ERT

Expert Paper

European Sustainability Reporting Standards (ESRS)

March 2023

General observations

ERT recognises the need for introducing ESRS to direct capital flows towards a more sustainable economy. We welcome the improvements that have been made by EFRAG following the consultation process, including the deletion of the rebuttable presumption principle, the reduction in the number of disclosure requirements and data points on which undertakings are required to report, and further alignment with the reporting structure of the Task Force on Climate-related Financial Disclosures (TCFD), the current status of the standards developed by the International Sustainability Standards Board (ISSB) and the Global Reporting Initiative (GRI) standards. The transitional provisions (phase-in) for specific disclosure requirements – e.g. in the context of the value chain for the first three years of application – are also appreciated.

Despite the improvements, the twelve draft ESRS still contain 82 disclosure requirements and more than 1,000 datapoints – many of which are mandatory. From our perspective, the disclosure requirements are still too extensive, granular and complex and therefore present a significant burden on European companies to implement in such a short time frame.

The overall reduction of disclosure requirements and data points is relativised by the addition of new disclosures (e.g. in ESRS S1 / E1) or by shifting required information. The latter can be seen in the example of the ED ESRS G1, whose content was essentially moved to the draft ESRS 2. It should be noted that the Application Requirements (anchored in the appendix) are also mandatory. The number of disclosure requirements and datapoints to be reported should be reduced also in view of the additional sector-specific standards which will further increase disclosures.

To avoid the disclosure of information that is not relevant across sectors, ERT strongly recommends further review and differentiation between sector-agnostic versus sector-specific relevance. This should be done with the objective to relocate sector-specific content to the corresponding future sector-specific standards. We emphasise the need for materiality also in the sector-specific content as materiality can vary significantly also within the same sector.

Unclear, incomprehensible, and ambiguous definitions and terms, as well as unclear reporting scopes and inconsistent individual disclosure requirements create too much room for interpretation of the legal foundations. This in turn leads to uncertainty on the part of companies regarding the implementation of the ESRS, inevitably resulting in diverging interpretations of the legal requirements and thereby considerably reducing the comparability of disclosed information. The aim should be for the published data to allow comparability between undertakings, which is why very clear, consistent and, when possible, internationally recognised and harmonised definitions are necessary. To give one example: the draft ESRS do not contain a definition of how to set value chain boundaries for the purpose of determining the scope of the disclosures. ESRS S2 comprises reporting requirements on workers in the value chain without introducing limits on the scope of the value chain either upstream or downstream. The reporting on the value chain should follow a risk-oriented approach focusing on material impacts, risks and opportunities as set out in ESRS 1. The focus should be on material value chain information and not going beyond Tier 1. Covering the entire value chain will be impossible. ERT reiterates that clear boundaries for the disclosures on the value chain should be set.

Different jurisdictions and legal challenges

Some mandatory information is also defined and designed differently in different jurisdictions (e.g. working hour concepts, fair wage, health & safety indicators, and compensation indicators) reducing comparability even further. Definitions should be sharpened and aligned at the international level and between jurisdictions. Non-specific information on required disclosures should be specified and supplemented by clear and comprehensive guidance that is prepared in consultation with business and made available in a timely fashion to support ESRS implementation, taking account of lessons learned through the implementation of guidance in support of the EU Taxonomy.

In addition, the draft ESRS do not take into account the issue of legally permitted data collection in a global context. Legal constraints such as data protection limit the undertaking's ability to collect, process and disclose information in some areas (e.g., data on non-employee workers) and some countries/regions thereby jeopardising compliance with ESRS requirements. It is of utmost importance to consider the legal differences between countries.

ERT also recommends carrying out a legal review of the draft ESRS to ensure that every disclosure requirement proposed is directly linked to a requirement in the Corporate Sustainability Reporting Directive (CSRD). Disclosure requirements that have no legal foundation in the CSRD, or that go beyond the boundaries set by the CSRD, should be deleted or amended accordingly.

Global alignment and EU competitiveness

We greatly appreciate the intensification of the dialogue between the Commission and the ISSB over recent months. Global alignment of reporting standards for sustainability matters is crucial to provide a comprehensive view of a company's sustainability performance. Preparing different reports based on differing standards would lead to a de facto double reporting – and, as a result, to unnecessary additional costs and reduced comparability. The associated reporting burden diminishes the competitiveness of European companies. We strongly recommend close and constructive cooperation and collaboration between the European Commission and the ISSB to align the ISSB standards and the European standards as much as possible. Fulfilling the ESRS requirements should be sufficient for European companies to comply also with the ISSB requirements and there should not be any additional requirements for EU companies based on the ISSB standards. We also support enhanced collaboration with other regional or local standard-setters such as the SEC in the US.

The mandatory disclosure of forward-looking, commercially sensitive information will put EU companies at a competitive disadvantage. This includes ESRS SBM-3, E1-9, E3-5, and E4-6, which require undertakings to disclose potential strategic opportunities and risks with financial cash flows with quantitative estimates of financial impact, as well as information around climate resilience and the ability of companies to adapt to climate change. ERT strongly recommends that EU companies do not need to disclose commercially sensitive information.

