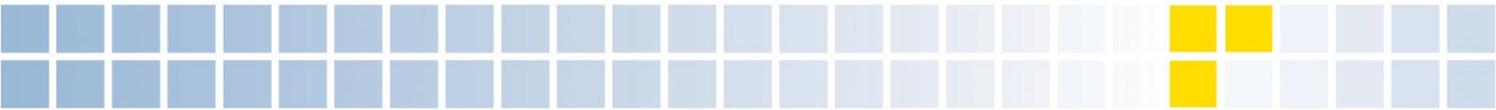
1. German companies actively embrace their responsibility vis-à-vis society and commit well beyond what is required by law. This has a long tradition. The numerous activities and initiatives of German companies at global, European and national level are a concrete expression of this awareness of responsibility. In so doing, companies meet society's expectations with respect to corporate social responsibility (CSR). They communicate their commitment to society in a way that is appropriate for the specific situation of the company in question – influenced by sector, international interlinkage, nature of shareholder groups, and requirements of the general public and stakeholders. There is no “one-size-fits-all” solution for either CSR measures or related reporting. For that reason, the introduction of new statutory publication obligations in the framework of the proposal for a directive on disclosure of non-financial and diversity information should be firmly rejected.

2. The German business community shares and welcomes the objective of further strengthening and widening CSR. The exercise of social responsibility by companies

and its integration in company strategy are right and important. But the statutory disclosure obligation proposed by the European Commission is not only inappropriate for meeting this objective, it is even counterproductive. Precisely because the company-specific situations relevant for CSR are highly diverse – society's expectations of a clothing firm are completely different from those of a car maker or bank – and call for a variety of CSR measures and approaches, companies need discretion to decide for themselves whether and how they want to communicate their commitment to society. Many companies set their own standards tailored to their specific situation, others apply existing standards. For this reason alone, the route of setting detailed statutory criteria makes no sense – and is also not necessary since companies, in their own interest, already communicate to the extent that they deem to be genuinely useful.

The EU-wide regulation that the Commission plans with this proposal would lead to massive interference in companies' freedom to organise themselves, since it would deprive them of the possibility to decide what forms of CSR and CSR reporting are appropriate in their particular case.

BDA is the leading organization dealing with social policy on behalf of the entire German private sector. It represents the interests of small, medium-sized and large companies in all sectors and all issues linked to social policy and collective negotiations, labour legislation, labour market policy and education. BDA works at national, European and international level for the interests of one million companies which employ 20 million workers, and which are networked with BDA through voluntary membership of employer federations. These employer federations are organized in 51 national sectoral organizations and 14 regional associations which are direct members of BDA.



3. With its proposal for a uniform CSR disclosure obligation, the European Commission misunderstands the very concept of CSR. CSR describes the societal commitment of companies which they demonstrate voluntarily in their sphere of influence worldwide, over and above statutory requirements, in the areas of environment, social policy and economy, with a view to a sustainable society. This definition of CSR was also determined jointly by all groups involved in the European Multi-stakeholder Forum on CSR as long ago as 2005. If the European Commission now wants to introduce a legislative measure, it not only disregards the fact that companies can deploy a wide range of communication possibilities, approaches and methods reflecting the diversity and complexity of CSR practices and which cannot be forced into such a framework, but also implicitly changes the definition of CSR that has applied hitherto.

4. The Commission's proposal comprises a tightening of German accounting law and would lead to considerably more red tape for companies. In this regard, the extent and scale of additional costs generated is underestimated. This makes a nonsense of the objective of dismantling bureaucracy for a competitive Europe. The wish to achieve a greater CSR commitment through more regulation of reporting obligations is out of place and counterproductive. Rather, the directive would lead to a competitive disadvantage for European companies on global markets, to the detriment of growth and jobs.

5. Practical initiatives to promote exchange of best practice for the development of CSR and reporting would be useful. This is demonstrated by the increasing number of companies that already publish annual sustainability or CSR reports voluntarily and adapted to their fields of activity.

