THE SAFE HARBOUR PRINCIPLE OF MANDATORY CORPORATE SUSTAINABILITY REPORTING IN THE EUROPEAN UNION

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Abstract: In the European Union, public-interest entities of a certain size and number of employees are required to issue a sustainability disclosure under Directive 2014/95/EU. The legislation is currently under changes since in April 2021 a proposal for a new directive was issued. Both the current directive and the proposal include a safe harbour principle, which allows information to be exceptionally omitted from the disclosures if the information relates to impending developments or matters in the course of negotiation and the disclosure of the information would be seriously prejudicial to the commercial position of the company. The principle has been transposed into the national legislation of nearly all member states.

The principle has, over the years, received some criticism, especially regarding its rather imprecise phrasing which leaves the interpretation of it partly open. Despite the criticism, the principle has not, so far, been addressed by the EU nor has it been studied comprehensively. The purpose of the thesis is to thus contribute to the research on mandatory corporate sustainability reporting in the EU. The purpose behind the principle will first be addressed, and the findings show that the purpose behind the principle is not clear. Moving on to the interpretation of the principle on EU level, unclarities can again be noted due to the imprecise phrasing of some parts the principle. Due to the unclarities on EU level, and since the phrasing of the principle gave room for manoeuvre for the transposition of the principle, member state observations will be conducted, too. The member state observations show that many member states have, in fact, deviated from the phrasing of the principle on EU level. Considering the partly unclear interpretation and the often deviating transposition of the principle, the effect that the principle has on reaching the purposes behind the overall legislation on corporate sustainability reporting will be addressed. The findings show that the principle can have an undermining effect on the legislation as a whole, and its current state can cause problems not only to the companies reporting, but also to the users of such reporting and the EU itself. Lastly, suggestions on the future of the principle are made.

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ABBREVIATIONS

CESR	The Committee of European Securities Regulators
CSRD	Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting COM (2021) 189 final
EU	The European Union
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1
NFRD	Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1
NFRD proposal	European Commission, 'Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 84/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups' COM (2013) 207 final
PIEs	Public-interest entities
SDGs	Sustainable Development Goals
SFDR	Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1
TFEU	Consolidated version of Treaty on the Functioning of The European Union [2012] OJ C 326/47
UN	The United Nations

1 INTRODUCTION

1.1 Background and motivation

The planet faces enormous economic, social and environmental challenges.[1] Due to these challenges, the need for sustainable development has long been recognized.[2] Sustainable development was first defined and called upon in the Brundtland Report in 1987 as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[3] Sustainable development thus considers the needs of both current and future generations, taking into account the boundaries of the planet on which the welfare of both current and future generations depends on.[4] Many actions have been taken in order to achieve sustainable development, one of the most notable ones perhaps being the Sustainable Development Goals (hereinafter "SDGs") by the United Nations (hereinafter "UN"). The UN recognize that while the SDGs have been agreed on by the governments of UN member states, the success of the SGDs depends on other actors, too, including those representing business.[5] The need for contribution from companies has been noted in literature, too.[6] The crucial role of companies in the search for sustainable development comes as no surprise since companies can have a significant effect on their surroundings through their decisions and actions. Through direct and indirect impacts, the decisions and actions taken by a company can have effects on e.g., economy, natural environment, and social cohesion.[7]

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[1] Global Reporting Initiative, United Nations Global Compact and WBCSD, 'SDG Compass – the guide for business action on the SDGs' (2015) <https://sdgcompass.org/wp-content/uploads/2015/12/019104_SDG_Compass_Guide_2015.pdf> accessed 28 January 2022.

[2] Justice Mensah, 'Sustainable Development: Meaning, History, Principles, Pillars and Implications for Human Action: Literature Review' (2019) 5(1) Cogent Social Sciences <https://www.tandfonline.com/doi/full/10.1080/23311886.2019.1653531> accessed 28 January 2022.

[3] World Commission on Environment and Development, 'Our Common Future' (1987) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 28 January 2022.

[4] David Griggs, 'Sustainable development goals for people and planet' (2013) 495(7441) Nature 305.

[5] Global Reporting Initiative, United Nations Global Compact and WBCSD (n 1).

[6] Beate Sjåfjell and Jukka Mähönen, 'Upgrading the Nordic Corporate Governance Model for Sustainable Companies' (2014) 11(2) European Company Law 58.

[7] Anthony Hopwood, Jeffrey Unerman and Jessica Fries, *Accounting for sustainability – Practical Insights* (Taylor & Francis Group 2010) 4.

While the need for a contribution from companies has been widely recognized in moving towards sustainable development, typically, the role of companies has not been seen as one to promote sustainability. Instead, the theory of shareholder primacy has been dominating the theories of corporate purpose.[8] The shareholder primacy model considers the purpose of a company to be maximizing shareholder wealth,[9] which has been considered as a barrier to sustainability considerations in business.[10] Sustainable decisions can, however, sometimes be aligned with shareholder primacy. For example, it has been argued that it is in fact shareholder primacy that results in aggregate social welfare.[11] Also, some alterations of the theory of shareholder primacy, which better consider the long-term horizon, stakeholders and sustainability, have become more popular over the past decades.[12] In addition, it is possible for sustainable business decisions to simply have a positive impact on bottom line and maximizing shareholder profit through e.g., increased sales due to

[8] Henry Hansmann and Reinier H Kraakman, 'The End of History for Corporate Law' (2000) 89(2) Georgetown Law Journal 439, 468; Lynn Stout, 'The Economic Nature of the Corporation' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law* (1st edn, Oxford University Press 2017) 350. More on the origins behind the dominance of shareholder primacy, see e.g., William Lazonick and Mary O'Sullivan, 'Maximizing shareholder value: a new ideology for corporate governance' (2000) 29(1) Economy and Society 13, 14-17; Lynn Stout, 'On the rise of shareholder primacy, signs of its fall, and the return of managerialism' (2013) 36(2) Seattle University Law Review 1169, 1174-1177.

[9] Stout, 'The Economic Nature of the Corporation' (n 8) 350.

[10] Sjåfjell and Mähönen, 'Upgrading the Nordic Corporate Governance Model for Sustainable Companies' (n 6) 59; Beate Sjåfjell and others, 'Shareholder primacy: the main barrier to sustainable companies' in Benjamin J Richardson and Beate Sjåfjell (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015); Judd F Sneirson, 'The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism' in Beate Sjåfjell and Christopher M Bruner (eds) *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019). Also, tackling the question of corporate purpose from a sustainability point of view through mere combat between shareholder and stakeholder primacy has been criticized, too, see Beate Sjåfjell and Jukka Mähönen, 'Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy' (2022) University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2022-43 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4039565> accessed 13 March 2022.

[11] Hansmann and Kraakman (n 8). This stance has, however, been criticized. See e.g., Sjåfjell and others, 'Shareholder primacy: the main barrier to sustainable companies' (n 10).

[12] For example, the enlightened shareholder value theory suggests that corporations should pursue shareholder primacy with a long-term orientation that seeks sustainable growth and following profits taking into account the full range of relevant stakeholder considerations. For the definition, see David Millon, 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law' (2010) 2010(11) Washington & Lee Legal Studies Paper. The theory of enlightened shareholder value gained publicity with Jensen presenting it as the proper relation between value maximization and stakeholder theory. See Michael C Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2002) 12(2) Business Ethics Quarterly 235.

sustainability-conscious customers redirecting their business to companies that conduct their business in a sustainable way or lesser use of commodities such as water or electricity.

While some business decisions and actions can naturally be aligned with sustainability considerations, it is clear that such alignment does not always appear. In order to tackle the conflict of the predominant corporate purpose clashing with sustainable development, many solutions have been presented. While some have suggested altering the corporate purpose to better address sustainability issues,[13] softer approaches exist, too. One of these approaches has been corporate sustainability reporting.[14]

Corporate sustainability reporting entails disclosing information on the way a company operates and manages social and environmental challenges.[15] Typically, the process of reporting starts with determining material topics based on the most significant impacts and ends with publicly reporting information on the determined topics.[16] Such reporting has

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[13] Sjåfjell and Mähönen, 'Upgrading the Nordic Corporate Governance Model for Sustainable Companies' (n 6) 59. The authors suggest that the corporate purpose should be redefined as sustainable value within the planetary boundaries. See also Sjåfjell and others, 'Shareholder primacy: the main barrier to sustainable companies' (n 10).

[14] Many different terms refer to reporting on sustainability matters, including sustainability reporting, non-financial reporting, climate reporting and integrated reporting. For the differences between the four, see Josef Baumüller and Karina Sopp, 'Double materiality and the shift from non-financial to European sustainability reporting: review, outlook and implications' (2021) 23(1) Journal of Applied Accounting Research 8. While the plurality of terms is recognized, the term 'corporate sustainability reporting' will be categorically used due to the predominant setting of EU legislation and due to the conscious shift that the EU has made from the term 'disclosure of non-financial information' to 'corporate sustainability reporting'. In the original directive concerning such reporting requirements, the term 'non-financial information' is used, while the new directive proposal presents the term of 'corporate sustainability reporting'. In recital 7 of the latter, it has been noted that the term 'non-financial' in considered inaccurate by many stakeholders due to it implying that the matters that the legislation touches upon do not have financial relevance. Instead, it is noted that the information is regarded to have an increasing financial relevance, and that many are already using the term 'sustainability reporting'. It should be noted that the European Parliament already in 2013 warned that the term 'non-financial' should not mask the financial consequences that social, environmental and human rights aspects have on business. See European Parliament, 'Resolution of 6 February 2013 on corporate social responsibility: promoting society's interests and a route to sustainable and inclusive recovery' (2012/2097(INI)) OJ C 24; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups OJ L 330/1; European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting' COM (2021) 189 final.

[15] European Commission, 'Corporate Sustainability Reporting' <https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en> accessed 2 March 2022.

[16] Global Reporting Initiative, 'GRI 1: Foundation 2021' <https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/> accessed 5 November 2021.

remained predominantly voluntary around the world, but along with a few countries around the world,[17] the European Union has for some years now had mandatory corporate sustainability reporting requirements in place. The earliest corporate sustainability reporting requirements were introduced back in 2003,[18] but a significant step forward was taken in 2014, when more comprehensive mandatory corporate sustainability reporting requirements were introduced through directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups (hereinafter "NFRD") and first applied to the financial year starting on or after 1 January 2017.[19] Many problems in the NFRD have, however, been pointed out over the years.[20] As a result, in April 2021, the Commission issued a proposal for a new directive (hereinafter "CSRD proposal") with the purpose of addressing the deficiencies and shortcomings found in the NFRD and improving corporate sustainability reporting.[21]

Both the NFRD and the CSRD proposal include some exceptions to disclosure requirements otherwise set in the directives. One of the exceptions is the so-called safe harbour principle,

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[17] For example, South Africa, China and Malaysia require some form of mandatory corporate sustainability reporting. In addition, both Denmark and the United Kingdom introduced mandatory corporate sustainability reporting requirements before significant EU-wide requirements.

[18] Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings [2003] OJ L 178/16.

[19] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1 (Non-Financial Reporting Directive).

[20] The shortcomings of the NFRD have not only been pointed out by different scholars and organizations representing interest groups but by the EU, too. As for the former, see e.g., European Coalition for Corporate Justice, 'Assessment of the EU Directive on the disclosure of non-financial information by certain large companies' (2014) <https://media.business-humanrights.org/media/documents/files/media/documents/eccj-assessment-eu-non-financial-reporting-may-2104.pdf> accessed 2 February 2022; Deirdre Ahern, 'Turning up the Heat: EU Sustainability Goals and the Role of the Reporting under the Non-Financial Reporting Directive' (2016) 13 ECFR 599; European Coalition for Corporate Justice, 'A Human Rights Review of the EU Non-Financial Reporting Directive' (2019) <http://corporatejustice.org/wp-content/uploads/2021/04/eccj_ccc_nfrd_report_2019_final.pdf> accessed 2 March 2022; Simona Fiandrino and others, 'The multi-faceted dimensions for the disclosure quality of non-financial information in revising directive 2014/95/EU' (2022) 23(1) Journal of Applied Accounting Research 274. As for the latter, see e.g., European Parliament, 'Resolution of 29 May 2018 on sustainable finance' (2018/2007(INI)); Council, 'Conclusions of 5 December 2019 on the deepening of the capital markets union'; European Parliament, 'Resolution of 17 December 2020 on sustainable corporate governance' (2020/2137(INI).

[21] Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting' COM (2021) 189 final (Corporate Sustainability Reporting Proposal).

which allows information relating to impending developments or matters in the course of negotiation to be omitted from the disclosures if the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking. While transposing the principle was voluntary, most member states chose to transpose the principle to their national legislation.[22] Ever since its first introduction in the NFRD, the principle has remained unchanged. The European Commission has since published two non-binding guidelines in order to give guidance on compliance with the NFRD, but neither have addressed the principle.[23] The CSRD proposal does not, at least as of now, alter the principle or give further guidance on it, either.

Considering the apparent status quo of the principle, why should it now be observed, then? First, alongside many other aspects of the NFRD, the principle has faced criticism, most notably over the unclear and insufficiently detailed nature of the principle, which leads to the very practical problem of how the principle should be interpreted.[24] Not much research or literature seems to have contributed to the interpretation of the principle, either. Second, since the principle is an exception to the requirements otherwise presented in the NFRD and the upcoming CSRD, a question on the reasoning behind the principle arises, especially when considering the fact that transposing the principle was not mandatory to member states and several member states have chosen not to transpose it. Third, the unclear nature of the principle combined with some aspects of the overall legislation,

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[22] CSR Europe, GRI and Accountancy Europe, 'Member State Implementation of Directive 2014/95/EU – A comprehensive overview of how Member States are implementing the EU Directive on Non-Financial and Diversity Information' (2017) <https://www.accountancyeurope.eu/wp-content/uploads/1711-NFRpublication-GRI-CSR-Europe.pdf> accessed 31 January 2022.

[23] European Commission, 'Guidelines on non-financial reporting (methodology for reporting non-financial information)' (Communication) COM (2017) 4234 final; European Commission, 'Guidelines on non-financial reporting: Supplement on reporting climate-related information' (Communication) COM (2019) 4490 final. In the former, the safe harbour principle is, however, briefly mentioned, but no guidance can be derived from the mention.

[24] The criticism concerning the principle will be covered in more detail later. Criticism on the principle has been presented in e.g., Daniel Gergely Szabó and Karsten Engsig Sørensen, 'New EU Directive on the Disclosure of Non-Financial Information (CSR)' (2015) 3 ECFR 307, 336; International Association of Oil & Gas Producers, 'IOGP position on the "European Commission proposal on the update of the Corporate Sustainability Reporting Directive"' (2021) <https://iogpeurope.org/wp-content/uploads/2021/09/CSRD-response-paper.pdf> accessed 4 February 2022; American Chamber of Commerce to the European Union, 'Our Position – EU Corporate Sustainability Reporting Directive (CSRD)' (2021) <https://www.amchameu.eu/system/files/position_papers/corporate_sustainability_reporting_directive.pdf> accessed 9 February 2022; Timo Kaisanlahti, 'ESG-perusteinen yritysinformaatio – Tuoreen komissioehdotuksen mukaiset velvoitteet ja vastuu raportointivirheestä' (2021) 119(7-8) Lakimies 1385.

including e.g., the currently lacking assurance requirements and penalties resulting non-compliance with the legislation, can possibly lead to problems. Finally, since criticism towards the principle has been pointed out, why has the principle remained unchanged over the years while many other problematic aspects of the legislation have been addressed? The question is of utmost current interest, since both the final version of the CSRD and the delegated acts that will supplement the CSRD are to see the light of day in 2022.

1.2 Research questions

As has been presented above, mandatory corporate sustainability reporting is an extremely current topic in the EU. The shortcomings of the current legislation combined with the EU now aiming at correcting these shortcomings and improving the legislation, research on the topic is of the most pressing interest. Due to the limitations of a thesis, the topic of research has been narrowed down to one particular aspect of the mandatory corporate sustainability reporting legislation in the EU – the safe harbour principle. As has been presented above, the choice of the topic stems especially from the principle having been found unclear or otherwise lacking by many different actors, from the relatively sparse literature on the principle and from the current unchanged status quo of the principle despite other significant changes in mandatory corporate sustainability reporting legislation in the EU. Next, three research topics concerning the safe harbour principle are presented.