A more detailed overview of key issues and challenges is outlined in the annex. It also provides recommendations to improve the draft ESRS to allow for a proper implementation of the reporting standards.

Recommendations to ensure a successful implementation

ERT would strongly encourage to provide for sufficient and substantial guidance and teaching material on the final ESRS to ease the implementation and application for preparers. Without such guidance and materials, there may be different interpretations which defeat the purpose of the CSRD and ESRS.

We also suggest setting up an interpretations committee – similar to the IFRS Interpretations Committee – to provide undertakings with the best available technical expertise, harmonise the interpretation of the legal texts and ensure the comparability of disclosures.

The priority should be on making the sector-agnostic standards implementable for the preparers and not to rush through sector-specific standards that will add further disclosure requirements and increase the pressure on preparers. Undertakings should have sufficient time to implement the first set of ESRS.

Annex

Challenges regarding the draft European Sustainability Reporting Standards (ESRS)

January 2023

This annex contains a compilation of several challenges regarding the draft European Sustainability Reporting Standards (ESRS), as published by EFRAG on 23 November 2022.

It is a comprehensive list of various concerns reported by companies for which alternatives are proposed.

ERT and its Member companies stand ready to engage further and provide more insights.

ESRS 1 & 2

The following section gives an overview of specific issues in the ESRS 1 & 2 that should be amended and modified from our perspective.

ESRS 1 General Requirements

Para 38 "Materiality assessment"

Current text

"If the undertaking concludes that a topic is not material and therefore it omits all the Disclosure Requirements in a [draft] topical ESRS, it shall briefly explain the conclusions of its materiality assessment for the topic (see [draft] ESRS 2 IRO-2 Disclosure Requirements in ESRS covered by the undertaking's sustainability statements). In this case, the undertaking shall nevertheless report the information referred to in paragraph 32."

Proposed amendment

"If the undertaking concludes that a topic is not material and therefore it omits all the Disclosure Requirements in a [draft] topical ESRS, ~~**it shall briefly explain the conclusions of its materiality assessment for the topic (see [draft] ESRS 2 IRO-2 Disclosure Requirements in ESRS covered by the undertaking's sustainability statements). In this case,**~~ the undertaking shall nevertheless report the information referred to in paragraph 32."

Justification

Where a materiality assessment shows that a sustainability matter is not material for an undertaking, and therefore the undertaking omits disclosing information on that matter, ESRS 1 Par. 38 requires the undertaking to briefly explain the conclusions of its materiality assessment. We believe that the required justification is unnecessary. Justifying the exclusion of a sustainability matter due to immateriality in a way that can be externally verified could ultimately be equivalent to running a detailed materiality assessment on sustainability matters in order to conclude that the matter is not material.

There is no precise definition of the individual characteristics (scale, scope, and irremediable character of the impact) on the basis of which the severity of the effects should be assessed for the purpose of materiality determination (ESRS 1, Par. 48). From the company's point of view, more guidance should be made available here.

The draft ESRS do not contain a definition on how to set value chain boundaries for the purpose of determining the scope of disclosures. ESRS S2 comprises reporting requirements on workers in the value chain without introducing limits on the scope of the value chain either upstream or downstream. Value chain reporting should follow a risk-oriented approach focusing on material impacts, risks and opportunities as set out in ESRS 1 Par.66-70. The focus should be on material value chain information and should not go beyond Tier 1. Covering the entire value chain will be impossible. ERT reiterates that clear boundaries for value chain disclosures should be set.

Para 46 "Impact materiality"

Current text

"A sustainability matter is material from an impact perspective when it pertains to the undertaking's material actual or potential, positive or negative impacts on people or the environment over the short-, medium- and long-term time horizons. Impacts include those caused or contributed to by the undertaking and those which are directly linked to the undertaking's own operations, products, or services through its business relationships. Business relationships include the undertaking's upstream and downstream value chain and are not limited to direct contractual relationships."

Proposed amendment

Scope of the impact materiality assessment should be limited.

Justification

The wording of Para 46 would seem to indicate that an undertaking will need to conduct an impact materiality assessment on every aspect of its operations, products, or services throughout the entire upstream and downstream value chains, which is extremely broad and would be impossible to implement.

Under ESRS 1 Par. 71 (operational control), the meaning of alignment with financial reporting rules should be further clarified, especially regarding joint ventures and associates as the reference to operational control is currently unclear. According to the current wording, it could be suggested that the undertaking would have to report 100% of the impacts.

ESRS 1 Par. 106 implements the legal requirement stemming from the CSRD for the undertaking to provide an adequate description of the impacts, risks and opportunities, as appropriate, of the subsidiary or subsidiaries concerned. This is to ensure that significant differences between material impacts, risks or opportunities at group level and material impacts, risks or opportunities of one or more of its subsidiaries are identified. However, ESRS 1 does not give any indication of what constitutes "significant differences". We strongly request that preparers are provided with additional guidance on how to implement this legal requirement.