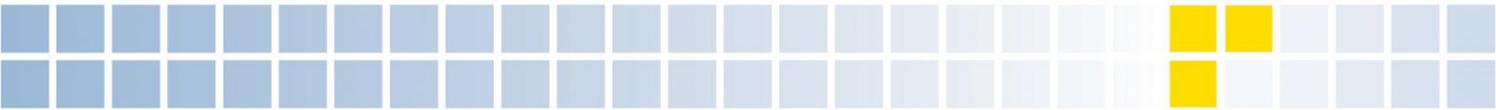
Introduction

This proposal for a directive gives concrete form to two of Single Market Commissioner Michel Barnier's projects which have now been under intensive and highly controversial discussion for three years now and is firmly rejected by business. The first is implementation of the announcement on binding disclosure of non-financial information made in the communication on the Single Market Act and the CSR communication "A renewed EU strategy 2011-2014 for corporate social responsibility". The second is implementation of the announcement that a greater degree of diversity in corporate decision-making bodies should be promoted, which was also contained in the action plan for company law and corporate governance. On this issue, there has already been a debate on the green paper on the European corporate governance framework.

Ahead of these official announcements, the European Commission carried out a public consultation on disclosure of non-financial information by companies in which BDA participated with a detailed position.

On 6 February 2013 the European Parliament adopted own-initiative reports on corporate social responsibility (CSR) under the leadership of MEPs Howitt (S&D, Great Britain) and Baldassarre (EPP, Italy). The invitation they issue to the Commission to make a "proposal" on disclosure of non-financial information by companies expressly also includes non-legislative proposals. In its report, the EP recognised that all solutions must be flexible, must not lead to an excessive administrative effort, and that the "think small first" principle should apply for small and medium-sized enterprises (SMEs). The European Parliament also expressly endorses the principle of the voluntary character of CSR by confirming that "charitable action" must never be made compulsory.

Against this background, it is difficult to understand that the European Commission still



insists on implementing its ideas via an amendment to accounting directives (fourth and seventh accounting directives, 78/660/EEC and 83/349/EEC).

Detailed comments

1. CSR and CSR reporting is very wide-spread and sophisticated in German firms – additional EU regulation is not necessary

There is a long tradition of German companies actively assuming their responsibility vis-à-vis society and committing well beyond what is required by law. Corporate responsibility is an established component of business culture in Germany.

Companies in Germany spend € 11.2 billion a year on their commitment to society (first commitment report 2012, German Federal Ministry for Family, Older People, Women and Youth). CSR involvement is very high among companies of all sizes: around 63% of small companies with up to 49 employees, 71% of companies with 50 to 499 employees and 96% of companies with more than 500 employees engage in CSR.

Furthermore, around 95% of SMEs apply CSR strategies (Institut für Mittelstandsforschung, IfM-Materialien no. 194, March 2010). It is self-evident that this is not always reported publicly – especially in the case of family-run or very small businesses. Customers, business partners, employees and above all the local community often already know about these activities anyway.

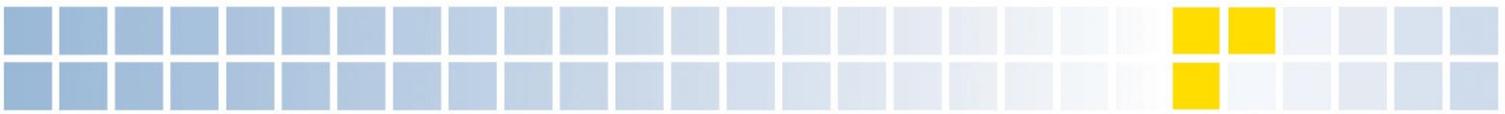
There has been rapid growth in voluntary CSR reporting by companies since the 1990s – as witnessed by many studies. Thus, 95% of the 250 largest companies worldwide report on their social and environmental conduct. In Europe alone, the number of companies which report in appli-

cation of the Global Reporting Initiative (GRI) guidelines increased from 270 in 2006 to 850 in 2011. A recent study has shown that as many as 55% of companies have produced a sustainability report in the last three years or plan to do so in the near future (KPMG/Economist Intelligence Unit, Corporate Sustainability. A progress Report. 2011).