The first research topic consists of *what reasons lie behind the safe harbour principle.* The reasons behind the principle can aid in the following analyses on how the principle should be interpreted and on whether the principle in fact fulfils its purposes. Attention will be mostly paid to the presented reasoning behind the principle on EU level, but a member state example of reasoning presented alongside the transposition of the principle will also be observed. In addition, the choice to leave the transposition of the principle voluntary to member states will be analysed.

After having analysed the background of the principle, the next question to be covered is *how the safe harbour principle should be interpreted*. The phrasing of the principle in the NFRD leaves much room for the interpretation of the principle. In addition, the EU has not given any guidelines on how the principle should be interpreted despite having provided guidance on many other aspects of the NFRD. Even in the CSRD proposal, which has the

purpose of correcting many of the problems that have arisen from the NFRD, the principle is left untouched. Due to the voluntary and unclear nature of the principle, the principle can vary from one member state to another and thus, an interpretation will be made on EU level. An EU level interpretation is supported also by it setting the outer limits to the interpretation due to the principle being an exception to the requirements otherwise presented in the NFRD and the CSRD proposal and by setting a starting point to the interpretation of the principle in member states especially if no significant alterations have been made in the transposition of the principle. Despite the emphasis being on EU level, some selected member states will be observed and used as examples of deviating transposition of the principle or of further guidance on the interpretation of the principle.

After analysing the reasoning behind the principle and the interpretation of it, the questions of *does the principle fulfil its purpose, how does it fit into the context of mandatory corporate sustainability reporting in the EU* and *how should the principle be improved* can be examined. As for the question of does the principle fulfil its purpose, the results derived earlier on the background of the principle will be deployed. The question of how the principle fits into the context of mandatory corporate sustainability reporting in the EU will be approached through both the overall purpose that the legislation aims at achieving and more individual aspects of the legislation. Lastly, a look will be taken into whether there is room for improvement for the principle and if so, how should it be improved.

1.3 Method

In order to answer the above-presented research questions, multiple research methods must be employed. The method of legal dogmatics is used to assess the research question of how the safe harbour principle should be interpreted. Under such doctrinal approach, the question is approached from within the legal system, taking a systematic stance and only observing the law of the present.[25] Thus, the question is approached purely from the point of view of how the principle must be, within the current legal system, interpreted.

[25] Jan M Smits, 'What is legal doctrine? On the aims and methods of legal-dogmatic research' (2015) Maastricht European Private Law Institute Working Paper No 2016/06 <https://dx.doi.org/10.2139/ssrn.2644088> accessed 1 March 2022.

Considering the setting of the principle, two levels for interpretation can be noted – an EU level and a member state level. The emphasis will be on deriving an interpretation on EU level, while some examples from selected member states will be pointed out. Focus on an EU level interpretation can be motivated by various theoretical and practical aspects. First, the doctrine of indirect effect requires that national laws, especially those that are used to transpose EU legislation into national legislation such as the NFRD, must be interpreted consistently and in accordance with EU legislation.[26] Thus, an EU level interpretation can be considered as the starting point of interpretation in member states. Also, since the principle presents an exception to overall legislation, the EU level interpretation does set the outer limits to the interpretation of the principle in member states, meaning that while member states can transpose a narrower interpretation of the principle, a wider one is not acceptable. As a more practical note, since the principle has not been transposed to the national legislation of each member state, and its content varies between member states that have transposed it, observing and analysing the principle on the level of each member state is not possible within the limits of this study.

As for the member state level observation, it should be noted that the purpose of it is not, due to its limitations, to conduct research under the method of comparative law and compare the similarities and differences of the principle in the legal systems of selected member states,[27] instead, the purpose is to use the selected member states to look for interesting and possibly deviating remarks on the transposition of the principle in order to enrich the notion of the principle derived on EU level. Considering this, the observation will not

[26] Raimo Siltala, *Oikeustieteen tieteenteoria* (Suomalainen Lakimiesyhdistys 2003) 867. The doctrine of indirect effect has been established by the European Court of Justice in Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR 1891.

[27] The demanding requirements of the method of comparative law, which include e.g., being culturally fluent in the legal languages of the observed legal systems and understanding foreign norms and legal texts are recognized and consequently, no such goal is pursued. Also, considering the length limitation at hand and the emphasis on other methods, the method of comparative law cannot be truly pursued. This does, however, leave the door open for further interesting research on the topic. More on the requirements of the method of comparative law, see e.g., Jacco Bomhoff and Maurice Adams, *Practice and Theory in Comparative Law* (Cambridge University Press 2012); Maurice Adams, Jaakko Husa and Marieke Oderkerk, *Comparative Law Methodology* (Edward Elgar Pub 2017); Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019); Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).

comprehensively cover all possible aspects of the principle in the selected member states, instead, focus will be on the aspects that complement the EU level analysis.

After taking the doctrinal approach, which has been considered as a necessary prerequisite for any other type of analysis of law,[28] the questions of does the principle fulfil its purpose, i.e., the effectiveness of the principle from a teleological point of view, how does it fit into the context of mandatory corporate sustainability reporting in the EU and how should the principle be improved will be approached through law and economics, which studies both the effect of law on economics and the economic efficiency of law,[29] and more specifically through theory of regulation, which is a part of law and economics.[30] Theory of regulation concentrates on assessing the appropriateness of legislation.[31] Both *de lege lata* and *de lege ferenda* approaches will be taken. With the former, the aim is to assess the effectiveness of the safe harbour principle as of now, and the objective of the latter approach is to give a recommendation on the principle should be improved.

1.4 Structure

First, a look will be taken into the general concept of sustainability reporting. In chapter 2.1, the purposes behind corporate sustainability reporting will be observed. The topic will be covered both on universal level and on EU level, with the latter observing what are the reasons that the EU has named to have motivated the legislation. After having covered the purpose of corporate sustainability reporting, the contents of the legislation in EU will be briefly covered in chapter 2.2. Due to the current state of having a proposal of a directive which remains subject to change, both the NFRD and the CSRD proposal will be addressed.

In chapter 3, the focus will be shifted to the core of the research questions, i.e., the safe harbour principle. First, in chapter 3.1, the principle will be analysed on EU level. In chapter 3.2, the transposition of the principle in some selected member states will be observed. Some notions from market abuse regulation will be derived in chapter 3.3. Chapter 3.4 will

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[28] Smits (n 25).

[29] Ari Hirvonen, 'Mitkä metodit? Opas oikeustieteen metodologiaan' (2011) <https://www2.helsinki.fi/sites/default/files/atoms/files/hirvonen_mitka_metodit.pdf> accessed 2 February 2022, 29.

[30] Kalle Määttä, *Oikeustaloustieteen perusteet* (2nd edn, Edita Publishing Oy 2016) 31.

[31] Määttä, *Oikeustaloustieteen perusteet* (n 30) 31.

gather all the results presented in previous chapters together and try to give an answer to how the principle should be interpreted – or whether no conclusion can be made.

After analysing how the principle should currently be interpreted, the research will then be steered towards how well the principle fits into the objectives of the directive and whether there are any problems that might arise. In chapter 4.1, the interpretation of the principle, derived from the results of chapter 3, will be analysed in the wider context of the directive. In chapter 4.2, some problems relating to the interpretation of the principle will be discussed, such as the liability related to decisions made based on the principle and the current lack of assurance. Lastly, in chapter 4.3, a recommendation will be given on how the principle should be developed in order for it to fulfil the objectives of the principle without undermining other objectives of the legislation as a whole or causing problems that as of now can arise. Finally, in chapter 5, the topics discussed will briefly be summarized. A brief suggestion for future research will be presented.

2 CORPORATE SUSTAINABILITY REPORTING

2.1 The purpose behind corporate sustainability reporting

The object of research, the safe harbour principle, creates an exception to the mandatory corporate sustainability reporting requirements otherwise set in the EU. In order for the effect that the principle has on achieving the purposes behind corporate sustainability reporting to be analysed, next, the public interests behind corporate sustainability reporting will be observed.[32]

Corporate sustainability reporting has a significant role on the efficient functioning of capital markets and consequently on economic welfare. Economic welfare requires allocative efficiency, where resources are put to their most valuable use. One of the main functions of capital markets is allocating resources,[33] and consequently capital markets serve the economic welfare as a whole. However, efficient allocation depends on two assumptions: adequate information on different options available and rational behaviour.[34] The lack of adequate information can lead to allocative inefficiency and even market failure.[35] Earlier, adequate information has consisted of financial information.[36] In the recent years, the allocators of resources on capital markets, investors, have, however, shown a significantly increasing interest in taking sustainability considerations into account in their investment

[32] Typically, there is tension between market system in which individuals can pursue their own welfare goals with only minor restraints, and collectivist system in which certain behaviour that would not occur without intervention is encouraged. The objective of the latter is to fix deficiencies in the market system to meet public interest goals. Since mandatory corporate sustainability reporting has the purpose of resulting in something that might not otherwise happen without intervention, it represents collectivist system. Such legislation can be considered to contribute to the public interest goals of e.g., well-functioning capital markets and moving towards sustainable development. On the role of public interest goals in regulation, see Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (1st edn, Hart Publishing 1994).

[33] Solomon Tadesse, 'The Allocation and Monitoring Role of Capital Markets: Theory and International Evidence' (2004) 39(4) Journal of Financial and Quantitative Analysis 701.

[34] Ogus (n 32) 38.

[35] The effect of information asymmetry on market has been studied by Akerlof in his Nobel-winning study concerning the so-called lemons problem. The study implies that information asymmetry between a buyer and a seller can cause a market collapse. See George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) The Quarterly Journal of Economics 488. See also Ogus (n 32) 29.

[36] More on the role of traditional corporate disclosures on capital markets, see Paul M Healy and Krishna Palepu, 'Information Asymmetry, Corporate Disclosure and the Capital Markets: A Review of the Empirical Disclosure Literature' (2001) 31(1) Journal of Accounting & Economics 405.

decisions.[37] Also, sustainability risks are becoming more and more relevant to companies in the form of e.g., negative publicity and sanctions resulting from non-compliance with sustainability-related legislation.[38] Thus, it can be argued that in addition to financial information, adequate sustainability information is also needed for investors to have all the necessary and relevant information when making investment decisions, which in turn enhances allocative efficiency and economic welfare.

While adequate sustainability is important for investors when making investment decisions, it is also important to protect investors that have already invested their resources.[39] Lack of sustainability-related information raises the question of an agency problem, namely of that between the shareholders of the company and the management.[40] In the core of any agency problem lies the question of how to minimize the costs of monitoring that the agent is acting in the principals' best interest. From the shareholders perspective, corporate sustainability reporting is a cost-efficient manner of managing the agent problem that

[37] In 2020, 51 percent more institutional investors and 45 percent more fund selectors engaged in active ownership of ESG investments compared to the previous years. In 2021, a record amount of assets poured into ESG funds compared to earlier years. In addition, ESG funds accounted for ten percent of worldwide fund assets for the first time. See Nasdaq, 'Factors Behind the Growing Popularity of ESG Investing' (*nasdaq.*com, 24 April 2021) <https://www.nasdaq.com/articles/factors-behind-the-growing-popularity-of-esg-investing-2021-04-24> accessed 17 February 2022; Ross Kerber and Simon Jessop, 'Analysis: How 2021 became the year of ESG investing' (*reuters.com*, 23 December 2021) <https://www.reuters.com/markets/us/how-2021-became-year-esg-investing-2021-12-23/> accessed 17 February 2022.

[38] Negative publicity can have multiple different types of adverse effects, e.g., an effect on consumer behaviour and an effect on stock price. For more on the former, see e.g., Rohini Ahluwalia, Robert E Burnkrant, and H Rao Unnava, 'Consumer Response to Negative Publicity: The Moderating Role of Commitment' (2000) 37(2) Journal of Marketing Research 203, and for the latter, see e.g., Joseph E Engelberg and Christopher A Parsons, 'The Causal Impact of Media in Financial Markets' (2011) 66(1) The Journal of Finance 67.

[39] In fact, the most usually stated public interest goal of mandatory financial disclosure is investor protection. Ogus (n 32) 139.

[40] One of the earlier notions of the separation between ownership and control was by Berle and Gardiner in 1932. One of the most famous studies to date on the agency problem is, however, one by Jensen and Meckling, in which the agency relationship was defined as a contract under which the principals engage the agent to perform some service on their behalf and some authority over decision making is delegated to the principle. The setting results in a possible problem since the interests of the agent and the principal might differ and it is difficult or impossible for the principle to be sure that the agent is acting in the principal's best interest. Typically, the agency problem is tackled by trying to achieve the most cost-efficient way of monitoring the agent. See Adolf A Berle and C Means Gardiner, *The Modern Corporation and Private Property* (1932); Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial behavior, agency costs and ownership structure' (1976) 3(4) Journal of Financial Economics 305. See also Eugene F Fama, 'Agency problems and the theory of the firm' (1980) 88(2) Journal of Political Economy 288.

relates to sustainability performance. Should shareholders not be satisfied with the sustainability performance of a company, they can exercise their right to exit from the investment.[41]

Corporate sustainability reporting also plays a role in enhancing sustainable development in various ways. As has been noted above, more and more investors are interested in directing their investments towards more sustainable options. Corporate sustainability reporting enables considering sustainability aspects in investment decisions for investors. This, in turn, can lead to more companies publishing corporate sustainability reporting and paying attention to sustainability performance in order to attract investments. Investor requirements have, in fact, been considered as one of the key factors behind the surge in voluntary corporate sustainability reporting.[42] Corporate sustainability reporting can also enhance sustainable development by having a direct effect on the actions and decisions taken by a company. For example, corporate sustainability reporting enables the identification and interlinking of sustainability costs and benefits to companies' strategies and actions.[43]

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[41] Armour, Hansmann and Kraakman have classified legal strategies that are used to protect principals into five categories. The category of entry and exit entails regulating the terms on which principals affiliate with agents. In order to make such decisions, investors need an adequate supply of information. Thus, requiring adequate information has been regarded as a legal strategy used to tackle the agency problem. John Armour, Henry Hansmann and Reinier Kraakman, 'Agency Problems, Legal Strategies and Enforcement' (2009) Harvard Law School Discussion Paper No 644 <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_644.pdf> accessed 3 March 2022.

[42] United Nations Global Compact, 'Guide to Corporate Sustainability' (2015) <https://d306pr3pise04h.cloudfront.net/docs/publications%2FUN_Global_Compact_Guide_to_Corporate_Sustainability.pdf> accessed 28 January 2022, 39-41. Since the guide presents investor requirements as one of the driving forces behind increased corporate sustainability reporting, it is rather interesting to note that according to a survey presented in the Guide, providing information for investors was regarded as a benefit arising from sustainability reporting by less than half of companies taking part in the survey, placing it at the very bottom of the list of benefits. According to the survey, which was aimed at companies that are committed to issuing an annual 'Communication on Progress', companies saw helping integrate corporate responsibility into business operations, improving reputation and demonstrating active participation in the UN Global Compact as the three most important benefits of corporate sustainability reporting. On investor requirements on corporate sustainability reporting, see also Jeffrey R Cohen, Lori Holder-Webb and Valentina L Zamora, 'Nonfinancial Information Preferences of Professional Investors' (2015) 27(2) Behavioral research in accounting 127; Amir Amel-Zadeh and George Serafeim, 'Why and How Investors Use ESG Information: Evidence from a Global Survey' (2018) 74(3) The Financial Analysts Journal 87; Hans B Christensen, 'Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review' (2021) 25(3) Review of Accounting Studies 1176, 1177.

[43] Hopwood, Unerman and Fries (n 7) 2.

To sum up, some of the public interests lying behind corporate sustainability reporting that have been addressed above are the efficient allocation of resources on capital markets and the ensuing economic welfare, protecting investors as principals in an agency relationship and enhancing sustainable development. While corporate sustainability reporting has been naturally rising even without a legal requirement to do so, as has been noted above, these public interests cannot be best pursued by leaving the choice of disclosing to the discretion of companies. While it is not the intent to comprehensively compare mandatory and voluntary corporate sustainability reporting, nor could such comparison be adequately addressed within the limitations of this study, the reasons behind turning to mandatory requirements will briefly be examined in order to better grasp the purpose behind the setting of this thesis, mandatory corporate sustainability reporting in the EU. Next, mandatory corporate sustainability reporting will be addressed through theoretical considerations and recent research.