The option to incorporate by reference (ESRS 1 Par. 120), which we strongly support, is subject to certain strict conditions (e.g. that publication of the referenced documents occurs at the same time as the management report, that the referenced documents are subject to at least the same level of assurance as the sustainability statements, that they are available with the same technical digitalisation requirements as the sustainability statements) that may limit considerably the use of this option and the number of references when drafting the management report. If the incorporation by reference cannot be used extensively, the result will be extremely voluminous reports. At the same time, there is the potential risk of giving very general information of little value to the report users. In either case, there is a risk of producing reports that are not user-friendly.

ESRS 1, Appendix B, AR 4 outlines that an undertaking should consider the identification of actual and potential impacts (both negative and positive), through engaging with relevant stakeholders and experts to assess impact materiality and determining the material matters to be reported. A definition for the term "relevant stakeholders and experts" is missing and should be provided. Additionally, AR 4 defines that the undertaking shall adopt thresholds to determine which of the impacts will be covered in its sustainability statements. Allowing entities to adopt thresholds to determine which impacts will be covered does not lend to comparability and would also open them up to spurious claims of greenwashing at a minimum as well as litigation by parties felt to be impacted but not included in an entity's reporting.

ESRS 1, Appendix B, AR11 outlines topics that the undertaking should consider when performing its materiality assessment. According to ESRS 1, Appendix B, AR 12, this list is not a substitute for the process of determining material aspects, but a supporting instrument for the materiality assessment. The extent to which the contents of the list should be understood as mandatory is not clear, nor is the degree to which granularity must be followed (e.g. at the level of sub-sub-topics). We would strongly recommend giving more guidance on this matter.

ESRS 1, Appendix D outlines that the disclosure requirement E1-9 may be phased in: "The undertaking may comply with the requirement by reporting only qualitative disclosures, for the first three years of preparation of its sustainability statements, if it is impracticable to prepare quantitative disclosures." However, the term "impracticable" is not defined in ESRS 1. Guidance on this matter is therefore needed.

ESRS 2 General Disclosures

Under DR 2 – GR 6, undertakings are required to disclose significant estimations on uncertainty. Given that the nature, structure and sector of business operations in value chain companies differ to those of the undertaking, uncertainty would more often refer to commercial uncertainty such as supply chain disruptions rather than sustainability uncertainty. Further clarity is needed on how sustainability uncertainty is expected to be incorporated into these assessments, as it presents a significant operational challenge.

Under DR 2 – GOV 1, roles and responsibilities of the administrative, management and supervisory bodies of committee level and board level personnel should be disclosed. It is unclear whether this would also apply to ESG leads in supervisory roles, or how proof of sustainability training or access to experts is to be demonstrated in the annual report. Clarity on this will be important to ensure disclosures are both consistent and accurate.

ESRS E1-E5

For all 5 environmental reporting standards (E1-E5), we strongly recommend that the disclosure for issues by unconsolidated subsidiaries/entities should be moved to the sector-specific standards as it has limited cross-sectoral relevance.

In addition, the following section gives an overview of specific issues in the ESRS E1-E5 that should be amended and modified from our perspective.

ESRS E1 Climate change

E1-1 "Transition plan for climate change mitigation"

Para 15e "EU Taxonomy"

Current text

"if applicable, an explanation of the undertaking's objective for aligning its economic activities (revenues) with the Taxonomy Regulation (EU) 2020/852 including any delegated regulations related to climate change mitigation and adaptation and its plans for future Taxonomy alignment (revenues, CapEx and CapEx plans);

Proposed amendment

"if applicable, an explanation of the undertaking's objective for aligning its economic activities (revenues) with the Taxonomy Regulation (EU) 2020/852 including any delegated regulations related to climate change mitigation and adaptation ~~**and its plans for future Taxonomy alignment (revenues, CapEx and CapEx plans);"**~~

Justification

The paragraph should be aligned with the EU Taxonomy Regulation. This will ensure that the requirements of the ESRS do not go beyond those of the taxonomy.

AR4 "EU Taxonomy"

Current text

"When disclosing the information required under paragraph 15 (e), the undertaking shall explain how the alignment of its economic activities with the provisions of the Delegated Act (EU) 2021/2139 (evolution of green revenue)

supports its transition to a sustainable economy. In doing so, the undertaking shall take account of the information required to be disclosed under Article. 8 of the Taxonomy Regulation (in particular, the green revenue, and CapEx and, if applicable, CapEx plans)."

Proposed amendment

"When disclosing the information required under paragraph 15 (e), the undertaking shall explain how the alignment of its economic activities with the provisions of the Delegated Act (EU) 2021/2139 ~~**(evolution of green revenue)**~~ supports its transition to a sustainable economy. In doing so, the undertaking shall take account of the information required to be disclosed under Article. 8 of the Taxonomy Regulation ~~**(in particular, the green revenue, and CapEx and, if applicable, CapEx plans)."**~~

Justification

The paragraph should be aligned with the EU Taxonomy Regulation to avoid that the requirements of the ESRS go beyond those of the taxonomy.