In connection with the Commission proposal, it should be remembered that there are already some 10,000 corporate information obligations in Germany which generate costs of more than € 43 billion a year for companies; around € 24 billion of this can be traced to European directives (German Federal Government's report 2010 on application of the standard cost model and on the status of bureaucracy dismantling). Very many of these are information obligations of a non-financial nature and relate, for instance, to information obligations vis-à-vis social insurance entities, etc. Thus, companies already report extensively on non-financial information.

Moreover, it must be borne in mind that many different ways exist and are used by companies to communicate their CSR commitment internally and externally in a differentiated manner:

- SMEs – which account for 99% of all companies in the European Single Market – often do not need any formalised communication efforts to provide information on their CSR commitment. Rooted firmly in the local community, employees, customers and local stakeholders know business people personally and know about their commitment and conduct. Information is passed on informally in direct contacts.
- In B2B and also on the financial market, transparency is generated by answering targeted questions. Customer firms and SRI funds send their suppliers questionnaires on their CSR commitment and conduct. In this area, there are good



reasons why there is no general, recognised and standardised survey and evaluation procedure.

- In B2C, companies make a considerable effort through supplementary, voluntary information on the packaging, on the label or in direct communication with consumers to provide information about the product and the production process. Consumers and companies are in close contact with each other via Internet visits and emails or through hotlines. In this way, companies generate transparency, also in relation to their social and ecological conduct. In this regard, it is legitimate for companies to use transparency in the CSR sphere also for building up their profile and image, and competing for customers with their societal commitment.
- Companies organise workshops to come into contact with stakeholders, give account of themselves and discuss social as well as ecological themes.
- Companies report on topical developments, initiatives and projects via information to the press. In addition, ever more companies produce a CSR or sustainability report in which they report on their social and ecological conduct. Lastly, they present themselves with their experience on CSR websites (e.g. on the portal www.csrgermany.de) and in compendiums of good practice as well as via speeches. In the framework of the UN Global Compact, more than 7,000 companies already draw up progress reports on implementation of the ten principles of the UN Global Compact. In addition, there are numerous, sometimes sector-related initiatives such as the Wittenberg process put in place by social partners in the German chemical industry where companies and employees, employer federations and trade unions work together to deepen corporate social responsibility. The German chemical sec-

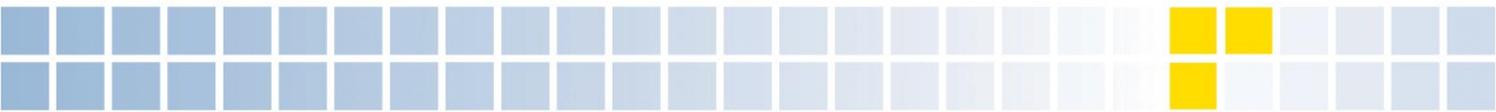
tor is also working with the new “Chemie hoch 3” to further embed sustainability as the model for action.

The nature and form of CSR communication are built around the individual situation of the company, the needs of legitimate interest groups, the needs of stakeholders (which can differ widely) and the public as well as a cost-benefit assessment. Companies must have flexibility to develop and use the approaches that are best for them. CSR reporting is in a state of constant development. Yet a voluntary approach to transparency does not mean arbitrariness. On the contrary: the great efforts made by companies continuously to improve transparency vis-à-vis employees, consumers, local community, investors and society show how far the issue of transparency and CSR has already moved into the core of business action. There is no one-size-fits-all solution in this area. Disclosure required by law would also restrict the possibility of responding to the individual needs and expectations of stakeholders.