The question over mandatory and voluntary corporate sustainability reporting has resulted in a lot of debate over the recent years.[44] For many of those favouring voluntary reporting, a key argument has been the increasing number of corporate sustainability reporting all over the world, even in areas without mandatory reporting requirements.[45] If corporate sustainability reporting is naturally increasing, why would mandatory corporate sustainability reporting be necessary if more and more companies are reporting even without any requirements to do so? Recent research seems to prove that while the number of reporting

[44] Fabio Fortuna and others, 'Mandatory Disclosure of Non-financial Information: A Structured Literature Review' in Mara Del Baldo and others (eds), *Accounting, Accountability and Society – Trends and Perspectives in Reporting, Management and Governance for Sustainability* (Springer 2020).

[45] KPMG, 'The Time Has Come – the KPMG Survey of Sustainability Reporting 2020' (2020) <https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/11/the-time-has-come.pdf> accessed 2 February 2022. Out of the 250 largest companies in the world measured by revenue, 96 percent report on sustainability and out of the 100 largest companies in each of the 52 studied countries, 80 percent report on sustainability. Both groups represent steady growth, and especially in the latter group tremendous growth has been noted in the past decade.

might voluntary be increasing, there are many benefits both quantity and quality[46] wise arising from mandatory requirements.

While information may sometimes be disclosed voluntarily, as has been the trend with corporate sustainability reporting, there is a risk of providers possibly offering misleading or false information or only providing positive information while negative information is left out.[47] In the context of corporate sustainability reporting, such risk has been seen to materialize in the form of greenwashing.[48] Misleading disclosures can be combatted with legislation regarding the content and verification of disclosures. Also, considering the public interest goal of enhancing sustainable development, most research on the topic suggests that companies tend to align their activities to reporting requirements, meaning that under mandatory corporate sustainability reporting requirements attention is also paid to the sustainability of one's operations.[49] Some more specific benefits of mandatory corporate sustainability reporting are an increase in the level of ESG disclosures, and an increase in the likelihood of voluntary independent verification of the disclosures and the voluntary adoption of ESG reporting frameworks.[50] Mandatory corporate sustainability reporting is also not as interventionist as other possible measures used to achieve the same public

[46] The Global Reporting Initiative has identified eight key principles can be used to assess the quality of corporate sustainability reporting. The most up-to-date principles, effective as of 1 January 2023, consist of the following. Accurate reporting allows the organization's impacts to be assessed. Balanced reporting, on the other hand, presents a fair representation of the organization's both positive and negative impacts in an unbiased way. Clarity refers to presenting information in an accessible and understandable way. Comparability relates to the possibility to assess the change in the organization's impacts over time and relative to other organizations. Completeness entails providing sufficient information. Timeliness refers to reporting on regular schedule. Verifiability requires that the quality of the reporting can be examined. Finally, the quality criterion of sustainability context requires that an organization reports information about its impacts in the wider context of sustainable developments. Global Reporting Initiative (n 16) accessed 5 November 2021.

[47] D Neu, H Warsame and K Pedwell, 'Managing Public Impressions: Environmental Disclosures in Annual Reports' (1998) 23(3) Accounting, Organizations and Society 265; Ogus (n 32) 40-41.

[48] Federica Balluchi, Arianna Lazzini and Riccardo Torelli, 'CSR and Greenwashing: A Matter of Perception in the Search of Legitimacy' in Mara Del Balbo and others (eds), *Accounting, Accountability and Society – Trends and Perspectives in Reporting, Management and Governance for Sustainability* (Springer 2020). The authors find the concept of greenwashing to be 'vast, complex and interdisciplinary', which leads to a difficulty in grasping a clear concept of greenwashing.

[49] Christensen (n 42).

[50] Ioannis Ioannou and George Serafeim, 'The Consequences of Mandatory Corporate Sustainability Reporting' in Abagail McWilliams and other (eds), *The Oxford Handbook of Corporate Social Responsibility: Psychological and Organizational Perspectives* (Oxford University Press 2019).

interest goals.[51] Finally, the mandatory reporting requirements in the EU have been found to have improved both the quantity and quality of corporate sustainability reporting.[52]

However, some downsides exist, too, when considering mandatory corporate sustainability reporting. First, mandatory requirements can lead to shifting operations to countries or companies outside the scope of mandatory reporting, which undermines the purpose of enhancing sustainable development.[53] Also, while most studies have found a positive correlation between mandatory corporate sustainability reporting and enhanced sustainability performance, there are studies that have, on the other hand, found little or no connection between the two.[54] Finally, considering the varying nature of sustainability-related matters, it has been noted that a one-size-fits-all approach does not suit corporate sustainability reporting, leading to difficulties in drafting efficient legislation.[55]

All in all, there are advantages and disadvantages to both mandatory and voluntary corporate sustainability reporting.[56] Since mandatory reporting requirements do not seem to automatically top voluntary reporting on all aspects, it is important to observe the interests that the European Union has tried to achieve with the legislation. Next, attention will be shifted towards the mandatory corporate sustainability reporting in the European Union in order to observe the reasoning behind it. In addition, the contents of both NFRD and CSRD proposal will briefly be covered.

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[51] Regulation can be divided into social regulation and economic regulation, out of which mandatory corporate sustainability reporting represents social regulation. There are several forms of social regulation, ranging from less to more interventionist measures: information regulation, private regulation, economic instruments, command-and control, and prior approval. Information regulation, which is further divided into mandatory disclosure and control of false or misleading information, is less interventionist than many other measures, which is why it is favoured by those who argue that the state's role should be minimal. Ogus (n 32).

[52] Chiara Mio and others, 'Carrot or stick? An empirical analysis of the different implementation strategies of the EU' (2021) 28(6) Corporate Social Responsibility and Environmental Management 1591.

[53] Christensen (n 42).

[54] Christensen (n 42).

[55] Some aspects that can render the legislative process difficult are the diversity of users, diversity of topics, diversity in measurements, voluntary nature of sustainability activities, the long-term horizon and central role of externalities. Christensen (n 42).

[56] For a comprehensive analysis on the advantages and disadvantages of mandatory and voluntary corporate sustainability reporting, see Brenda Scholtz and others, 'Voluntary and Mandatory Company Sustainability Reporting: A Comparison of Approaches' (2014) <http://www.enviroinfo.eu/sites/default/files/pdfs/vol8514/0001.pdf> accessed 1 March 2022.

2.2 Corporate sustainability reporting in the European Union

2.2.1 Mandatory corporate sustainability reporting in the European Union

The importance of corporate sustainability reporting has long been recognized in the EU. Some of the earliest notions towards such reporting date back to as early as 2001.[57] It wasn't until the 2010s, however, that the progress towards requirements on corporate sustainability reporting in the EU truly began. In 2011, the Commission noted that merely a bit over half of member states had national policy frameworks in place to promote corporate sustainability reporting, and the need for harmonizing the transparency of the social and environmental information between different member states was stressed.[58] The same need was recognized again in another communication during the same year.[59] In 2013, the European Parliament stressed the importance of information on sustainability, e.g., social and environmental factors, in two different resolutions with a view of identifying sustainability risks in order to increase investor and consumer trust.[60]

As a result, in 2013, the European Commission issued a proposal of a directive concerning the disclosure of non-financial and diversity information by certain large companies and

[57] European Commission, 'Green Paper: Promoting a European Framework for Corporate Social Responsibility' COM (2001) 366; European Commission, 'The recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies' (Recommendation) COM (2001) 1495.

[58] European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final.

[59] European Commission, 'Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"' (Communication) COM (2011) 206 final. In the communication, the significant European asset-management industry which could be used to promote the development of businesses which pursue objectives of general interest or relating to social, ethical or environmental development beyond the quest for financial gain was also noted.

[60] European Parliament, 'Resolution of 6 February 2013 on Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery' (n 14); European Parliament, 'Resolution of 6 February 2013 on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth' (2012/2098(INI)) OJ C 24.

groups (hereinafter "NFRD proposal")[61] and in 2014, the NFRD was issued.[62] The presented motivation behind the proposal included helping companies better manage non-financial risks and opportunities, aiding civil society organizations and local communities in assessing the impact and risks related to the operations of a company, and allowing investors to better consider sustainability aspects and long-term performance. The varying quality of non-financial disclosures was noted, also, and the need to harmonize the legislation between member states was stressed for investors and other stakeholders to better understand and compare the performance of different companies.[63] In the NFRD, the needs to establish a minimum legal requirement and to enhance consistency and comparability of disclosures were stressed.[64]

While the NFRD improved both the quality and the quantity of non-financial reporting in the EU,[65] it also faced wide criticism on its shortcomings, too. Even before the NFRD was applied for the first time, criticism arose regarding its effectiveness in achieving transparency and sustainability gains.[66] The problems of the NFRD were soon widely recognized by

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[61] European Commission, 'Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 84/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups' COM (2013) 207 final (Proposal for Non-Financial Reporting Directive).

[62] As was briefly mentioned before, some corporate sustainability reporting requirements had, however, already existed in the EU due to the requirement set in the Directive 2003/51/EC (n 18) to disclose employee and environmental information in the management report. However, the EU itself has noted that the approach had not been effective enough, see Proposal for Non-Financial Reporting Directive (n 61). The NFRD amended the Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (Accounting Directive).

[63] Explanatory memorandum of Proposal for Non-Financial Reporting Directive (n 61).

[64] Recitals 5 and 6 of Non-Financial Reporting Directive (n 19).

[65] Mio and others (n 52). The comparison was conducted between financial year 2016, the last financial year before the requirement to disclose information under the NFRD, and 2017, the first financial year under the requirement to disclose information under the NFRD. In order to assess whether the reporting quality had improved, the 14 themes on which to report under recital 7 of the NFRD were observed. The more of the themes were covered in the disclosures, the better the quality of the disclosures was regarded.

[66] Ahern (n 20).

the European Union, too, and improving the NFRD was consequently called upon by many actors within the EU.[67]

While criticism around the NFRD arose, the EU decided to take significant steps towards a more sustainable future. In the European Green Deal, which was published in late 2019, strategy concerning the targets of making Europe the first climate-neutral continent by 2050 and decoupling economic growth from resource use were set.[68] Other objectives included e.g., common participation in the transition towards a sustainable economic system and protecting the citizens from environment-related risks and impacts. The European Green Deal set out to achieve the targets through a set of legislation. The European Green Deal, as many others, too, recognized the problems in the NFRD and set out to review the directive.[69] Other legislative measures of the European Green Deal included the EU Taxonomy that would classify environmentally sustainable activities, and the Sustainable Finance Disclosure Regulation (hereinafter "SFDR") that sets requirements to manufactures of financial products and financial advisers towards end-investors.[70] All three legislations, the NFRD, the EU Taxonomy and the SFRD, are strongly interlinked. The requirements set in the EU Taxonomy are reported alongside the NFRD disclosures, and the NFRD disclosures are needed for the manufactures of financial products and financial advisers to meet the requirement set in the SFRD to provide information to end-investors.

As a result of both the perceived problems concerning the NFRD and the ambitious goals set in the European Green Deal, in April 2021, the Commission issued the CSRD proposal.[71] In the proposal, the need to address the shortcomings of the NFRD is noted. Aside from the aim to fix the shortcomings, other objectives behind the proposal are presented, too. For

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[67] European Parliament, 'Resolution of 29 May 2018 on Sustainable Finance' (n 20); Council, 'Conclusions of 5 December 2019 on the Deepening of the Capital Markets Union' (n 20); European Parliament, 'Resolution of 17 December 2020 on Sustainable Corporate Governance' (n 20).

[68] European Commission, 'The European Green Deal' COM (2019) 640 final.

[69] See also European Commission, 'Adjusted Commission Work Programme 2020' COM (2020) 440 final.

[70] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 [2020] OJ L 198/13 (Taxonomy); Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1 (Sustainable Finance Disclosure Regulation).

[71] Corporate Sustainability Reporting Proposal (n 21).

example, the systemic risk that sustainability-related risks might create is noted and tackled by trying to ensure adequate publicly available information about the risks that sustainability issues present for companies and the impacts of companies on sustainability-related topics.[72] The proposal also aims at improving sustainability reporting at the least possible cost,[73] and notes the growing awareness on sustainability issues, growing market for sustainability-related investment products and the need for compatibility with other legislation.[74]

While many objectives behind the EU legislation concerning corporate sustainability reporting align with those presented at more general level, e.g., providing information for investors and enhancing the functioning of capital markets by reducing the systemic risk arising from sustainability-related risks, some are more related to the nature of the EU, such as harmonizing legislation between member states in order to enhance the single market area and enhancing the compatibility of the legislation with other EU legislation to better achieve the wider sustainability goals set in the EU. Thus, when moving onto the research questions and observing the effect of the safe harbour principle on achieving the objectives behind the legislation, one must not only consider those mentioned within the NFRD and the CSRD proposal, but also those stated in the European Green Deal. Later on, the effect that the safe harbour principle has will be compared against all these objectives and aims. First, however, the contents of both the NFRD and CSRD proposal will be briefly addressed in order to set the context for the principle.

2.2.2 Non-Financial Reporting Directive

In order to analyse the safe harbour principle, it is necessary to grasp the context of it, i.e., the essence of the NFRD and the upcoming CSRD. While the CSRD is set to shortly replace

[72] Corporate Sustainability Reporting Proposal (n 21) 3-4. Systemic risk has been defined as 'the risk of threats to financial stability that impair the functioning of a large part of the financial system with significant adverse effects on the broader economy'. For the definition, see Xavier Freixas and others, *Systemic Risk, Crises, and Macroprudential Regulation* (MIT Press 2015).

[73] It is noted that while the novel reporting requirements will initially lead to additional costs to those reporting, in longer term costs should in fact be reduced due to the currently increasing and uncoordinated sustainability information demands and due to the CSRD coordinating those demands. European Commission, 'EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing finance towards the European Green Deal (Communication)' COM (2021) 188 final.

[74] Corporate Sustainability Reporting Proposal (n 21) 3.

the NFRD, the final content of the CSRD remains yet to be seen, which is why the NFRD must be covered. However, it is likely that the CSRD will, for the most part, follow the CSRD proposal, which is why addressing it is deemed necessary despite the prevailing uncertainty over the final phrasing of the directive.

To grasp the essential matters of the legislation, four questions can be presented: which companies are within the scope of the legislation, what requirements does the legislation bring to those within its scope, what exceptions are there to such requirements, and how is compliance with the requirements monitored.[75] Next, each question will briefly be addressed, starting from the NFRD and then moving to the CSRD proposal. It should be noted that the legislation will be presented as in the directives. Some of the legislation was optional for member states, and some set the minimum requirement that could be exceeded by the member states. Thus, differences can exist between member states.

Under Article 19a(1) of the Accounting Directive, which was inserted into the Accounting Directive by the NFRD, within the scope of the legislation are 'large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year'. While this sets the minimum requirement of which companies must adhere to the NFRD, member states can introduce legislation that brings more companies to the scope of the NFRD. In addition, the definition of a public-interest entity might differ from one member state to another. While the Accounting Directive does define certain companies, namely listed companies, credit institutions and insurance undertakings, as public-interest entities, it also allows the definition to extend to any entities designated by member states as such. Thus, the scope of the NFRD as transposed to each member state's national legislation might differ from one member state to another due to either expansion of the scope when transposing the NFRD but also due to extended criteria on which undertakings are considered public-interest entities.