ESRS E1-4 requires organisations to disclose GHG targets in CO2 tonnes. This is in contrast to science based decarbonisation targets under the SBTi, which focus on reaching net zero at a particular date rather than removing a specified volume of emissions. We see this as a reporting challenge because the targets are long term in nature and precise measurement will vary period to period, based on other business activities (e.g. M&A) that change the volume of emissions. This may also impact the relevance of comparables both across different businesses and within a single business, depending on sector and activity profile, which would undermine the goal of a consistent disclosure standard. This is particularly relevant for sectors where M&A activity is expected to be high in the next few years (e.g. telecommunications).

ESRS E1 also requires disclosure of GHG removals and mitigation activities. Much of this data is managed via third parties; we would therefore question the availability of the detailed information required by the standard, including the methodologies used by those organisations to calculate the GHG emissions removed. It is also necessary under ESRS E1 for this information to be verified against recognised quality standards. This seems ambitious given the reporting timelines set out under the standard. In short, the diversity and scope of such activities, alongside the array of third parties involved, will make information collection and verification highly challenging (at least in the short-term whilst appropriate information sharing relationships are put in place). This also raises the question as to whether the requirement may also

constitute the sharing of potentially commercially sensitive information.

ESRS E1-4 requires undertakings to report emissions for unconsolidated entities. This requirement should be moved to the sector specific standards as unconsolidated entities do not play a material role in emissions in all sectors.

In two key areas, ESRS E1 goes beyond the requirements of CSRD. Firstly, ESRS E1 includes a limiting definition of “residual emissions” that is not found in the CSRD. In the section that outlines disclosure requirements on GHG removals and mitigation projects financed through carbon credits (E1-7), the ESRS E1 defines residual emissions as emissions that are leftover “after approximately 90-95% of GHG emissions reduction”. The requirement should be aligned with the CSRD. Secondly, the objectives of the ESRS E1 standard include helping users of sustainability statements understand the undertaking’s “past, current and future mitigation efforts in line with the Paris Agreement (or an updated international agreement on climate change)”. The reference to “future international agreements” in AR1 is beyond the requirements set out under the CSRD, which only references the Paris Agreement.

ESRS E1 defines “climate resilience” as an organisation’s capacity to adjust to uncertainty related to climate change. The undertaking is required to conduct a resilience analysis (ESRS E1 AR11-14), which should inform the assessment of potential financial effects from material physical and transition risks. This is a judgement and may include disclosure of commercially sensitive information on business strategy and financial figures. There should be no obligation to disclose sensitive information. Additionally, it is unclear whether the disclosure seeks detailed information on how and when an organisation will adjust, or whether it is sufficient to disclose the high-level strategic direction with a focus on key material risks.

ESRS E3 Water and marine resources

In E3, Appendix B, AR 1., AR 2 a reference is made to the Task Force on Nature-related Financial Disclosures (TNFD) framework in the context of requirements for the materiality assessment of environmental topics. This increases complexity as the framework is not yet final. The ESRS E3 should not reference any (international) frameworks that are still work in progress. Before the TNFD framework is included or referenced in the ESRS, a proper analysis and impact assessment should be made. We strongly recommend including the TNFD framework in a review of the ESRS at a later point in time and postponing all disclosure requirements related to the TNFD framework.

In addition, the interaction with the "usual" assessment of impact materiality via likelihood and severity (see ESRS 1, 3.4, 48. or Appendix B) is unclear. A consistent approach across all issues, including governance, social and environmental dimensions, should be allowed for the materiality assessment process.

ESRS E4 Biodiversity and ecosystems

The reference to the Task Force on Nature Related Financial Disclosures (TNFD) is welcome, but it should be borne in mind that the framework is not yet final. As above, we strongly recommend postponing all disclosure related to the TNFD framework until work and negotiations at an international level have been finalised.

AR 26 “entire value chain”

Current text

“the scope of the metrics and methodologies:

i. undertaking, site, brand, commodity, corporate business unit, activity;

ii. entire value chain, upstream or downstream value chain, or own operations and leased assets;

iii. aspects (as set out in paragraph AR 4) covered.”

Proposed amendment

Point ii) should be amended to reflect the fundamental principle as set out in ESRS 1 that the entire value chain does not need to be included in the reporting.

Justification

ESRS 1 Par. 66-71 sets out the fundamental principle that the value chain should be included based on a risk-oriented approach focusing on material impacts, risks and opportunities. ESRS 1 Par. 68 sets out that it is not necessary to include information on each and every entity in the value chain.

The focus should be on material value chain information.

ESRS E4, Appendix B, Disclosure Requirement E4-5, AR 26 is inconsistent with the general requirements of ESRS E4 (between the main part and the appendix) and ESRS 1. In E4, information on the value chain is required, which is linked to a materiality analysis, while in Appendix AR 26 the understanding is established that value chain information must always be integrated. There is a clear contradiction between AR 26 and ESRS 1. There should not be a requirement to cover the entire supply chain also referring to the fundamental principle set out in ESRS 1 on value chain reporting.

ESRS S1-S4

The following section gives an overview of specific issues in the ESRS S1 -S4 that should be amended and modified from our perspective.

ESRS S1 Own workforce

Disclosures on Own Workforce (S1-1- S1-9) are mandatory for companies with at least 250 employees. It is not clear why S1-1 to S1-9 are to be treated differently to other requirements in the topical S standards. We recommend that the Commission carefully considers whether these requirements in the social area should be included amongst those that are always-to-be-disclosed.