German business regards CSR as a priority theme and sees CSR as a contribution by companies to realisation of the concept of sustainable development. In terms of policy-making, BDA has already been involved for a long time at national and international level with a view to providing companies with the support they need for their voluntary commitment vis-à-vis society within their own responsibility.

2. Voluntary character as a central feature of CSR not respected

The European Commission disregards the concept of CSR as the societal commitment of companies which they demonstrate voluntarily in their sphere of influence worldwide, over and above statutory requirements, in the areas of environment, social policy and economy, with a view to a sustainable socie-



ty. This CSR definition, based both on the element of voluntary involvement and on the fact that CSR supplements statutory requirements, is the outcome of long and intensive discussions, inter alia in the European and German Multi-stakeholder Forums. Back in 2005, the response to the issue from all groups participating in the Multi-stakeholder Forum was unambiguous: state authorities should not create any framework. Word for word, the final report of the European Multi-stakeholder Forum found that “convergence of CSR practices and tools is occurring on a market-led basis through voluntary bottom-up and multi-stakeholder approaches, and other drivers, and that this can achieve quality and a good balance between comparability, consistency and flexibility”. If this CSR definition based on voluntary involvement is over-ruled first by the European Commission in the 2011 CSR communication (“A renewed EU strategy 2011-2014 for corporate social responsibility”) and now by the proposal for a directive, this damages the trust that is necessary for the motivation and promotion of voluntary actions.

With its call for introduction of a legislative measure, the European Commission disregards the fact that companies can deploy a wide range of communication possibilities, approaches and methods reflecting the diversity and complexity of CSR practices and which cannot be forced into such a framework. Thanks to this dynamic, CSR has prevailed in virtually all larger companies in Germany. However, statutory disclosure requirements restrict the diversity of CSR and run counter to the underlying idea of a broad spectrum of societal commitment.

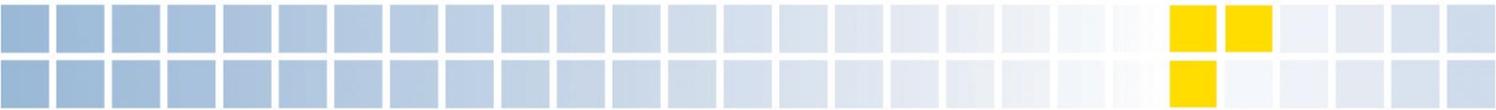
3. Proposal would generate additional red tape, to the detriment of competitiveness

New statutory reporting requirements lead to a considerable bureaucratic effort and place sometimes disproportionate burdens on mid-

sized companies in particular. The European Commission ignores the fact that additional burdens for companies are the wrong route.

The European Commission justifies the proposal for a directive by stating that there is a positive correlation between a company's non-financial and financial performance. Wider transparency leads to greater business success. But even the Commission concedes that a causal link between wider transparency and greater business success cannot be proved, rather it talks about a correlation. This can also mean that successful businesses typically exhibit a higher commitment. The reference to a correlation in itself is not appropriate to justify the Commission's proposal for a directive. A recent study from Princeton (“Financial constraints on corporate goodness”, Hong/Kubik/Scheinkman, October 2012) demonstrates this: the study demolishes the validity of the widely held thesis “doing well by doing good”. Rather, it comes to the clear conclusion that companies which have sufficient financial resources are more often active in the field of CSR. In other words: “they do good when they do well”.

The European Commission estimates the additional costs for non-financial disclosure at between € 600 and € 4,300 annually per company. Regarding diversity, the annual costs given per company are € 600 to € 1,000. It is impossible to substantiate these estimates. According to a recent study, the total costs for disclosure of non-financial information, to which data collection costs must be added, are between € 155,000 and € 604,000 annually per company (Centre for Strategy and Evaluation Services, 2011, pages 26 and 32). Other estimates also work on the basis of considerably higher costs than those anticipated by the European Commission. The French government estimates that reporting obligations in France will lead to costs of between € 33,000 and € 357,000 per company. Even this is many



times more than the European Commission's assumptions.