The companies within the scope of the NFRD as defined above must disclose 'information to the extent necessary for an understanding of the undertaking's developments,

[75] While both the NFRD and the CSRD proposal use the term "undertakings" in the articles, the term "companies" will be categorically used except for when quoting the articles. The choice of term does not necessarily go against the terminology of the EU, since the term "companies" is used e.g., in the explanatory memorandum of the CSRD proposal despite the use of the term "undertakings" in the articles.

performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters'.[76] Thus, the requirements of the NFRD on the content of the disclosures represent a double materiality requirement, meaning that those reporting under the NFRD must report both on how sustainability issues affect the undertaking itself, but also on what kind of an impact the undertaking has on its surroundings.[77] The disclosure must include:

> (a) a brief description of the group's business model;
> (b) a description of the policies pursued by the group in relation to those matters, including due diligence processes implemented;
> (c) the outcome of those policies;
> (d) the principal risks related to those matters linked to the group's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks;
> (e) non-financial key performance indicators relevant to the particular business.[78]

The starting point of the NFRD on how the required disclosures are to be published is including the disclosures in the management report.[79] However, member states may allow publishing the disclosures in a separate report if the report is either published together with the management report or is made publicly available within a reasonable period of time, a maximum of six months after the balance sheet date, on the company's website, and is referred to in the management report.[80] Most member states have allowed the

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[76] Article 19a(1) of Accounting Directive (n 62).

[77] While the term 'double materiality' was not specifically mentioned in the NFRD, the European Commission has confirmed the approach of the NFRD to be that of double materiality. European Commission, 'Questions and Answers: Corporate Sustainability Reporting Directive proposal' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_1806> accessed 9 March 2022. Many have, however, found the double materiality approach of the NFRD to be imprecise. See e.g., Claire Jeffery and Filip Gregor, 'Comparing the implementation of the EU Non-Financial Reporting Directive in the UK, Germany, France and Italy' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3083368> accessed 9 March 2022; Fiandrino and others (n 20).

[78] Article 19a(1) of Accounting Directive (n 62).

[79] The other contents of a management report are also regulated on EU level, see Article 19 of Accounting Directive (n 62).

[80] Article 19a(4) of Accounting Directive (n 62).

option to present the disclosures in a separate report.[81] Additionally, as for the format of the disclosures, companies are allowed to present the required disclosures relying on either national, Union-based or international frameworks.[82] Should undertakings decide to use such frameworks, the used framework must be specified.[83]

There are three exceptions to the above-presented requirements. The first is the safe harbour principle, which is the topic of the research questions presented earlier and thus forms the core of the thesis. Under the principle, information that should otherwise be disclosed can be omitted if disclosing it would be seriously prejudicial to the commercial position of the company.[84] Transposing the principle was not mandatory, and while most member chose to transpose it, some member states have not allowed the option to exercise the principle.[85] A comprehensive analysis on the principle will be conducted later on.

The second exception relates to groups of companies and in particular to subsidiaries, which are exempted from the requirements of the NFRD if the subsidiary and its subsidiaries are included in the consolidated management report or a separate report of another company, i.e., a parent company.[86] The last exception, a comply-or-explain approach, is of a more general nature. Under the approach, should a company wish to deviate from the requirements in any other way aside from the two presented above, it can do so if a clear and reasoned explanation for not doing so is provided. [87]

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[81] CSR Europe, GRI and Accountancy Europe (n 22).

[82] Article 19a(4) of Accounting Directive (n 62).

[83] The NFRD gives examples on frameworks that can be relied on, e.g., Eco-Management and Audit Scheme, United Nations Global Compact or Global Reporting Initiative. The list is non-exhaustive as 'other recognized international frameworks' are mentioned, too. See Non-Financial Reporting Directive (n 19) recital 9.

[84] Article 19a(1) of Accounting Directive (n 62).

[85] CSR Europe, GRI and Accountancy Europe (n 22).

[86] Article 19a(3) of Accounting Directive (n 62). Consolidated management reports are further regulated in article 29 of Accounting Directive (n 62).

[87] Article 19a(1) of Accounting Directive (n 62). The comply-or-explain principle is widely used in corporate governance codes, too, but some criticism has been aimed at it. See e.g., Andrew Keay, 'Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight' (2014) 34(1) Legal Studies 279.

Compliance with the above-listed requirements is monitored in two ways. First, statutory auditors or audit firms must check whether the required disclosures are provided either in the management report or in a separate report.[88] While assurance on the existence of the disclosures sets the minimum requirement on assurance in all member states, member states were allowed to require that the contents of the disclosures are verified by an independent assurance service provider.[89] Aside from assurance requirements, member states are encouraged to ensure that adequate and effective means exist to enhance compliance.[90] Since such means are member state specific, they will not be discussed further.

2.2.3 Corporate Sustainability Reporting Proposal

As has been addressed earlier, many aspects of the NFRD have been found problematic over the years. Some of the largest issues have been that the NFRD does not cover all companies that users of sustainability information would want such information from, and as for those companies that do report under the NFRD, the reported information might not always fulfil the needs of the users.[91] In addition to these two overall issues, other more detailed problematic aspects that have been brought up include e.g., lack of reliability and comparability, difficulty in finding the reporting, lack of availability in machine-readable digital format, and no adequate reporting on intangibles considering the major role they play in advanced economies.[92]

The CSRD proposal, which was published in April 2021, has not reached its final phrasing yet. While changes can still occur before the final phrasing, and while the proposal, as of now, does not suggest any changes or amendments to the safe harbour principle, the changes it suggests to the overall nature of the legislation are drastic and entering into force soon and thus have a major effect on the context of the safe harbour principle and

[88] Article 19a(5) of Accounting Directive (n 62).

[89] Article 19a(6) of Accounting Directive (n 62). While most member states merely transposed the minimum requirement of verification of provision of disclosures, some member states opted to transpose content assurance requirements, too. See CSR Europe, GRI and Accountancy Europe (n 22).

[90] Recital 10 of Accounting Directive (n 62).

[91] Corporate Sustainability Reporting Proposal (n 21) 2.

[92] Corporate Sustainability Reporting Proposal (n 21) 2.

the research questions.[93] All in all, while there is a risk that some of what will be presented next may never see the light of day, it would be inadequate to merely cover the current and soon-expiring legislation and thus, a look into the contents of the CSRD proposal, especially suggestions deviating from the NFRD, must be taken.

The contents of the NFRD were earlier classified into four categories that are best represented by the following questions: which companies are within the scope of the legislation, what requirements does the legislation bring to those within its scope, what exceptions are there to such requirements, and how is compliance with the requirements monitored. Under the CSRD proposal, answers to all of the questions are to change.

One of the most significant changes is the widening scope of the directive. The CSRD proposal suggests that all large companies and all companies listed on EU regulated markets, with the exception of micro-companies, would be required to report under the requirements of the CSRD.[94] As a result, approximately 49 000 companies would be in the scope of the reporting requirements, whereas so far merely 11 600 companies have been within the scope under the NFRD.[95] Also, a possibility for non-listed small and medium size companies (hereinafter "SMEs")[96] to voluntary follow the sustainability reporting standards for

[93] Under the current schedule, the requirements arising from the CSRD proposal are to be applied for the first time to financial year starting on or after 1 January 2023, with some exceptions concerning e.g., small and medium size companies. Articles 1(3) and 5 of Corporate Sustainability Reporting Proposal (n 21). The timeline has been regarded rather challenging and even the question of whether the timeline is realistic has been raised. See more European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting - Summary of 15 November 2021 of stakeholder feedback on the CSRD proposal' (2021) 9-10.

[94] Article 1(3) of Corporate Sustainability Reporting Proposal (n 21).

[95] It should be noted, however, that most of the 11 600 current companies that are required to report under the NFRD must do so due to national transposition of the NFRD. In the CSRD proposal, it is estimated that merely 2 000 companies would be in the scope of the NFRD without deviating transposition of the NFRD into the member states' national legislation. Thus, the difference between the scope of the NFRD and of the CSRD proposal as defined in the directives is even more drastic than the current numbers suggest.

[96] SMEs are defined in Article 3 of Accounting Directive (n 62), under which SMEs consist of undertakings that are not micro-undertakings under the article and do not on their balance sheet dates exceed the limits of at least two of the following three criteria: balance sheet total of EUR 20 000 000, net turnover of 40 000 000 and average number of 250 employees during the financial year. Micro-undertakings, on the other hand, are undertakings that do not on their balance sheet dates exceed the limits of at least two of the following three criteria: a balance sheet total of EUR 350 000, a net turnover of EUR 700 000 and average number of 10 employees during the financial year.

listed SMEs has been presented, which would result in even more companies reporting under the CSRD.[97]

While the scope of the directive drastically broadens, some leniency is given to SMEs. While others within the scope must comply with the requirements as of the financial year starting on or after 1 January 2023, listed SMEs must only do so 3 years later than others within the scope.[98] This would, as of now, entail that the requirements of the CSRD would apply to listed SMEs as of the financial year starting on or after 1 January 2026. In addition, the standards that listed SMEs must follow will differ from those of other companies under the scope.[99]

As the scope of the legislation significantly changes, so do the reporting requirements. What companies should disclose is specified in much more detail compared to the NFRD. Some of the new requirements include e.g., disclosure about strategy, targets, the role of the board and management, principal adverse impacts connected to the company and its value chain and how the company has identified what to report.[100] Also, the principle behind the sustainability reporting, the double materiality principle, is clarified so that there is no uncertainty over the reporting having to meet both the criteria of enabling understanding of how sustainability matters affect the company and how the company impacts the people and the environment.[101] It is also specified that companies under the scope of the CSRD should report both qualitative and quantitative information and both forward-looking and retrospective information, and as for the forward-looking information, the

[97] Recital 18 of Corporate Sustainability Reporting Proposal (n 21). The reasoning behind the suggestion lies in SMEs typically being a part to supply chains of companies that do have the obligation to report under sustainability reporting standards and who might request such information from non-listed SMEs. However, a concern has been raised that voluntary reporting standards might in reality turn into obligatory ones with larger companies requiring reporting from their supply chain, setting considerable administrative burden and costs to smaller companies. See e.g., Suomen Yrittäjät, 'Lausunto U29/2021vp komission ehdotuksesta yritysten kestävyysraportoinnista (KOM(2021) 189 lopullinen)' (*eduskunta.fi*, 8 September 2021) <https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2021-AK-386864.pdf> accessed 10 March 2022.

[98] Article 1(3) of Corporate Sustainability Reporting Proposal (n 21).

[99] Article 1(4) of Corporate Sustainability Reporting Proposal (n 21).

[100] Article 1(3) of Corporate Sustainability Reporting Proposal (n 21).

[101] Recital 32 of Corporate Sustainability Reporting Proposal (n 21).

disclosures should cover short, medium and long-term horizons as appropriate.[102] The CSRD proposal removes the possibility that some member states have opted for to allow the disclosures to be reported in a separate report. Thus, under the CSRD proposal, the disclosures must be published as a part of the management report.[103] The CSRD proposal also introduces a requirement to publish the disclosures in a digital, machine-readable format.[104]

While the CSRD proposal itself answers to many questions on the content requirements of the disclosures, it also delegates some power to the European Commission by suggesting the European Commission to adopt EU sustainability reporting standards by means of delegated acts within boundaries specified in the CSRD proposal.[105] The standards by the Commission must be adopted by 31 October 2022 for all other companies than SMEs under the scope of the CSRD and by 31 October 2023 for SMEs under the scope of the CSRD.[106] Considering the current timetable for all other companies than SMEs, the standards seem to arrive rather late should they first be applied to the financial year starting on or after 1 January 2023. Also, the question of whether the safe harbour principle will be addressed at all will remain open until the release of the standards.

There are changes when it comes to exceptions from the requirements of the legislation, too. First, the approach of a comply-or-explain will no longer be allowed. Also, while under the NFRD subsidiaries were completely exempted from the requirements of the NFRD if the subsidiary and its subsidiaries were part of a parent company's NFRD reporting, the CSRD requires all subsidiaries to publish the consolidated management report of the parent

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[102] Article 1(3) of Corporate Sustainability Reporting Proposal (n 21).

[103] Recital 50 of Corporate Sustainability Reporting Proposal (n 21).

[104] Article 1(4) of Corporate Sustainability Reporting Proposal (n 21).

[105] Under Article 290(1) of the Treaty on the Functioning of The European Union [2012] OJ C 326/47, '[a] legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act'. More on delegated acts, see e.g., Deirdre Curtin and Tatevik Manucharyan, 'Legal Acts and Hierarchy of Norms in EU Law' in Damian Chaimers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (1st edn, Oxford University Press 2015) 111-116.

[106] Article 1(4) of Corporate Sustainability Reporting Proposal (n 21).

company reporting at group level. Also, subsidiaries must include a reference in their own management reports stating that they are exempted from the requirements of the CSRD.[107]

While it has been noted that many significant changes have been proposed in the CSRD proposal, as for the last exception to the requirements and the core of the thesis, the safe harbour principle, no changes are made. No mentions of or references to the principle can be found within the proposal, merely a word-to-word copy of the principle in the NFRD inserted into the new directive.[108] No definite conclusions can yet, however, be made, since the proposal is, as its name suggests, a proposal. Thus, changes to it and the safe harbour principle may still occur, especially since the European Parliament has yet to publish its amendment proposals. In addition, as has been mentioned above, the European Commission will adopt reporting standards, which could address the principle, by the end of October 2022.

Lastly, significant changes concerning the monitoring of compliance have been suggested, too. The CSRD proposal suggests bringing reporting under it to the scope of limited assurance and keeps the door open to later require reasonable assurance, while under the NFRD, the minimum requirement consisted of a statutory auditor or audit firm merely checking the existence of the disclosures.[109] Aside from tightening assurance requirements, the CSRD proposal also aims at harmonizing penalties for non-compliance between member states. So far, the sanctions between different member states may have varied a lot, which has been considered as a threat to the single market.[110] As a result, the CSRD proposal sets a minimum level for penalties and lists factors that should be taken into consideration when determining the type and level of penalties in member states. As a minimum level for penalties, the CSRD proposal suggests a public statement indicating the responsible entity and the nature of the infringement, an order requiring the responsible entity to cease the conduct and to desist from any repetition of that conduct, and administrative pecuniary sanctions.[111] The proposal also lists relevant circumstances to be taken into account when

[107] Article 1(7) of Corporate Sustainability Reporting Proposal (n 21).

[108] Article 1(3) of Corporate Sustainability Reporting Proposal (n 21).

[109] Article 3(12) of Corporate Sustainability Reporting Proposal (n 21).

[110] Recital 69 of Corporate Sustainability Reporting Proposal (n 21).

[111] Article 1(12) of Corporate Sustainability Reporting Proposal (n 21).

determining the type and level of penalties in member states, administrative sanctions or measures, which include the following:

a) the gravity and the duration of the breach,
b) the degree of responsibility of the natural person or legal entity responsible;
c) the financial strength of the natural person or legal entity responsible;
d) the importance of profits gained or losses avoided by the natural person or legal entity responsible, in so far as such profits or losses can be determined;
e) the losses sustained by third parties as a result of the breach, in so far as those losses can be determined
f) the level of cooperation of the natural person or legal entity responsible with the competent authority
g) previous infringements by the natural person or legal entity responsible.[112]

[112] Article 1(12) of Corporate Sustainability Reporting Proposal (n 21).

3 THE SAFE HARBOUR PRINCIPLE

3.1 The principle on EU level

3.1.1 General

As has briefly been discussed earlier, the safe harbour principle was introduced in the NFRD. Transposing the principle was not mandatory, instead, member states were merely given the option to transpose the principle into their national legislation. The phrasing of the principle, as presented in the NFRD and inserted into the Accounting Directive, is the following:

> Member States may allow information relating to impending developments or matters in the course of negotiation to be omitted in exceptional cases where, in the duly justified opinion of the members of the administrative, management and supervisory bodies, acting within the competences assigned to them by national law and having collective responsibility for that opinion, the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking, provided that such omission does not prevent a fair and balanced understanding of the undertaking's development, performance, position and impact of its activity.[113]

The principle has received criticism on numerous aspects over the years by both scholars and stakeholders. The uncertainty over the interpretation of the principle has been noted, and a consequent concern has been raised over it leading to retroactive reviews and uncertainty until steady practice is established.[114] Also, the unclear relationship between the principle and market abuse regulation in the EU has been voiced, with demand to clarify the principle.[115] The effectiveness of the principle in guarding commercially sensitive information has also been questioned by stakeholders.[116]

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[113] Article 19a(1) and 29a(1) of Accounting Directive (n 62).