We are very critical of the reporting standards on social issues – in particular ESRS S1 – with regard to the granularity and complexity of the information to be disclosed. Companies are confronted with a large reporting burden with regard to the level of detail required by the standards on social topics. We therefore strongly recommend that a new cost-benefit analysis from the preparer's perspective be completed as the analysis elaborated by CEPS was based on the exposure drafts. Some changes to the ESRS S1 increase the reporting burden considerably, so that the cost-benefit analysis no longer reflects the true costs for preparers. In addition, there are a number of missing, ambiguous or overly broad definitions that would lead to operational obstacles and unachievable reporting requirements. In particular, we view the broad scope of the term "own workforce" especially critically. The collection of data on sub-contracting third parties/consulting firms is considered extremely complex or not feasible. Indeed, data on non-employee workers cannot be obtained in many cases due to legal requirements in many countries including the EU. The own workforce and the associated disclosure requirements should therefore be limited to employees who are in a direct employment relationship with the company. In this case, the disclosure requirements for non-employee workers must be differentiated from this and revised, taking into account practical application limits.

In addition, information on employee characteristics (e. g. salary below fair wages, parental leave) is in many cases either difficult to assess due to a lack of clear and unambiguous definitions or challenging (or even impossible) to collect due to the legal requirements in some countries. Further, some required information is defined differently and designed by the local legislature in specific countries (e. g. working hour concepts, fair wage, health & safety indicators, compensation indicators). The huge number of disclosure requirements will result in an enormous expansion of HR Controlling and cause a high degree of administration, including the costly implementation of new IT systems.

Some employee figures required in ESRS S1-S4 violate local data privacy legislature and therefore can either not be collected and/or publicly reported. Data protection requirements of various countries should be considered. The ability to collect data on the contents/KPIs required by the social reporting standards (e.g. persons with disabilities, work related ill health) is highly dependent on national legislation, including existing definitions. Different levels of data protection between states makes reporting sometimes impossible. ERT believes that an undifferentiated disclosure of all required details (datapoints) will result in irrelevant information and unnecessary reporting burdens. The focus should be on disclosing relevant and material information based on clear, unambiguous and internationally harmonised definitions. If it is not possible to define reporting requirements based on homogeneous definitions for all jurisdictions worldwide to avoid data gaps, limited comparability and thereby limited added value for the user, the respective requirement should not be included in ESRS S1 for the time being. ERT and its Members stand ready to engage with the Commission to develop implementable solutions.

The following list gives an overview of current limitations and potential remedies to make the disclosure requirements implementable for preparers:

S1-6 "Characteristics of the undertaking's employees"

Para 51(a) "50 or more employees"

Current text

"a report by head count of the total number of employees, and breakdowns by gender and by country for countries in which the undertaking has 50 or more employees;"

Proposed amendment

"a report by head count of the total number of employees, and breakdowns by gender and by country for countries in which the undertaking **employs 10% or more of its total workforce;"**

Justification

The disclosure requirement is too granular. The focus should be reverted on countries where the reporting undertaking employs a substantial part of its workforce. This would also increase the significance of the statements for the stakeholders.

We would instead propose a threshold of 10% of the company's total workforce. This would increase the meaningfulness and relevance of reporting for the stakeholders

Para. 51 (b) classification criteria

Current text

"a report by head count or full time equivalent (FTE) of:

i. permanent employees, and breakdowns by gender and by region;

ii. temporary employees, and breakdowns by gender and by region; and

iii. non-guaranteed hours employees, and breakdowns by gender and by region."

Proposed amendment

a report by head count or full time equivalent (FTE) of:

i. permanent employees, and breakdowns by gender and by region"

Justification

No such classification according to particular criteria is required by CSRD. Disclosing these details about key characteristics of employees touches upon sensitive issues related to the business model and the entire HR policy. Additionally, the multitude of definitions of permanent, temporary and non-guaranteed hours across different countries dilutes the added value of this requirement aiming at collecting comparable information. Moreover, not all countries have the same data protection and privacy laws, and it is therefore impossible to provide differentiated gender-related information on the entire workforce. In terms of the concept of "gender", requiring employees to provide this kind of personal information may become delicate in certain cultural settings and could be considered an invasion of privacy.

The requirement should therefore be limited to reporting on permanent employees.

AR 54 "region"

Current text

"A region can refer to a country or other geographic locations, such as a city or a world region."

Proposed amendment

Specification and clarification necessary.

Justification

The term "region" needs to be specified as to whether regions are smaller than a country such as subnational regions; or whether several countries can be combined into one region. The AR does not help implementing the disclosure requirement. The required information still needs to be determined

and gathered internally by every reporting undertaking for each individual country, hence aggregating information at regional level is in no way a simplification and does not serve the comparability of reports.

The definition should match the existing management report or segment reporting. We have already defined regions there.

S1-7 Characteristics of non-employee workers in the undertaking's own workforce

Para. 53 "key characteristics of non-employees"

Current text

"The undertaking shall describe key characteristics of non-employee workers in its own workforce."

Proposed amendment

To be deleted in S1-7 and moved to ESRS S2 Workers in the Value Chain.