The use of resources for putting in place and maintaining a reporting structure for companies with 500 and more employees, as proposed by the Commission, would be considerable for mid-sized companies in particular. This relates not only to preparation of the report but also the investment in suitable systems for data collection and trained personnel. In addition, it is difficult to keep up with the further requirements which come into force every year.

The proposal ultimately leads to more bureaucracy for companies, and underestimates the extent and scale of additional costs generated. It makes a nonsense of the objective of dismantling bureaucracy for a competitive Europe. If adopted, the directive would also lead to a competitive disadvantage for European companies on global markets, to the detriment of growth and jobs.

4. Legally binding CSR reporting reduces companies' discretion and jeopardises commitment to CSR

The objective of further strengthening and widening CSR will be negatively affected by a statutory disclosure requirement. Where information about corporate social responsibility is concerned, companies must have the freedom and the possibility to respond to the information needs of individual interest groups in a targeted way, using the most suitable communication possibilities to do so. Against this background, the German Multi-stakeholder Forum on CSR – in which NGOs, trade unions, academia and business are represented – had also proposed that no regulation should be introduced.

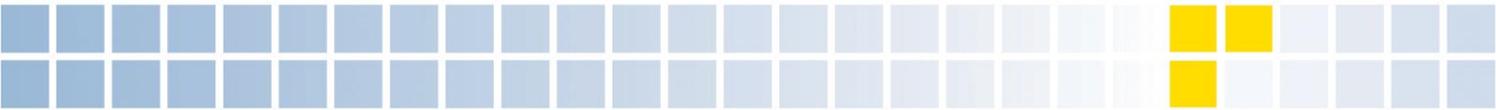
The disclosure requirement proposed by the Commission and the associated additional costs and bureaucratic burdens would jeop-

ardise voluntary commitment by companies itself and hence run counter to efforts towards greater corporate social responsibility. The directive would put CSR on track to be degraded to an unavoidable chore instead of promoting and rewarding responsible business. CSR would be perceived as regulation and a burden, and not as a task for everyday practice.

Companies need discretion to decide for themselves whether and how they want to communicate on CSR. It is clear that companies will also set their own standards or apply existing standards (GRI, UN GP, etc.). But many companies have chosen other and highly diverse routes for communicating their CSR activities.

The proposal for a directive goes in the wrong direction. It sets out to create a statutory obligation. This disregards the fact that companies can deploy a wide range of communication possibilities, approaches and methods reflecting the diversity and complexity of CSR practices and which cannot be forced into such a framework. For instance, an SME faces different challenges with respect to transparency than a multinational group. Moreover, an IT firm has completely different issues from, say, an energy conglomerate. A binding framework acts as a straitjacket for reporting on non-financial information. In the last analysis, it would not do justice to any company, but would only restrict the freedom of companies of all sizes and in all sectors to organise themselves and thereby impede creative competition for the optimal solution.

The European Commission's representation in Germany believes (EU-Nachrichten no. 7 of 25 April 2013, page 2) that Germany produces the second most social reports of excellent quality (after Great Britain) even though this is not prompted by any statutory requirement in Germany. This is an assessment we can share. It is therefore difficult to



see why there should be a new statutory duty of disclosure.

5. Internationally recognised principles for CSR reporting make additional European regulation superfluous

It is clarified in the draft directive that companies can draw support from national, EU-based or international frameworks when preparing information. Explicitly mentioned are the Eco-Management and Audit Scheme (EMAS), the United Nations' Global Compact, the UN guiding principles on business and human rights, the OECD guidelines for multinational enterprises, ISO 26000, the tripartite ILO declaration of principles concerning multinational enterprises and social policy as well as the Global Reporting Initiative. On its own, this listing in the Commission proposal shows that there are numerous recognised standards which are applied by a large number of companies and which make statutory regulation at European level superfluous.