[114] Szabó and Sørensen (n 24) 336.

[115] Kaisanlahti (n 24) 1391.

[116] American Chamber of Commerce to the European Union (n 24) accessed 9 February 2022; International Association of Oil & Gas Producers (n 24) accessed 4 February 2022.

After the issuance of the NFRD, the European Commission has issued two very much called-for accompanying guidelines in order to help companies disclose environmental, social and climate-related information.[117] Despite criticism over the safe harbour principle, neither gave guidance on the interpretation of the principle. No clarifications can be found in the CSRD proposal either – the safe harbour principle is left unaltered in the proposal.[118]

In the following chapters, an interpretation for the safe harbour principle will be searched for. First, an EU level interpretation will be explored, which is of utmost importance for numerous reasons. First, since the principle presents an exception to the requirements otherwise set in the NFRD and the upcoming CSRD, it sets the outer limits to the interpretation of the principle. In other words, member states may transpose the principle so that the scope of the principle is narrower than in the NFRD, but it cannot be wider. Also, the doctrine of indirect effect requires that national laws must be interpreted consistently and in accordance with EU legislation.[119] Thus, in the interpretation of the principle in member state level, the EU level interpretation must be taken into consideration. Lastly, in cases where member states have seemingly not made any changes to the principle in the transposition of the NFRD, the EU level interpretation can be employed fairly well on member state level.

However, since the transposition can differ from the principle on EU level in some member states, and since directives are not directly applicable or effective, the conclusions of the

[117] Before the publication of the European Commission's guidelines, it had been noted that the guidelines would be of utmost importance in making sure that the NFRD leads to corporate sustainability reporting that is more reliable and more comparable. See Daniel Gergely Szabó, *Mandatory Corporate Social Responsibility reporting in the EU: Comprehensive Analysis of Various Corporate Reporting Instruments' Current Capacity and Future Potential to Convey Non-financial Information* (Eleven International Publishing 2016) 154. For the communications, see European Commission, 'Guidelines on non-financial reporting (methodology for reporting non-financial information)' (n 23); European Commission, 'Guidelines on non-financial reporting: Supplement on reporting climate-related information' (n 23). In the former, however, the existence of the principle is noted without any further mentions of the principle. In addition, the object of the principle, commercially sensitive information, is addressed in the section concerning strategic and forward-looking information, but no significant guidelines on the principle can be found in the section, either.

[118] Articles 1(3) and 1(7) of Corporate Sustainability Reporting Proposal (n 21). It should, however, be noted that the contents of the CSRD might still change and thus, it remains to be seen whether the principle will be addressed.

[119] Siltala (n 26) 867.

EU level interpretation cannot be directly drawn to individual member states.[120] This means that member states may have chosen not to transpose the principle at all, or they may have chosen to alter it in the transposition. Thus, in order to better analyse the principle, some examples will be drawn from selected member states.

3.1.2 Objectives on EU level

Taking a look back at the origins of the NFRD, a few interesting remarks on the background of the safe harbour principle can be made. In the original NFRD proposal,[121] the principle cannot be detected. There is no mention of a need for such principle, nor does the NFRD proposal include anything that would give member states the possibility to allow companies to omit information from their disclosures based on commercial position considerations. Instead, the principle seems to have found its way to the NFRD due to a suggestion by the European Parliament since the principle can for the first time be detected in the European Parliament's report on the NFRD proposal.[122] In the report, the European Parliament proposed the following recital to be added to the directive:

> The disclosure of information on impending developments or matters in the course of negotiation may lead to the disclosure of sensitive business information and, as a consequence, interfere with the business model and, ultimately, distort competition. For this reason, the members of the administrative, management, and supervisory bodies of undertakings should be given the possibility to decide whether to disclose such information if disclosure would be seriously prejudicial to the commercial position of the undertaking concerned and where, in the reasonable and duly justified opinion of the members of its administrative, management, and supervisory bodies, non-disclosure of that information would not be likely to mislead the public.[123]

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[120] For more on the effect of EU directives, see e.g., August Reinisch, *Essentials of EU law* (2nd edn, Cambridge University Press 2012) 64.

[121] Proposal for Non-Financial Reporting Directive (n 61).

[122] European Parliament, 'Report of 8 January 2014 on the proposal for a directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups' (2014) (European Parliament's Report on Proposal for Non-Financial Reporting Directive).

[123] Amendment 11 of European Parliament's Report on Proposal for Non-Financial Reporting Directive (n 122).

Based on the reasoning presented in the proposed recital to be added, the European Parliament also proposed an amendment to the articles of the directive, suggesting the following to be added:

> Information relating to impending developments or matters in the course of negotiation need not be disclosed where, in the reasonable and duly justified opinion of the members of the administrative, management, and supervisory bodies:
>
> (a) the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking;
> (b) the non-disclosure of this information would not be likely to mislead the public.
>
> Where, pursuant to this paragraph, the undertaking has not disclosed information, it shall provide a duly justified statement to this effect.[124]

The European Commission decided in favour on the proposed amendments by the European Parliament on 9 July 2014, but when comparing the suggestions made by the European Parliament to the final version of the NFRD, it can be noted that some differences exist.[125] Next, the differences found in the reasoning behind the principle will be analysed. Changes that relate to the content of the principle will be discussed in the following chapters.

Since the safe harbour principle was first suggested by the European Parliament, the originally intended reasoning behind the principle can be observed from the above-presented proposed recital.[126] Under the proposed recital, the reasoning for the principle seems to arise from competition considerations. Disclosures under the NFRD could reveal sensitive business information, interfering with business model and leading to distorting competition. The recital explaining the reasoning behind the principle as proposed by the European

[124] Amendment 37 of European Parliament's Report on Proposal for Non-Financial Reporting Directive (n 122).

[125] On the legislative process, see 'Procedure 2013/0110/COD' <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32014L0095> accessed 11 March 2022.

[126] In EU legislation, recitals are used to specify the reasons for adopting the operative provisions. See Tadas Klimas and Jurate Vaiciukaite, 'The Law of Recitals in European Community Legislation' (2008) 15 ILSA Journal of International & Comparative Law 61, 62.

Parliament was not, however, included in the final version of the NFRD. In fact, in the recitals of the NFRD, there is no mention of the safe harbour principle at all. The omission of the proposed recital from the final version of the NFRD leaves open the question of whether the reasoning of the European Parliament behind the principle, disclosure of sensitive business information leading to interfering with business model and, ultimately, distorting competition, can be regarded as the reasoning to why the safe harbour principle was ultimately included in the NFRD.

In legal literature, it has, however, been suggested that despite the lack of an explicit recital relating to the principle, the recital[127] concerning respecting the fundamental rights and the principles recognized in the Charter of Fundamental Rights of the European Union[128] would be linked to the principle by granting basis for the overall existence of the principle, since the lack of a possibility to omit information as provided by the principle might jeopardize fundamental rights.[129] It must, however, be noted that under Article 51(1) of the Charter of Fundamental Rights of the European Union, the provisions of the Charter are addressed to the European Union with due regard for the principle of subsidiary and to the member states only when they are implementing European Union legislation. Thus, the rights and principles of the Charter should automatically be taken into consideration within the context of the NFRD, even without a specific mention of such in the recital.[130] In addition, since the transposition of the principle was voluntary and several member states chose not to transpose it at all, it seems even more unlikely that fundamental right considerations would lay the foundation for the principle that cannot be exercised in all member states. Therefore, it seems that no guidance on the reasoning behind the principle can be derived from the recitals of the NFRD due to the lack of a specific recital relating to the principle and due to mere fundamental right considerations seeming unlikely.

[127] Recital 22 of Non-Financial Reporting Directive (n 19): 'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including freedom to conduct a business, respect for private life and the protection of personal data. This Directive has to be implemented in accordance with those rights and principles.'

[128] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

[129] Szabó (n 117) 148.

[130] More on the Charter of Fundamental Rights of the European Union and its impact, see e.g., Juha Raitio and Toni Tuominen, *Euroopan unionin oikeus* (2nd edn, Alma Talent Oy 2020) 321-322.

Another interesting remark concerning the reasoning behind the principle besides the recitals can be found in the explanatory statement of the European Parliament's report on the NFRD proposal. In the explanatory statement, the following is stated:

> --- any legislative measures regarding such matters should take account of the diversity of sectors and legislations in which undertakings operate. In some legal systems, for example, certain information might fall under the definition of 'state secret' or 'trade secret', resulting in legal uncertainty for European undertakings operating in those countries. Equally, the disclosure of certain information that is commercially and economically sensitive (strategic information on contracts, levels of profitability, results, management, etc.) could put undertakings at a competitive disadvantage, or could call into question agreements or contracts drawn up with the tax authorities of third countries.[131]

While the statement does not directly mention the suggested safe harbour principle, many factors, including the notion of commercially sensitive information and competitive disadvantage, point to the direction of the principle. From the statement possible further reasoning behind the principle can be derived. First, the legal differences between different member states are noted, which might result in the information disclosed under the NFRD to be classified as state or trade secrets. This approach could be supported by the fact that transposing the principle was voluntary and some member states chose not to transpose it at all. Second, commercially and economically sensitive information is noted, with a mention of competitive disadvantage. The latter point resembles the reasoning presented in the proposed recital to a great extent, but the former relating to state or trade secrets is more novel. However, neither are mentioned in the final phrasing of the NFRD, and no affirmative conclusions can be made.

All in all, the reasoning behind the safe harbour principle remains unclear. The European Parliament's report on the NFRD proposal, which is where the principle was first introduced, offers quite extensive reasoning, including considerations concerning commercially sensitive information, competition considerations and even state and trade secrets. In legal literature it has also been suggested that the principle would relate to the Charter of

[131] Explanatory statement of European Parliament's Report on Proposal for Non-Financial Reporting Directive (n 122).

Fundamental Rights of the European Union. However, from the final version of the NFRD, no guidance on the reasoning behind the principle can be derived. The principle is also left untouched in the CSRD proposal, both content-wise and reasoning-wise. The lack of understanding on the objectives of the principle is problematic, since reasoning and intent could help in the interpretation of the principle, which will be addressed next.

3.1.3 Interpretation on EU level

Due to the lack of reasoning presented in the NFRD for the safe harbour principle and the following difficulty of deriving a teleological interpretation for the principle, other measures must be taken to find an interpretation for the principle.[132] When observing the principle as presented in the NFRD and the CSRD proposal through literal interpretation, three prerequisites for the application of the principle can be noted.[133] The three prerequisites concern those making the decision, the nature of the information to be omitted and the impact that omitting the information will have. All three prerequisites must be fulfilled for the principle to be applicable.

First, those making the decision of omitting information under the principle must be members of the administrative, management and supervisory bodies that act within the competences assigned to them by national law. In addition, those making the decision must bear collective responsibility for the decision. The phrasing of the prerequisite does not raise any unclarities, and since the question of who can make the decision to exercise the

[132] In the context of the EU legislation, the need to consider other aspects than merely the wording of legislation in interpretations, including the context of the legislation, i.e., the teleological method of interpretation, has been confirmed in many cases. For example, in case van Gend & Loos, it was confirmed that 'the spirit, the general scheme and the wording of the EEC treaty' must be taken into consideration in an interpretation. See Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 1. See also Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20(3) Fordham International Law Journal 656. While the European Court of Justice has been found to frequently employ the method of teleological interpretation, which supports the attempt to find an interpretation for a directive through teleological means, the method's justification in EU law has also been questioned. See Stephen Brittain, 'Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal' (2016) 55 Irish Just 134.

[133] Literal interpretation in the context of EU legislation has been defined as 'action of explaining what normative text conveys by looking at the usual meaning of the words contained therein'. See Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' EUI Working Paper AEL 2013/9 (2013) <https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1> accessed 11 March 2022. Also, the ordinary meaning of terms has been stressed if the terms are not defined in e.g., directives. See Case C-19/11 Markus Geltl v Daimler AG [2012] 3 CMLR 32.

principle depends on the national legislation of a member state, further analysis on the prerequisite cannot be conducted on EU level.

The second prerequisite for the application of the principle concerns the nature of the information to be omitted. First, the information must relate to impending developments or matters in the course of negotiation, and second, the disclosure of the information must be seriously prejudicial to the commercial position of the undertaking. It is stressed that those making the decision, as defined in the first prerequisite, must hold a duly justified opinion of the disclosure being seriously prejudicial to the commercial position of the undertaking. This prerequisite raises two major questions – what type of situations are classified as impending developments or matters in the course of negotiation and what is the difference between prejudicial and seriously prejudicial to one's commercial position. Neither of the questions are addressed on EU level, leaving the literal interpretation very open on this part.

The last prerequisite concerns the impact that omitting information under the principle will have. Should information be omitted under the principle, it must not prevent a fair and balanced understanding of the undertaking's development, performance, position, and impact on its activity, which also guides the reporting as a whole.[134] This refers to the double materiality approach of the legislation, meaning that the disclosures should represent both how various sustainability matters affect the company and the impacts of the activities of the company on people and environment.[135] Thus, when considering whether an omission under the principle would meet the third prerequisite, it must be carefully assessed that the omission does not undermine either the 'outside-in' perspective of how sustainability matters affect the performance, position and development of the company or the 'inside-

[134] Understanding of a company's development, performance, position and impact on its activity are currently also stated as the overall guidelines for the disclosures in articles 19a(1) and 29a(1) of Accounting Directive (n 62). It should be noted that originally the third prerequisite was not tied to the overall guidelines determining what should be reported, instead, the European Parliament referred to omission not being likely to mislead the public, which bears significant similarities to the EU's market abuse regulation as will be covered in more detail later. See Amendment 37 of European Parliament's Report on Proposal for Non-Financial Reporting Directive (n 122); Article 17(4) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1.

[135] Recital 25 of Corporate Sustainability Reporting Proposal (n 21).

out' perspective of how the company impacts people and environment, or in the worst case, both. It has been noted that the double materiality approach, which also embodies the third prerequisite for the exercise of the principle, has not been adequately clear under the NFRD.[136] In the CSRD proposal, the double materiality approach is clarified, as has been presented above, but some of the further work on the approach is left to the reporting standards to be published as delegated acts by the European Commission.[137] Thus, while the CSRD proposal has already given further instructions on what should be considered when aiming at meeting the third prerequisite, even further guidance should be able to be derived from the delegated acts by the European Commission once they are published later in 2022.

All in all, through literal interpretation, some prerequisites on the exercise of the safe harbour principle are unproblematic, but some remain open on EU level. The first prerequisite on those who can make the decision to exercise the principle is tied to the national legislation of member states and thus an EU level assessment of the criterion is not sensible. The third prerequisite, which embodies the double materiality approach of the reporting as a whole, has been further clarified in the CSRD proposal and even further guidance can be expected when the European Commission releases reporting standards as delegated acts later in 2022. The problems seem to thus mostly arise when considering the second prerequisite. The question of what type of situations are classified as impending developments or matters in the course of negotiation and what is the difference between prejudicial and seriously prejudicial to one's commercial position cannot be answered, rendering it impossible to derive an interpretation of the principle that would adequately answer the question of when the principle can be exercised. Due to the difficulty of deriving a literal interpretation, a look could be taken into praxis and legal literature. However, no EU level praxis can be found on the interpretation of the principle, and even legal literature is rather sparse. Consequently, attention will next be steered towards some selected member states.

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[136] Results of ex-post evaluations, stakeholder consultations and impact assessments in Corporate Sustainability Reporting Proposal (n 21).

[137] Recital 33 of Corporate Sustainability Reporting Proposal (n 21).

3.2 Transposition of the principle

3.2.1 General

Above, the safe harbour principle has been analysed on EU level. Next, the principle will be observed on member state level for three reasons. First, the transposition of directives, including the NFRD, the upcoming CSRD and the safe harbour principle, can vary between member states since directives are binding merely as to the result to be achieved, leaving the choice of form and methods to national authorities.[138] This means that the transposition of the principle can vary between different member states due to the nature of directives.[139] Second, in addition to the overall nature of directives possibly causing deviations, transposing the safe harbour principle itself was voluntary, and thus differences might exist in whether the principle has been transposed to the national legislation of a member state and if so, in how the principle has been transposed.[140] Finally, as has been noted in the previous chapter, many questions on the principle remain open on EU level, and while member state level observation cannot fill the gaps on EU level, it can help in grasping a more comprehensive picture of the principle.