Justification

There is no basis within the framework of the CSRD for requiring this specific content. This disclosure requirement is a set example for a clear breach of the "non-essential elements"-principle in accordance with Art. 290 TFEU. Significant manual effort is to be expected to meet this disclosure requirement, especially given that third party data cannot be derived from the company's own systems. Disclosing these details about key characteristics of non-employee workers touches upon sensitive issues related to the business model.

Details of non-employee workers are not the responsibility of the reporting undertaking. They are known only to a third party or in the case of self-employed workers only to them. This type of data is not disclosed for data protection reasons and due to the "need to know" principle in terms of disclosure of information. The required details are irrelevant for sustainability reporting and raise concerns regarding the protection of trade secrets.

Reporting on the undertaking's own workforce include disclosures on employees and non-employees. This bears the risk that it could be interpreted like non-employees, including agency workers, are treated as own employees. This could represent a co-employment risk to the undertaking. A narrower and clear-cut definition of "non-employee workers" is needed containing at most temporary workers that are already included in other disclosure requirements. Non-employees, as provided in the current draft standard, should therefore be excluded here and instead be reported under ESRS S2 Workers in the Value Chain.

The CSRD does not entail any basis for this requirement demanding information about specific contractual arrangements used by companies. Further, the multitude of definitions of permanent, temporary, non-guaranteed hours, full-time and part-time employees across different countries dilutes the added value of this requirement in terms of collecting comparable information.

S1-8 Collective bargaining coverage and social dialogue

Para. 53 "information in relation to collective bargaining"

Current text

"In the EEA, the disclosure required by paragraph 60 shall include a disclosure of whether the undertaking has one or more collective bargaining agreements and, if so, the overall percentage covered by such agreement(s) for each country in which the undertaking has significant employment, defined as at least 50 employees by head count. Outside of the EEA, the collective bargaining coverage rate may be reported by region."

Proposed amendment

"In the EEA, the disclosure required by paragraph 60 shall include a disclosure of whether the undertaking has one or more collective bargaining agreements and, if so, the overall percentage covered by such agreement(s) for each country in which the undertaking has significant employment, defined as at least **10% of its total workforce** by head count. Outside of the EEA, the collective bargaining coverage rate may be reported by region."

Justification

The threshold for "significant employment" in a particular country (i.e., at least 50 employees) is too low. This will cause a disproportionate burden for employers engaged in cross-border and international activities, which in turn is likely to disincentivise such engagements and limit the internal market. We would instead propose a threshold of 10% of the company's total workforce. This would increase the meaningfulness and relevance of reporting for stakeholders.

For non-employee workers, data on binding to collective agreements is often not available (for self-employed workers, the European legal basis for collective agreements is currently being created, for temporary workers this may be required in the purchasing conditions, but the corresponding payment is not verifiable). This requirement therefore has extremely limited feasibility.

AR.69 Social Dialogue

Current text

"For calculating the information required by paragraph 103 (a), the undertaking shall identify in which European Economic Area (EEA) countries it has significant employment (i.e., at least 50 employees). For these countries it shall report the percentage of employees in that country which are employed in establishments in which employees are represented by workers' representatives at the establishment level. Establishment is defined as any place of operations where the undertaking carries out a non-transitory economic activity with human means and goods. Examples include: a factory, a branch of a retail chain, or an undertaking's headquarters. For countries in which there is only one establishment the percentage reported shall be either 100% or 0%."

Proposed amendment

"For calculating the information required by paragraph 103 (a), the undertaking shall identify in which European Economic Area (EEA) countries it has significant employment (i.e., at least **10% of its total workforce**). For these countries it shall report the percentage of employees in that country which are employed in establishments in which employees are represented by workers' representatives at the establishment level. Establishment is defined as any place of operations where the undertaking carries out a non-transitory economic activity with human means and goods. Examples include: a factory, a branch of a retail chain, or an undertaking's headquarters. For countries in which there is only one establishment the percentage reported shall be either 100% or 0%."

Justification

The threshold for "significant employment" in a particular country (i.e., at least 50 employees) is too low, causing a disproportionate burden for employers engaged in cross-border and international activities. This in turn is likely to disincentivise such engagements and limit the internal market. We would instead propose a threshold of 10% of the company's total workforce. This would increase the meaningfulness and relevance of reporting for stakeholders.

S1-10 Adequate wages

AR.69 "lowest wage"

Current text

"The lowest wage shall be calculated for the lowest pay category, excluding interns and apprentices. This is to be based on the basic wage plus any fixed additional payments that are guaranteed to all own workers. The lowest wage shall be considered separately for each country in which the undertaking has operations, except outside the EEA when the relevant adequate or minimum wage is defined at a sub national level."

Reading the application requirement AR 72 in conjunction with the disclosure requirement set in para. 66, it is not clear why the particular "lowest wage" needs to be calculated and reported. The term "pay category" may also create confusions when dealing with salary bands, e.g., base salary for employee department x is 5 – 10 monetary units, base salary for employee department y is 4 – 11 monetary units. In this case it remains unclear whether the lower range or the lowest end would determine which employee category would qualify as the "lowest pay category".