6. Unjustified interference in companies' freedom to organise themselves

According to the proposal for a directive, the companies affected by non-financial disclosure must present their company policy, results, possible risks and risk management. If a company has not introduced a policy on one of these points, it must explain why not.

This is particularly serious, since companies are expected to list in their business reports risk areas which can contain highly sensitive internal information. The Commission thus interferes massively in companies' freedom to organise themselves in a sphere where state regulation should have no place. A disclosure obligation becomes pressure for action. Yet the very essence of corporate social

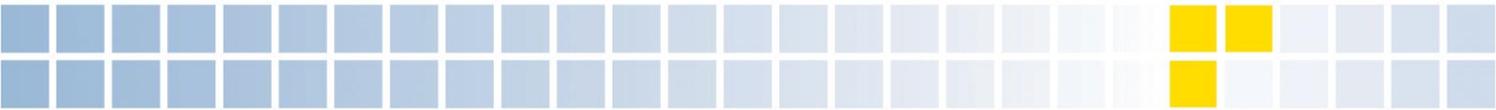
responsibility is the voluntary character of a company's commitment.

7. Diversity disclosure requirement justified with threadbare arguments

The European Commission's arguments justifying its proposed diversity reporting obligation are not well-founded. It claims that the reporting obligation can increase diversity in companies' decision-making bodies through greater transparency. This is intended to bring about effective control of the business performance and robust company management. It is supposed to puncture so-called "group think" which prevents members of management bodies from being open to innovative ideas. However, the European Commission can advance no proofs that this thesis is correct. A question mark is placed over this justification in the European Commission's own impact assessment, since the causality claimed by the Commission between a management body characterised by diversity and successful management cannot be proved.

8. Mid-sized companies and family-owned firms are unnecessarily burdened

The additional reporting obligations contained in the proposal would confront mid-sized companies in particular with sometimes disproportionate requirements in Germany – even with a blanket exemption for companies with fewer than 500 employees. Numerous mid-sized companies in Germany would be directly affected. Furthermore, the indirect pressure on companies with fewer than 500 employees also to make the same disclosures would increase markedly. These companies are typically in the supply chain and would then also have to deploy enormous resources on preparing the corresponding reports in order not to suffer a competitive disadvantage and to keep im-



portant customers. The data requests along the supply chain – responding to which already requires a great effort – would increase further.

9. Divergent scopes and requirements in the proposal for a directive are not coherent

The obligation to report non-financial information would apply to companies which employ more than 500 employees on average and have a balance sheet total of more than € 20 million or a net turnover of more than € 40 million. However, the diversity obligation would apply only to listed companies. Expressly excluded are companies falling within the scope of article 27 of directive 78/660/EEC which on their balance sheet dates do not exceed the limits of two of the three following criteria, namely an average number of employees during the financial year of 250, a balance sheet total of € 17.5 million and a net turnover of € 35 million. It is difficult to see any justification for these differences in the scope.

A further example of incoherence is the fact why, in the framework of article 46a of directive 78/660/EEC, the statement should contain a “clear and reasoned explanation” where a company has no diversity policy, whereas a plain “explanation” is sufficient under article 46. No justification is given to explain why different requirements are being introduced. Companies are confronted with exaggerated and incoherent explanation obligations, a situation which should be rejected.

10. Exchange of experience and incentives better than legal compulsion

In the view of German business, practice-oriented promotion of experience exchange in particular is better than regulation. This is

demonstrated by the increasing number of companies that already publish annual sustainability or CSR reports voluntarily and adapted to their fields of activity.

Moreover, the many international standards which are currently being elaborated further with ever greater ambition (e.g. work on GRI 4.0) show that the market has developed its own dynamic within a short period and without statutory intervention. This should be acknowledged. Completely to the contrary, blanket regulation can be inimical to the current market dynamic, since rules imposed by law hold back the motivation to develop the standards in question further.

The European Commission should therefore withdraw this proposal for a directive and promote corporate social responsibility and transparent conduct on the ground and constructively while maintaining principle of voluntary involvement.

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