Due to the aforementioned reasons, next, member state observations will be made. As has been noted earlier, the purpose of the observation is not to conduct research under the method of comparative law, instead, the purpose is to use the selected member states to look for remarks in the transposition of the principle that can enrich the notion of the principle after EU level analysis. Considering this, the observation will not comprehensively cover all possible aspects of the principle in the selected member states, instead, focus will be on the aspects that complement the EU level analysis. The observation will be divided into two parts. First, member state observations will be used to assess whether the

[138] Article 288 of Consolidated version of the Treaty on the Functioning of the European Union OJ (n 105). More on the nature of EU directives, see e.g., Karen Davies, *Understanding European Union Law* (5th edn, Routledge 2013) 56-57; Christian Dadomo and Noëlle Quénivet, *European Union Law* (Hall & Stott 2020) 51-54; Raitio and Tuominen (n 130) 80-83.

[139] It should, however, be noted that under the principle of indirect effect, directives must be interpreted consistently between member states. See Siltala (n 26).

[140] Out of the 30 member states and EEA states at the time, 25 transposed the safe harbour principle into their national legislation. See CSR Europe, GRI and Accountancy Europe (n 22) accessed 31 January 2022. However, in recent years, some states that did not originally transpose the principle, e.g., Denmark and Norway, have added the principle to their national legislation.

interpretation of the principle that has been found to be lacking on EU level has been further clarified in member states, after which attention will be steered towards deviations in the transposition of the principle.

3.2.2 Further guidelines on the principle

Since both the reasoning and the interpretation of the safe harbour principle were found to be unclear on some aspects on EU level, the question of whether more guidance on either the reasoning or interpretation of the principle has been given in any member state, arises. While most member states do not seem to have provided any further guidance relating to the principle, in *Sweden,* this seems to, however, be the case.

In Sweden, the safe harbour principle was transposed into the Swedish Annual Accounts Act (1995:1554).[141] The principle, as presented in section 13 of chapter 6 of the Swedish Annual Accounts Act, seems to follow the phrasing of the NFRD to a great extent and while some minor differences in the phrasing exist, they do not seem to alter the content of the principle.[142] Thus, the safe harbour principle as transposed into the Swedish legislation does not seem to deviate from the NFRD, due to which observing the guidelines given on the principle in Sweden becomes more relevant. When taking a look at the legislative materials behind the transposition of the NFRD in Sweden, both more detailed information on the reasoning behind the transposition of the principle and examples of situations in which the principle can be exercised can be found. Next, a look will be taken into both.

In the legislative materials, the transposition of the principle is reasoned with merely market position considerations by stating that a publication of information under the NFRD could, from time to time, seriously harm a company's market position.[143] The presented motivation behind the transposition aligns with both the original reasoning presented by the European Parliament and the phrasing of the principle in the NFRD. The rest of the above-discussed possible reasonings behind the principle on EU level, including

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[141] *Årsredovisningslag* (1995:1554).

[142] It has been established in EU case law that member states do not need to use the precise words of a directive if the phrasing actually ensures the full application of the directive in a sufficiently clear and precise manner. See case 247/85 Commission v Belgium [1987] ECR 3029, para 9.

[143] Swedish Government, '*Proposition – Företagens rapportering om hållbarhet och mångfaldspolicy (2015/16:193)*' 47.

competition considerations, state and trade secrets, and fundamental rights, are not named to have motivated the transposition of the principle, and while no significant conclusions can be drawn, at least no additional support to these possible reasonings can be derived.

As for the interpretation of the safe harbour principle, in earlier chapters, the most unclear aspects regarding the interpretation of the principle were found to be the questions of what type of situations are classified as impending developments or matters in the course of negotiation and what is the difference between prejudicial and seriously prejudicial to one's commercial position. In Sweden, further guidance is provided on the former question by providing a non-exhaustive list of examples of situations in which the principle can be exercised. Under the legislative materials, such situations can relate to, but are not limited to, information on products that are yet to be launched, new manufacturing processes under development and negotiations with new suppliers.[144] While no interpretation derived from the examples can be directly drawn to other member states, the examples do present the Swedish legislator's interpretation of one of the most unclear and source-wise scarce aspects of the principle, and can thus be considered valuable.

3.2.3 Deviating transposition of the principle

As has been discussed before, while transposing the principle was voluntary for member states, also the way in which the principle could be transposed gave some leeway. Since the principle presents an exception to the requirements otherwise presented in the legislation, the phrasing of the principle on EU level sets the outer limit to the transposition of the principle, meaning that member states cannot extend the scope of the principle, but the phrasing does not seem do prevent transposing it in a narrower manner. Next, some deviating transpositions of the principle will be observed. While such observation does not, once again, provide any results that could directly be drawn to a more general level, it does provide valuable information on what aspects of the principle national legislators have regarded unnecessary or lacking.

[144] Swedish Government (n 143) 69.

One member state in which the scope of the principle was rendered narrower is *Finland.* In Finland, the safe harbour principle was transposed into the Finnish Accounting Act (1336/1997).[145] Under Section 3 of Chapter 3a of the Finnish Accounting Act, the scope of the principle is limited only to negotiations and developments or matters in the course of negotiations. Thus, while the NFRD allows exercising the principle in the case of impending developments, too, such situations seem to have been excluded from the scope of the principle in Finland.

While the phrasing of the principle in the Finnish Accounting Act merely allows the exercise of the principle when negotiations are present, when taking a look into the legislative materials, however, the scope seems to extend a bit.[146] In the legislative materials it is stated that the term negotiations, in the context at hand, also refers to comparable projects, that may, for example, relate to significant mergers.[147] No other examples or guidelines are given on the situations in which the principle can be exercised, meaning that the legislative materials leave the question of what can be considered as comparable projects to negotiations open, except for the example of significant mergers. And as for significant mergers, the question of where to draw the line between mergers and significant mergers is left open, too. Thus, despite the narrower phrasing of the law that excludes impending developments from the scope of the principle, it does seem, based on the legislative materials, that the scope is not after all limited to merely negotiations or developments or matters in the course of negotiation, instead, other 'comparable projects' can grant the right to exercise the principle, too. However, since impending developments are left out of the phrasing of the principle, it could be reasonably assumed that the Finnish legislator has done so on purpose in order to narrow the scope of the principle. Thus, it seems as if the Finnish scope of the principle is set somewhere between mere negotiations and developments or matters in the course of negotiations, and the scope as per the phrasing of the NFRD.

[145] *Kirjanpitolaki* (1336/1997).

[146] Finnish Government, '*Hallituksen esitys eduskunnalle laiksi kirjanpitolain muuttamisesta ja eräiksi siihen liittyviksi laeiksi HE 208/2016 vp*' 13.

[147] Finnish Government (n 146) 13.

In *Denmark,* the scope of the principle has been narrowed down, too. In Denmark, the principle was transposed into the Danish Annual Accounts Act.[148] Under the phrasing of the transposed principle in section 99a, the scope of the principle, similarly to Finland, excludes 'impending developments'. However, contrary to Finland, Denmark has instead included ongoing litigation to the scope of the principle. Thus, the overall scope of situations that the principle can be exercised in consists of ongoing negotiations and litigation, making it much narrower than the NFRD by excluding the possibility to exercise the principle in the rather vast category of 'impending developments'. The reason for the deviating phrasing is not addressed in the legislative materials.[149]

While it has been noted that the exercise of the principle can be restricted by narrowing down the scope of the principle, in some member states stricter exercise has been reached through additional requirements. In *Finland,* the legislative materials seem to present a requirement for the management of a company to conduct a report on the exercise of the principle.[150] No such requirement can be derived from the NFRD. In the legislative materials it is further explained that no reasoning must be included in the report, instead, the reasoning behind the exercise of the principle should be recorded in the minutes.[151] Thus, it seems that a report on merely the exercise of the principle is required, while it is recommended that the reasoning behind the decision is recorded in the minutes, which is a non-public document.

As for the required report on the exercise of the principle, its role remains an open question. The purpose of the report is not stated in the legislative materials. While the NFRD does not mention the need for such a report, it can be recalled that the principle, as originally proposed by the European Parliament, suggested a requirement to publicly note that

[148] *Årsregnskabsloven* (LBK nr 838 af 08/08/2019).

[149] Danish Ministry of Industry, Business and Financial Affairs, *'Forslag til Lov om ændring af årsregnskabsloven, revisorloven og lov om anvendelsen af visse af Den Europæiske Unions retsakter om økonomiske forbindelser til tredjelande m.v. (Tilpasninger til Europa-Parlamentet og Rådets direktiv 2013/34/EU, ændring af kravene til revisorers efteruddannelse og styrket kontrol i forbindelse med ansøgninger om tilladelse til eksport af cyberovervågningsudstyr) 2018/1 LSF 99*'.

[150] Finnish Government (n 146) 13.

[151] Finnish Government (n 146) 13.

the principle has been exercised.[152] However, since this kind of requirement cannot be derived from the final version of the NFRD, nor does either the Finnish Accounting Act or the legislative materials mention such need to publish the required report, no such requirement can be considered to legitimately exist in Finland. The role of the report does not seem to relate to retrospective judgement of the exercise of the principle, either, since it is explicitly mentioned in the legislative materials that no reasoning has to be included in the report and that including the reasoning in the minutes is recommended for the exact purpose of possible retrospective judgment.[153]

While the case of Finland remains unclear on the question of a report on the exercise of the principle, some other member states have inserted such a requirement in a much clearer manner. For example, in *Italy,* it is unambiguously stated that companies must disclose the exercise of the principle.[154] *Denmark* has also recently introduced the same requirement.[155]

Above, member state observation on the safe harbour principle have been conducted. The purpose has not been to comprehensively observe all the aspects and considerations related to the principle in the selected member states, instead, the observations have been used as an exemplary tool to demonstrate the possible deviations in the principle in member states and to discover further guidance provided by member states on the more problematic aspects of the principle, yet bearing in mind that further guidance provided by a single member state cannot be generalized to other member states, too. All in all, it has been found that in many member states the transposition of the safe harbour principle deviates in some aspects from the principle in the NFRD. Two differences that have been found to be present in more than one member state are the narrower scope of situations in which the principle can be exercised and the requirement to disclose the exercise of the principle. While some deviations have been noted, it should, however, be noted that some

[152] Amendment 37 of European Parliament's Report on Proposal for Non-Financial Reporting Directive (n 122).

[153] Finnish Government (n 146) 13.

[154] Jeffery and Gregor (n 77) 49.

[155] Section 99a of *Årsregnskabsloven* (n 148). While Denmark did not initially transpose the principle, it later on did so in order for Danish companies to have the same possibilities as their foreign competitors. See Danish Ministry of Industry, Business and Financial Affairs (n 149) 58-59.

have explicitly stated the decision to accurately follow the phrasing of the principle in the NFRD. For example, *Norway* has noted the unfinished and developing nature of the NFRD and has thus decided to closely follow in the footsteps of the phrasing of the directive.[156]

3.3 Notions on the principle and MAR

3.3.1 Reasons for the observation

When observing the safe harbour principle, significant similarities to the delayed disclosure of inside information to the public under the EU's market abuse regulation (596/2014) (hereinafter "MAR") arise.[157] First, the natures of the safe harbour principle and the delayed disclosure of inside information are similar, since both represent an exception to disclosure requirements that are in place to e.g., protect investors and contribute to the functioning of capital markets.[158] Also, the scopes of companies under the NFRD and MAR overlap significantly, meaning that many companies must follow both. Whilst it is noted that the two do not have any official relationship, two reasons arise that render the observation of MAR in the context of the safe harbour principle interesting.

First, as has been noted, the scopes of companies under the NFRD and MAR have, at least so far, overlapped remarkably, meaning that many companies that must meet the requirements of the NFRD must also follow MAR. Since also the object of both the safe harbour principle and the delayed disclosure of inside information is quite similar, too, it seems that there are situations in which both the safe harbour principle and the delayed disclosure of inside information could be exercised. Consequently, since it has been argued that the legislation on the delayed disclosure of inside information seems to be stricter and would thus

[156] Norwegian Ministry of Finance, *'Prop. 66 LS (2020-2021) – Endringer i verdipapirhandelloven og regnskapsloven mv. (periodisk rapportering og direktivgjennomføring) og samtykke til godkjenning av EØS-komiteens beslutninger nr. 293/2015 og nr. 39/2016 om innlemmelse av direktiv 2013/34/EU og direktiv 2014/95/EU'* 32.

[157] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1 (Market Abuse Regulation).

[158] The public interests behind corporate sustainability reporting and especially the mandatory corporate sustainability reporting in EU have been analysed in chapter 2. For regulatory aims behind MAR, see Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Bloomsbury Publishing Plc 2017) 23-27.

be primarily applied,[159] a question of whether the interpretation of the safe harbour principle, which has been in force for several years, has remained underdeveloped due to it remaining in the shadows of MAR and the delayed disclosure of inside information, arises. Second, considering especially the similar nature and setting of the two exceptions, the guidelines on the exercise of the delayed disclosure of inside information offer some examples of means that could be employed to improve the interpretation of the safe harbour principle. Next, the two above-presented topics will be observed more closely.

3.3.2 Overlap of the principle and the delayed disclosure of inside information

Since a suspicion over the overlap of the safe harbour principle and the delayed disclosure of inside information has been raised, a more thorough observation is required. First, attention will be paid to the scopes of companies under the NFRD and MAR, after which attention will be shifted to whether the two exceptions themselves can sometimes overlap with both applying to the same circumstances at hand.

As for the scopes of companies under the NFRD and MAR, while they are not the same, similarities can be detected. As discussed earlier, the scope of the NFRD, as of now, consists of large companies which are public-interest entities (hereinafter "PIEs") exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year.[160] PIEs, on the other hand, are entities whose transferable securities are admitted to trading on a regulated market of any member state, credit institutions, insurance undertakings, and other entities designated as PIEs by the member state.[161] A significant part of the scope of MAR, on the other hand, consists of companies whose financial

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[159] Kaisanlahti (n 24) 1391-1392.

[160] In the EU, large undertakings defined as undertaking which on their balance sheet dates exceed at the least two of the three following criteria: a balance sheet total of EUR 20 000 000, a net turnover of EUR 40 000 000 and an average number of 250 employees during the financial year. See Article 3(4) of Accounting Directive (n 62).

[161] Article 2 of Accounting Directive (n 62). The article also gives some guidelines on what type entities member states may designate as PIEs by suggesting that e.g., entities that are of significant public relevance due to the nature of their business, their size or their number of their employees may be designated as PIEs. More on the definition of PIEs in different member states, see Accountancy Europe, 'Definition of Public Interest Entities in Europe – State of Play after the Implementation of the 2014 Audit Reform – Survey' (2017) <https://www.accountancyeurope.eu/wp-content/uploads/171130-Publication-Definition-of-Public-Interest-Entities-in-Europe_1.pdf> accessed 14 January 2022.

instruments are admitted to trading on a regulated market of a member state or for which a request for admission to trading has been made.[162]

When comparing the two scopes of companies, a significant overlap a can be noticed. A notable share of PIEs, which form scope of the NFRD, are entities whose transferable securities are admitted to trading on a regulated market of a member state.[163] All these belong to the scope of MAR. Thus, out of entities within the scope of the NFRD, only PIEs that are not admitted to trading on a regulated market of a member state are left out of the scope of market abuse regulation. Thus, as of now, a significant portion of companies within the scope of the NFRD must follow MAR, too.[164]

Now that the overlap of companies that must follow both the NFRD and MAR has been established, attention will be paid to whether the situations that are covered by the safe harbour principle and the delayed disclosure of insider information overlap, too.[165] As for the requirements on the exercise of the former, three factors can be noticed. First, the information must relate to impending developments matters in the course of negotiation. Second, the disclosure of such information must be seriously prejudicial to the commercial position of the undertaking. Third, the omission must not prevent a fair and balanced understanding of the undertaking's development, performance, position and impact of its activity. When considering the delayed disclosure of inside information, on the other hand,

[162] Article 2(1) of Market Abuse Regulation (n 157). The more precise scope, which has not been presented in a more detailed manner due to it not being necessary to the objectives at hand, consists of: 'a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made; b) financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made; c) financial instruments traded on an OTF; d) financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference'.