Proposed amendment

To be deleted.

Justification

This disclosure requirement is not justified, and disclosing the required information could even be considered illegal across the EU. Revealing the remuneration of the lowest-earning employee cannot be justified under data protection law. In most cases, the remuneration can be traced back to a specific person in the company (especially the lowest and highest paid individual) and thus constitutes personal data. The processing of personal data is subject to legal requirements under the General Data Protection Regulation. A legal basis for the processing and disclosure of the remuneration is not provided for in the GDPR. Additionally, the definition of "any fixed additional payments that are guaranteed to all own workers" is highly unclear. Does it pertain to all employees in the respective entity, including the CEO – or does the standard intend for a different categorisation? Furthermore, the definition of fixed additional payments is highly unclear: would bonus systems with a guaranteed minimum payment be included, since this minimum payment is guaranteed although the compensation instrument itself is variable?

S1-11 Social protection

Para. 70 "social protection"

Current text

"The undertaking shall disclose whether its own workers are covered by social protection against loss of income due to major life events, and, if not, the countries where this is not the case and the percentages in those countries that are not protected."

Proposed amendment

To be deleted.

Justification

The company must disclose whether all employees of the own workforce are covered by the respective social protection systems. However, there is no basic definition of when an employee is considered "socially protected". There are different legal bases for this. For example, in some countries, the first days of illness are unpaid, although there is basically a social security system and corresponding protection in the respective country.

Here, too, the need-to-know principle applies: data for temporary workers is not available to the companies and must be queried/ manually recorded individually from the temporary employment agencies.

The disclosure requirement also has no basis in the CSRD, which does not mention the term "social security". Moreover, the term "social protection against loss of income" does not clearly define if statutory and/or privately arranged protection under a scheme created by law are subject to this disclosure requirement. We therefore see a clear breach of the "non-essential elements"-principle in accordance with Art. 290 TFEU.

Alternatively, very clear guidance on and a workable definition of "social protection" is necessary.

S1-12 Persons with disabilities

Para. 74 "disabilities"

Current text

"The undertaking shall disclose the percentage of persons with disabilities in its own workforce."

Proposed amendment

To be deleted.

Justification

Due to legal boundaries/divergent legal provisions (sometimes within the EU), data on persons with disabilities is not completely available in the company (data retrieval can also be understood as an invasion of privacy and sometimes prohibited by law), so extensive data collection is not possible. Furthermore,

the undertaking is usually not capable of providing this information for non-employee workers. Detailed guidance should be given on how to deal with the different legal definitions of "disability" (there is no universal definition of disability).

S1-13 (Training and skills development indicators)

Para. 80 "Regular performance and career development reviews"

Current text

"The disclosure required by paragraph 78 shall include:

(a) the percentage of employees that participated in regular performance and career development reviews; such information shall be broken down by employee category and by gender;

(b) the average number of training hours per person for employees, by employee category and by gender."

Proposed amendment

"The disclosure required by paragraph 78 shall either include:

(a) the percentage of employees that participated in regular performance and career development reviews; such information shall be broken down by employee category and by gender;

or

(b) the average number of training hours per person for employees, by employee category and by gender."

Justification

Both indicators can be used as proxies for the degree of employee development in an organisation, and it should thus be sufficient to report on one of them.

S1-14 Health and safety indicators

This reporting requirement poses fundamental problems and requires a revision with regard to (internal) national legislation as well as the extension of the option of omitting sensitive/legally questionable content.

The legislation with regard to the collection possibilities of medical data is regulated differently at national level. The data on work-related injuries of external company employees working at company locations can therefore not be reliably collected. Further, due to the sensitivity of the data, no direct conclusions can be drawn at the international level about the cause of downtime. This also applies to those parts of the workforce that are employed in the company, e.g. via temporary employment agencies – here the corresponding rates can only be requested from the personnel service providers, a control is not possible.

Para. 84 Work-related incidents

Current text

"The disclosure required by paragraph 82 shall include the following information broken down between employees and non-employee workers in own workforce:

(a) the percentage of own workers who are covered by the undertaking's health and safety management system based on legal requirements and/or recognised standards or guidelines;

(b) the number of fatalities as a result of work-related injuries and work-related ill health;

(c) the number and rate of recordable work-related accidents;

(d) the number of cases of recordable work-related ill health; and

(e) the number of days lost to work-related injuries and fatalities from work-related accidents, work-related ill health and fatalities from ill health.
The information for (b) shall also be reported for other workers working on the undertaking's sites."

Proposed amendment

To be specified and definitions need to be clarified and aligned with international state-of the-art definitions.

Justification

All the terms, in particular the underscored ones, require more clarification and clear-cut definitions. They should be aligned with international state-of-the-art definitions (ESRS/SFDR vs. GRI/OSHA). The number of days lost to work-related injuries can be counted differently under different legislations and are thus challenging to collect in a comparable manner. The number of days lost to fatalities must indeed be defined to be meaningful. Please see also the comments on Par. 84 (e).

Para. 84 (d) "work-related ill-health"

Current text

"the number of cases of recordable work-related ill health"

Proposed amendment

To be deleted.