[163] Accountancy Europe (n 161) accessed 14 January 2022. According to a survey conducted for the publication, at the time of the survey there were nearly 20,000 PIEs within the European Union, out of which 6,500 were entities whose transferable securities were admitted to trading on a regulated market of a member state.

[164] It should, however, be kept in mind that the scope of the NFRD under the CSRD proposal is about the expand significantly, making the proportion of companies under the CSRD that are also in the scope of the market abuse regulation much smaller.

[165] It should be noted that attention will not be paid to all prerequisites that must be met for the exercise of either of the exceptions, e.g., to more technical requirements of who are eligible to make the decision. Instead, emphasis will be on the factors that contribute to the observation of whether there are situations in which the requirements are fulfilled for the exercise of both the safe harbour principle and the delayed disclosure of inside information.

the information must be of a precise nature and not yet public. It must relate, directly or indirectly, to one or more issuers or financial instruments, and if it was made public, it would likely have a significant effect on the prices of the financial instruments.[166] The disclosure of such information may, at an issuer's own responsibility, be delayed if immediate disclosure is likely to prejudice the legitimate interests of the issuer, the delay of disclosure is not likely to mislead the public, and the issuer is able to ensure the confidentiality of that information.[167]

When observing the two, similarities can initially be noticed. First, while the criterion of 'legitimate interests' has not been defined in MAR, from non-exhaustive exemplary lists on situation which are considered to concern legitimate interests, it can be noticed that it bears significant resemblance to the situations that can give rise to the exercise in the safe harbour principle.[168] Second, while the delayed disclosure of inside information must not be likely to mislead the public, an omission under the safe harbour principle must not prevent a fair and balanced understanding of the company's development, performance, position and impact of its activity. While these two are similar by both concerning the information interest of others, even further similarity can be noticed when considering that the original wording of the safe harbour principle required that the omission 'would not be likely to mislead the public', which is identical with the phrasing of the delayed disclosure of inside information.

All in all, it seems that there are situations in which the safe harbour principle and the delayed disclosure of inside information could both apply. A significant number of companies

[166] Article 7 of Market Abuse Regulation (n 157). Under MAR, other types of information can be classified as inside information too, but they are not relevant to the research questions at hand. Also, the precise nature of inside information has been further defined in Article 7(2) of Market Abuse Regulation (n 157), while the significant effect on prices has been further defined in Article 7(4) of Market Abuse Regulation (n 157).

[167] Article 17(4) of Market Abuse Regulation (n 157).

[168] For examples, negotiations and development of a product has been named as examples of legitimate interests, with the former being mentioned in the phrasing of the safe harbour principle and the latter having been mentioned in the legislative materials of Sweden as a situation that grants the right to exercise the principle. See The Committee of European Securities Regulators, 'CESR's Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive' (2002) <https://www.esma.europa.eu/sites/default/files/library/2015/11/02_089d.pdf> accessed 3 February 2022, para 70; European Securities and Markets Authority, 'MAR Guidelines – Delay in the disclosure of inside information' (2016) <https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf> accessed 3 February 2022.

that are within the current scope of the NFRD must also comply with MAR. Through further observation, it has also been noted that in addition to overlapping scopes of companies, also the situations in which the two exceptions can be exercised bear such significant similarities that overlapping situations seem to exist.[169] The overlaps raise the question of whether it is possible that the interpretation of the safe harbour principle has remained vague over the years since often the exception of delayed disclosure of inside information applies, too, and is primarily applied to the situation at hand.

Considering the rather grave consequences of non-compliance with MAR,[170] and the lesser ones from non-compliance with the NFRD, it seems probable that more emphasis is put on compliance with MAR in practice. This effect can be enhanced by the fact that national authorities must check the correct exercise of delayed disclosure of inside information,[171] while it is not required to disclose the exercise of the safe harbour principle to any authorities. Thus, it seems that there often are situations in which both the safe harbour principle and the delayed disclosure of inside information apply, and due to monitoring and graver consequences resulting from non-compliance with the delayed disclosure of inside information, compliance with the former is primarily ensured. Also, if MAR and the delayed disclosure of inside information is considered to apply, such information simply cannot, under MAR, be published anywhere, including sustainability disclosures, meaning that there is no need to analyse the applicability of the safe harbour principle.[172] The predominant role of MAR and delayed disclosure of inside information could thus play a part in the underdeveloped custom of the safe harbour principle.

[169] The possibility of sustainability-related information constituting inside information has been found in e.g., Peter O Mülbert and Alexander Sajnovits, 'The Inside Information Regime of the MAR and the Rise of the ESG Era' (2021) European Corporate Governance Institute - Law Working Paper No. 548/2020 <http://dx.doi.org/10.2139/ssrn.3719944> accessed 23 March 2022.

[170] For administrative measures and sanctions resulting from non-compliance with MAR, see articles 30-34 of Market Abuse Regulation (n 157).

[171] Article 17(4) of Market Abuse Regulation (n 157).

[172] Article 17(4) of Market Abuse Regulation (n 157). One of the requirements for exercising the delayed disclosure of inside information is ensuring the confidentiality of the information.

3.3.3 Employing the means used in clarifying the delayed disclosure of inside information

As has briefly been mentioned above, the delayed disclosure of inside information has been defined and clarified through non-exhaustive exemplary lists. While it does not serve the topic of the thesis to dive deeper into the concept of delaying the disclosure of inside information, the means through which the concept has been clarified and guided can give an idea of what types of measures could be used to improve the interpretation of the safe harbour principle, too.

For example, as it has been noted that some aspects of the safe harbour principle, such as the question of what types of situations quality as impending developments or matters in the course of negotiation, are left rather vague in the NFRD, the term 'legitimate interests' has not either been clearly defined in MAR when relating to the delayed disclosure of inside information.[173] The Committee of European Securities Regulators (hereinafter "CESR") has defended the lack of a definition due to flexibility, stating that such definition would have to be extremely accurate in order not to widen the scope, whereas an adequately accurate definition would most likely not be able to foresee all the possible cases.[174] Similar difficulties can be considered to have affected the phrasing of the safe harbour principle, too. As for the delayed disclosure of inside information, however, the CESR has, instead of supporting defining the exception further in MAR, published a non-exhaustive list of examples of situations that concern legitimate interest. A similar list was later published by the European Securities and Markets Authority.[175]

As the shortcomings on the clarity and precision of the safe harbour principle have been noted, the method of clarifying the content of delayed disclosure of inside information could be employed in clarifying the safe harbour principle, too. This in an approach that would most likely work in the case of the safe harbour principle since such lists allow for more clarity on the interpretation without narrowing or extending the scope of the principle unnecessarily.

[173] Marco Ventoruzzo and Sebastian Mock (eds), *Market Abuse Regulation – Commentary and Annotated Guide* (Oxford University Press 2017) 372; Veil (n 158) 367.

[174] The Committee of European Securities Regulators (n 168) accessed 3 February 2022, para 68.

[175] European Securities and Markets Authority (n 168) accessed 3 February 2022.

3.4 Conclusion on the principle

Above, the safe harbour principle has been discussed through various perspectives. First, the reasoning behind the principle and the EU level interpretation were observed. Next, in order to grasp a more comprehensive view of the principle, member state observations were used to display more precise interpretation of and deviations from the principle. Lastly, a brief look into MAR was made to see whether the principle and delayed disclosure of inside information could, in certain situations, overlap, and what means that have been used in clarifying the concepts of delayed disclosure of inside information could possibly be employed in clarifying the unclear aspects of the safe harbour principle. Next, the most pivotal observations on the reasoning behind the principle and on the interpretation of the principle will be summarized. Member state observations and notions derived from MAR will be further discussed in the following chapter.

As for the reasoning behind the safe harbour principle, no affirmative conclusions can be made. While the European Parliament's report on the NFRD proposal, which first introduced the principle, offers quite extensive reasoning, e.g., considerations on commercially sensitive information, competition considerations and even state and trade secrets, no recitals refer to the principle in the final version of NFRD, and thus the reasoning for the inclusion of the principle in the NFRD remains unclear. In legal literature it has been suggested that the principle would relate to the Charter of Fundamental Rights of the European Union, but such reasoning does not seem plausible since the principle is not in force in all member states. In the CSRD proposal the principle is left untouched both content-wise and reasoning-wise, leading to a status quo on the unclear state of the reasoning behind the principle.

As the reasoning behind the principle remains uncertain and consequently no teleological conclusions can be derived, the situation is not much better when it comes to literal interpretation. As has been defined above, the exercise of the principle requires that three prerequisites concerning those making the decision, the nature of the information to be omitted and the impact that omitting the information will have must all be fulfilled. The first prerequisite concerning those making the decision cannot be further observed on EU level with the eligibility depending on the national legislation of a member state. The third

prerequisite concerning the impact that omitting information will have relates to the double materiality approach which has been improved in the CSRD proposal and will be given even more guidance through the delegated acts by the European Commission. Thus, the third prerequisite does not raise any significant concerns either.

However, problems arise when observing the second prerequisite on the nature of the information to be omitted. In order for information to be omitted under the safe harbour principle, the information must concern 'impending developments or matters in the course of negotiation' and the disclosure of such information must also be 'seriously prejudicial to the commercial position of the undertaking'. The vague phrasing of 'impending developments or matters in the course of negotiation' without any clarification or guidelines on EU level does not have adequate precision for any conclusions to be made on which situations the principle can be exercised. As has been found above, some member states, e.g., Sweden, do provide more guidance on the question, but this does not seem to be a case for all member states. As for the second part of the prerequisite, the disclosure of the information being 'seriously prejudicial to the commercial position of the undertaking', a question on where the line between seriously prejudicial and merely prejudicial to the commercial position of a company should be set.

4 THE SAFE HARBOUR PRINCIPLE IN THE CONTEXT OF MANDATORY CORPORATE SUSTAINABILITY REPORTING

4.1 The effect of the principle on objectives behind mandatory corporate sustainability reporting

In the previous chapter, it was concluded that both the reasoning behind and the interpretation of the safe harbour principle remain unclear on certain aspects. Now, attention will be steered towards how the principle and its current shortcomings fit into the context of mandatory corporate sustainability reporting under the NFRD and the upcoming CSRD. First, the unclear interpretation of the principle will be discussed in the broader context in order to assess how the principle affects some of the most significant objectives behind the NFRD and the CSRD. After that, some specific and more practical issues that the unclear interpretation brings about or enhances will be discussed.

When considering the role of the safe harbour principle in its regulatory context, it must be noted that the principle presents an exception to the requirements of the current NFRD and the upcoming CSRD. Thus, the scope of the principle must be narrow enough so that it does not threaten the goals of the directive as a whole. However, the width of the scope must be adequate enough in order to serve the purpose behind the principle. The reasoning behind the principle remains rather unclear, as has been established earlier, but the objectives behind the regulatory context are better known, and next, the principle will be discussed in the context of the objectives behind the overall regulation.

Earlier, some of the most significant objectives behind mandatory corporate sustainability reporting in EU were found to be e.g., helping investors take into account risks arising from sustainability aspects and reducing the systemic risk in the capital markets. Reaching these goals requires that the disclosures under the NFRD and the upcoming CSRD are accurate, so that informed decisions can be made based on the disclosures. With the unclarity surrounding the exercise of the safe harbour principle, and with no EU-wide requirement to even disclose the exercise of the principle, the risk that something is omitted from the disclosures incorrectly rises. While the unclarity can lead to incorrect omissions, it can also give leeway to companies to exercise the principle on a wider scope of matters. Since the principle is an exception that does not contribute towards meeting the goals behind

corporate sustainability reporting, it is clear that the principle should only be exercised when truly necessary since the omission of information results in e.g., investors not being able to take the omitted factor into consideration in their investment decision. In order for the principle to not be incorrectly exercised or applied to an unnecessarily wide scope of matters, which is crucial so that the principle does not unnecessarily undermine reaching the objectives behind corporate sustainability reporting, the principle would have to be clearly defined, which, as has been established earlier, is not the case at the moment.

Another goal behind the legislation relates to harmonizing legislation between member states on corporate sustainability reporting. As has been found in the previous chapter, many member states have chosen to deviate from the principle through either narrowing down the scope or presenting additional requirements on the exercise of the principle. In addition, some member states have chosen not to transpose the principle at all. Thus, the principle does not enhance harmonizing the legislation between member states. The deviations can also be considered to speak for the national legislators finding the principle to be lacking on some aspects, especially since some alterations have been made my multiple member states. Some of the changes that national legislators have made, e.g., requiring a disclosure on the exercise of the principle, would add reliability to the exercise of the principle, contributing to the goals behind the legislation.

Finally, the role of mandatory corporate sustainability reporting in the context of the European Green Deal should be considered.[176] While mandatory corporate sustainability reporting does have independent goals, too, as has been discussed above, it also plays a significant role in reaching the goals set in the European Green Deal by contributing to other sustainability-enhancing legislation. Its role is especially important in the effectiveness of EU's sustainable finance disclosure regulation, since the NFRD and upcoming CSRD disclosures are needed for manufactures of financial products and financial advisers to provide the information required by the SFRD to end-investors.[177] Since the interpretation of the principle remains unclear, the risk of incorrect exercise of the principle rises. Should incorrect exercise occur, not only would it result to the corporate sustainability disclosure being

[176] European Commission, 'The European Green Deal' (n 68).

[177] Sustainable Finance Disclosure Regulation (n 70).

lacking, but it could indirectly also lead to incorrect information provided under the SFRD. Thus, the unclarity surrounding the exercise of the safe harbour principle does not merely affect the effectiveness of mandatory corporate sustainability reporting, instead, it can also have an undermining effect on the sustainable finance disclosure regulation and consequently, on the European Green Deal.

4.2 Other problems

4.2.1 Non-compliance and penalties

Due to the unclear interpretation of the safe harbour principle which can lead to its incorrect exercise, a question on liability arises. Currently, in the NFRD much room is left for member states' own discretion:

> Member States shall provide for penalties applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that those penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive.[178]

Thus, the penalties that can result from non-compliance with the NFRD, including the proper application of the safe harbour principle, can greatly deviate between different member states. Currently, most member states seem to penalise non-compliance with the NFRD with fines that vary greatly in sizes.[179]

However, the CSRD proposal suggests more harmonization on the penalties between member states by introducing minimum levels of penalties and listing circumstances that should be taken into consideration when determining the type and level of penalties.[180] According to the proposed article, the minimum penalties must include a public statement, an order requiring to cease the conduct constituting the infringement, and administrative pecuniary sanctions. Thus, while it cannot be stated to be the case for all member states, since the penalties resulting from non-compliance with the NFRD, including the safe harbour

[178] Article 51 of Accounting Directive (n 62).

[179] CSR Europe, GRI and Accountancy Europe (n 22).

[180] Article 1(12) of Corporate Sustainability Reporting Proposal (n 21).

principle, currently seem to consist mostly of fines, the CSRD is to tighten penalties resulting from non-compliance in many member states.

The tightening penalties combined with the unclear interpretation of the safe harbour principle, which can lead to unintentional non-compliance, creates a significant risk of unintended breaches with the principle and ensuing penalties. The risk becomes even more relevant since nearly 40,000 companies are entering the scope of mandatory corporate sustainability reporting for the first time in the upcoming years. Considering this, the above-stressed need for more clarity and guidance on the safe harbour principle becomes a question of utmost importance.

4.2.2 The lack of assurance

Under the current provisions of the NFRD, there has been no requirement on the assurance of the content of corporate sustainability reporting. The mere requirement as per the NFRD has been that member states must ensure that statutory auditors or audit firms check whether the disclosures required by the NFRD are provided either in management report or in a separate report, i.e., perform an existence check. Some members states have chosen to extend assurance requirements to the content of the disclosures, too, but those member states represent a minority.[181] However, in the member states that do have some additional assurance requirements, many of which represent the largest member states, the levels of limited assurance and even reasonable assurance are very significant.[182]

The current lack of coherence and the resulting overall lack of assurance on the content of corporate sustainability reporting enhances above-presented problems surrounding the safe harbour principle. Under the interpretation of the principle, while some member states have opted otherwise, there is no EU-wide requirement that a company that omits information under the principle has to let the users of the corporate sustainability reporting know it has done so. The lack of mention of exercising the principle combined with the lack of assurance requirements on the content of sustainability reporting creates a situation in

[181] CSR Europe, GRI and Accountancy Europe (n 22) accessed 31 January 2022.

[182] European Commission and others, 'Study on the non-financial reporting directive: final report' (2021) <https://data.europa.eu/doi/10.2874/229601> accessed 3 February 2022. For example, France, Italy and Spain have all set additional assurance requirements exceeding the mere existence check, resulting in a content assurance level ranging from 95 to 100 percent.

which the user of sustainability reporting has no possibility of knowing whether something has been omitted under the principle and if so, whether the omission has been made in accordance with the NFRD. Considering that one of the main purposes behind the mandatory corporate sustainability reporting in EU is providing investors the possibility to take sustainability-related risks into account in their investment decisions and consequently increase investor trust,[183] the loophole that is created through the combination of safe harbour principle and lack of assurance contributes to the exact opposite. In addition, this problem has the possibility of lowering the users' reliance on corporate sustainability reporting, again contrary to the objectives of the mandatory sustainability reporting.[184]

However, under the CSRD proposal, as discussed above, a new approach is taken to assurance requirements. The CSRD proposal suggests as a minimum requirement that a statutory auditor, or an independent assurance provider should a member state choose to allow so, must perform a limited assurance engagement on the sustainability reporting of a company.[185] While the CSRD does have limited assurance as a starting point, the door to reasonable assurance is kept open. In three years after the entry of the CSRD into application, the European Commission must report on the implementation of the assurance requirements, and the report can include a proposal for reasonable assurance requirements.[186] Under the starting point of a limited assurance engagement, the engagement must cover at least compliance of the sustainability reporting with the reporting standards, the process carried out by the company in identifying the information reported pursuant to the standards, the compliance with the requirement to mark-up sustainability reporting, and the indicators reported under the taxonomy regulation.[187] Thus, the CSRD proposal does not specifically set assurance requirements on compliance with the safe harbour principle. The first assurance requirement on the compliance of the sustainability reporting with the reporting

[183] Recital 3 of Non-Financial Reporting Directive (n 19); Corporate Sustainability Reporting Proposal (n 21) 3.

[184] Corporate Sustainability Reporting Proposal (n 21) 3.

[185] Article 1(10) of Corporate Sustainability Reporting Proposal (n 21).

[186] Corporate Sustainability Reporting Proposal (n 21) 12.

[187] Article 1(10) of Corporate Sustainability Reporting Proposal (n 21).

standards, however, does cover the reporting rather widely, and compliance with the safe harbour principle could be considered to be covered under it.

Considering the problematic status quo of a vague interpretation of the safe harbour principle, no EU-wide disclosure requirements on exercising the principle and the lack of EU wide assurance requirements on the content of corporate sustainability reporting, bringing the content of corporate sustainability reporting under the CSRD to the scope of limited assurance can clearly be seen as a step towards reducing the above-identified problem that has the potential of creating lack of confidence towards such reporting. However, the upcoming requirement on limited assurance does not answer the problem as well as a reasonable assurance requirement would. The main difference between the two is the level of risk left after the assurance engagement with the risk in limited assurance being higher than in reasonable assurance. In reasonable assurance, the objective is to reduce the risk to an acceptably low level, while in limited assurance the objective is to reduce the risk to an acceptable level in the circumstances of the engagement, which in any case is higher than is reasonable assurance.[188]

Leaving the door open towards a requirement on reasonable assurance has the potential of diminishing the problems arising from the unclear interpretation of the safe harbour principle should the principle not be addressed and clarified in the near future. Reasonable assurance, having the goal of obtaining a reasonable assurance that the disclosures as a whole are free from material misstatement,[189] does better support the purposes of the CSRD proposal, and is more likely to offer the users of reporting under the CSRD assurance that the safe harbour principle has not been exercised incorrectly.[190]

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[188] International Auditing and Assurance Standards Board, 'Handbook of International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements' (2014) <https://www.ifac.org/system/files/publications/files/2014-IAASB-HANDBOOK-VOLUME-1_0.pdf> accessed 1 February 2022, 13-14

[189] International Auditing and Assurance Standards Board (n 188) 76. See also Steven Collings, 'Frequently Asked Questions in International Standards on Auditing' (John Wiley & Sons, Incorporated 2014).

[190] Moving to reasonable requirement has, however, received notable opposition from stakeholders. In the stakeholder feedback on the CSRD proposal, merely some civil society respondents supported immediate reasonable assurance requirements, while all stakeholders either welcomed reasonable assurance requirements at a later time, opposed moving to reasonable assurance overall or required transitional periods on any assurance requirements. See Commission (n 93) 9-10.

By adding a requirement on limited assurance, a step is taken towards the CSRD better fulfilling the purposes behind it. Overall, assurance is the only way to ensure the reliability of reporting.[191] Assurance reduces the risk of a misstatement, and therefore offers the users of such reporting more reliance on the disclosures, decreasing the risk of an unknown risk. Assurance on corporate sustainability reporting can also contribute to the overall quality of the reporting by improving the reporting definitions, scopes and methodologies.[192] Considering especially the safe harbour principle, assurance is crucial. Since in most cases the users of reporting under the CSRD have no possibility of knowing whether something has been left out of the disclosures based on the principle, it is crucial to have assurance so that users can rely on the false use of the principle being noted.

4.3 The future of the principle

Above, it has been established that the current imprecision of the principle is problematic for various different reasons. The imprecision of the principle can undermine the objectives of the legislation as a whole, and it is especially problematic considering penalties ensuing from unintentionally incorrect exercise and currently lacking assurance requirements. The problems concern all stakeholders of corporate sustainability reporting. Companies reporting under the NFRD and the upcoming CSRD must know when the exercise of the principle is appropriate, especially due to the soon tightening consequences from non-compliance. The vagueness of the principle can, in the worst case, lead to retrospective assessment of decisions made under the principle and consequent uncertainty until praxis has been established.[193] The users of the reporting, on the other hand, must be able to better rely on the proper use of the principle, especially since in most cases, there is no need to publish any information on the exercise of the principle.[194] Even as such, the unclear interpretation of the principle gives the users a hard time in assessing what type of information has been

[191] Jukka Mähönen, ‘Ei-taloudellinen informaatio ja corporate governance’ (2013) 94(4) Defensor Legis 566, 576.

[192] Brian Ballou, Po-Chang Chen, Jonathan H Grenier and Dan L Heitger, ‘Corporate social responsibility assurance and reporting quality: Evidence from restatements’ (2018) 37(2) Journal of Accounting and Public Policy 167.

[193] Szabó and Sørensen (n 24) 336.

[194] However, as has earlier been pointed out, many member states have added the requirement to disclose the exercise of the principle.

left out and how it affects the perceived risk, but combined with not knowing whether an omission has been made at all renders the situation even more difficult. Lastly, more clarity and guidance are also in the best interest of the EU, since the lack of a clear interpretation can create mistrust to mandatory corporate sustainability reporting, undermining the motives behind the regulation and reducing the usability of the reporting.

Despite its problematic state, the principle is, as of now, left untouched in the CSRD proposal, resulting in a status quo of a vague and unclear interpretation and consequent problems. The process on the CSRD is not, however, final, since the content is still subject to change and since the European Commission is to adopt more detailed reporting standards by means of delegated acts. Considering the history of the principle, special attention should be paid to the report on the CSRD proposal by the European Parliament, since originally the principle was first introduced by the European Parliament. As of now, the European Parliament has yet to officially suggest amendments to the CSRD proposal and the schedule for the report remains unannounced. In a draft report, which is still subject to alterations, the European Parliament does not, however, suggest any amendments or clarifications to the principle.[195]

While the EU seems to be failing addressing the principle, it is clear that due to the unclarity on the interpretation of the principle and the resulting problems, more guidance and precision are necessary. Especially with the nearing expansion of the scope of the regulation and the emphasized need to report on forward-looking information, which by nature can entail more commercially sensitive information, guidance and clarification are more needed than ever.[196] Now that the CSRD proposal has yet to reach its final phrasing, the principle could still be further defined and clarified. This approach has been supported in legal literature.[197] Also, the contents of the delegated acts by the European Commission

[195] European Parliament, 'Draft report of 16 November 2021 on the proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (COM(2021)0189 – C9-0147/2021 – 2021/0104(COD))'.

[196] The Commission has briefly addressed the problem of commercially sensitive information rising from forward-looking disclosures by stating that the forward-looking disclosures do not prevent consideration of commercially sensitive information, since the disclosures can be provided in 'broader terms' that still give useful information to investors and other stakeholders. See European Commission, 'Guidelines on non-financial reporting (methodology for reporting non-financial information)' (n 23).

[197] Kaisanlahti (n 24) 1392.

remain to be seen. Considering the purpose of delegated acts, which is to amend or supplement a non-essential element of a legislative act, giving more guidance on the interpretation of the principle in the delegated acts by the European Commission would be reasonable.[198] It can, however, be recognized that giving more definition to the principle without either expanding or limiting the scope unintendedly can be difficult, and thus, different options will be presented next, too.

Should no alterations be made to the principle in the CSRD, nor should the principle be addressed in the delegated acts by the European Commission, another way to clarify the principle is to give exemplary and non-exhaustive lists on situations in which the principle can be exercise. An example on how to give such guidance can be derived from the guidelines concerning the term of 'legitimate interests' in MAR. Originally, further guidance on the term was called upon, after which the difficulty of giving a precise definition was recognized, resembling the situation of the safe harbour principle.[199] However, multiple non-exhaustive lists of situations which can be regarded to belong to the group of situations concerning 'legitimate interests' have been issued, clearing the definition significantly.[200] In addition, it should be noted that Sweden has provided such a list in its legislative materials, meaning that the concept of an exemplary, non-exhaustive list is not completely novel in the context of the NFRD and the safe harbour principle.

Also, some have suggested the possibility of member states authorizing the exercise of the principle.[201] While having some type of authorization requirement would significantly decrease the risk of incorrect exercise of the principle, with the drastically widening scope of companies under the CSRD, such requirements would most likely result in excessive costs to member states. Thus, other measures would most likely be more cost effective.

[198] More on the definitions of 'amend', 'supplement' and 'non-essential element' in the context of delegated acts, see Curtin and Manucharyan (n 105) 111-116.

[199] The Committee of European Securities Regulators (n 168) accessed 3 February 2022, para 68.

[200] The Committee of European Securities Regulators (n 168) accessed 3 February 2022, para 70; European Securities and Markets Authority (n 168) accessed 3 February 2022.

[201] Szabó and Sørensen (n 24) 336.

5 CONCLUSIONS

Corporate sustainability reporting is constantly becoming more and more relevant due to the role of companies in enhancing sustainable development, the effect that sustainability matters can have on companies, and the ensuing increasing legislation and investor and stakeholder demands. While any study on corporate sustainability reporting can be considered topical, the European Union has been one of the pioneers in presenting mandatory reporting requirements, which in addition are currently under significant changes. Due to the width of the legislation in the EU, the study has been narrowed down to the safe harbour principle, which is an exception that allows information to be omitted if the disclosure of the information would be seriously prejudicial to the commercial position of the company. The principle has, over the years, faced some criticism from both scholars and stakeholders, but it has not been comprehensively studied before. Thus, studying the safe harbour principle has been motivated by the possibility to contribute to the existing research on mandatory corporate sustainability reporting in the EU.

Since the principle is an exception to the disclose requirements, the question of *what reasons lie behind the principle* arises. When examining the background of the principle, it was found that originally no such exception that would allow companies to omit information from their disclosures based on commercial position considerations was originally suggested to be included in the legislation, instead, it was the European Parliament that first suggested the principle. Based on what was presented by the European Parliament, the reasoning behind suggesting the principle to be added consisted of commercial position and consequent competition considerations. Also, state and trade secrets were noted. However, none of the reasoning presented by the European Parliament was later included in the NFRD, making the reasoning behind the final inclusion of the principle in the legislation unclear. Considering especially the fact that transposing the principle was voluntary for member states, meaning that no absolutely necessary EU-wide reasons can lie behind it, the task to answer the question of *does the principle fulfil its purpose* is rendered rather difficult.

After observing the reasoning behind the principle, attention was steered to *how the safe harbour principle should be interpreted*. Considering the lacking reasoning presented for

the principle and the consequent difficulty of deriving any teleological interpretation of the principle, the means of literal interpretation were next employed. When observing the phrasing of the principle on EU level, three prerequisites on the exercise of the principle were noted. One related to those competent to make the decision to exercise the principle, which was found to depend on the national legislation of a member state and was thus not further examined. Another concerned the effect that an omission under the principle would have on the overall double materiality requirement of the disclosures. The approach concerning the whole reporting has been clarified recently, and thus no significant problems were considered to arise. However, the last prerequisite that concerns the nature of the information to be omitted was found to be more complicated. In order for information to be omitted under the safe harbour principle, the information must concern 'impending developments or matters in the course of negotiation' and the disclosure of such information must also be 'seriously prejudicial to the commercial position of the undertaking'. The phrasing of the former was not found to be precise enough so that conclusions on what situations give rise to the exercise of the principle could be drawn. As for the latter, it remains unclear where the line between seriously prejudicial and merely prejudicial to the commercial position of a company is set.

Thus, the interpretation of the safe harbour principle can be considered inadequately clear and precise. While the difficulty of drafting the principle so that it covers all necessary situations without being unnecessarily wide is noted, many factors speak for the need for clarification through one method or another. First, the unclarity of the principle causes problems to the companies due to the difficulty of knowing whether the principle can be exercised or not. An incorrect exercise of the principle can lead to penalties, which are to tighten once the CSRD enters into force. From the viewpoint of the users of the reporting, having a vaguely phrased principle that allows information to be omitted from the disclosures without an EU-wide requirement to disclose the exercise of the principle, the completeness of the disclosures cannot be fully relied on. This problem is enhanced through the lacking assurance requirements in the NFRD, which, however, are set to be fixed by the CSRD proposal. Lastly, the current status of the principle should be considered problematic by the EU, too, since an unclear exception to the requirements set in the NFRD and the upcoming CSRD can lead to incorrectly lacking disclosures, undermining the goals set for

the legislation. All in all, the question of *how the principle fits into the context of mandatory corporate sustainability* reporting in the EU receives a rather concerning answer.

It should also be noted that the principle has been altered by many member states when transposing it. Some have chosen to narrow down the scope of situations that can give rise to the exercise of the principle, while some have chosen to present additional requirements, such as a requirement to disclose to exercise of the principle. In addition, some have set stricter assurance requirements overall, meaning that the correct exercise of the principle is better monitored. With many national legislators having deviated from the principle as presented in the NFRD, the stand that the principle could be improved from its current form is supported.

As for *how the principle should be improved*, since the CSRD has yet to reach its final form, it could still be defined in a more detailed manner in the upcoming directive. Also, the CSRD proposal suggests the European Commission to publish reporting standards as delegated acts by the end of October 2022, which represents another opportunity to address the principle. However, should no alterations to the principle be made in either, other options exist, too. For example, non-exhaustive exemplary lists, which have been the approach when defining the concept of delayed disclosure of inside information, could give more certainty not only to companies making the decision to exercise the principle but also to users of the reporting by better knowing what situations can give rise to omitting information from the disclosures.

The most significant limitations of the study, and at the same time suggestions for further research, relate to the predominantly EU level analysis and uncertainty over the final form of the soon changing legislation. The study has, aside from examples derived from member states, remained on EU level. Some member state observations have been made, but no comprehensive member state level analysis has been conducted. Considering the voluntary nature of the principle, which also allows for certain changes in the transposition of it, deeper and wider member state analysis on the principle would be a valuable contribution to the research on the topic. The second limitation of the study, no certainty over the final form of the novel legislation, means that it is possible that some findings could soon be outdated. Also, since the novel legislation has yet to be applied to practice, some findings

have remained on rather theoretical level, and could be complemented with notions arising from practice in a few years' time.

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