Justification

The number of work-related illnesses cannot be reported due to the different definitions and legislation. In Germany, for example, the reason for illness is not transmitted to the employer. There is no international definition of work-related diseases that covers all countries in which global companies operate. In Germany, only work-related accidents and occupational diseases can be recorded. Occupational diseases are a subset of work-related diseases. Occupational diseases in Germany can be recorded very reliably, but other work-related diseases cannot and must not be recorded.

The mere indication of numbers and quotas will not provide any meaningful insights in this regard. They must be put into context considering, in particular, what accident rates and occupational diseases are common in the respective countries and in the corresponding sector. The applicable timeframe plays a vital role as well, as to whether the figures are counted, for example, within a calendar year, quarterly, or since the company was founded. Requiring this high level of detail is disproportionate.

There are strong concerns that this more complex classification will not be possible, especially for smaller enterprises.

The requirement should therefore be deleted.

Para. 84 (e) "number of day […] and fatalities from ill health"

Current text

"[…] the number of days lost to work-related injuries and fatalities from work-related accidents, work-related ill health and fatalities from ill health […]

Proposed amendment

To be deleted.

Justification

This reporting requirement proves to be incomprehensible and data collection is considered unfeasible. Please see the comments on Para. 84 (d) "work-related ill-health" above for more explanation.

AR 85 (b) Examples for non-work-related incidents

Current text

"For example, the following incidents are not considered to be work related: […]

a worker driving to or from work is injured in a car accident (when driving is not part of the work and where the transport has not been organised by the undertaking)"

Proposed amendment

To be deleted.

Justification

In certain EU countries, this requirement could cause significant confusion and legal uncertainty. In Germany, for example, this could cause confusion in terms of insurance since commuting accidents are considered as work-related from a social security perspective and covered by the statutory accident insurance. The disclosure should respect the difference between a work accident (typically defined as a sudden incident resulting in an injury immediately or within a few days) and work-related illness (which is a result of a long-time impact from the work conditions). It should also take national definitions into consideration, i.e., in some countries, transportation to/from work is considered part of work hours while in other countries it is considered to be outside of work hours. In addition, the examination of whether an incident is actually considered as a work-related illness (occupational disease) is in the hands of a competent accident insurance firm (for example in Germany). There are therefore country-specific differences as to which occupational diseases are (or can be) recognised at all.

Corporate reporting with regard to occupational health and safety is superfluous and would cause unjustified administrative burdens. A multitude of differences exists across the occupational health and safety standards between the different countries, especially outside the EU. It is important to have a clear distinction between the safety and health system provided by the government and the company. The coverage would be considered as a minimum per law or above the legal requirements, depending on the definition.

Germany, for example, has very strict occupational health and safety laws and regulations, which are also regularly monitored by the accident insurance and state supervisory authorities; these standards cannot be applied internationally. Companies are already compliant with the legal requirements and customs that apply within the national context of their economic activities, reporting on compliance thus would become redundant.

The requirement should therefore be deleted.

S1-15 Work-life balance indicators

Para. 86 “family-related leave”

Current text

“The undertaking shall disclose the extent to which employees are entitled to and make use of family-related leave.”

Proposed amendment

“The undertaking shall disclose the extent to which employees are entitled to family-related leave, and report on policies in place related to different work-life balance approaches..”

Justification

One problem with collecting data on parental leave entitlements is that data is sometimes only available for employees who have actually taken parental leave. As a rule, companies do not know which employees have children (and thus parental leave claims), as there is no obligation to report on the part of employees. More broadly, work-life balance indicators should not be limited to family-related leave and should instead have a stronger focus on material topics like flexible and part-time work options.

In Germany, like elsewhere, family-related leave is regulated by law. Differences in national law reflecting cultural and societal preferences would not allow for meaningful comparability. Companies are already compliant with the legal requirements and customs that apply within the national context of their economic activities. Reporting on compliance thus would become redundant. In this context, data access and availability remain a contentious issue as well. Requesting this kind of personal information from employees is often prohibited by law and considered an invasion of privacy. Reporting companies will be dependent on the employees’ readiness to share information on their entitlement to take family-related leave in order to report exact figures in percentage form, as required.

S1-16 Compensation indicators (pay gap and total compensation)

Terms, key metrics and definitions should be harmonised with the recently adopted EU Pay Transparency[1] Directive, and further legal and linguistic examinations should be carried out after the final legal text of the Directive is available.

In addition, it is unclear what is subsumed under gross hourly earnings. A clear and unambiguous definition is needed here. If necessary, reference to narrower definitions of already implemented EU regulations makes sense.

Para. 90 "highest paid individual"

Current text

"The undertaking shall disclose the percentage gap in pay between women and men and the ratio between the compensation of its highest paid individual and the median compensation for its employees."

Proposed amendment

To be deleted.

Justification

Disclosing the remuneration of the highest-earning employee cannot be justified under data protection law. In most cases, the remuneration can be traced back to a specific person in the company (especially the highest paid individual) and thus constitutes personal data. The processing of personal data is subject to legal requirements under the General Data Protection Regulation. A legal basis for the processing and disclosure of the remuneration is not provided for in the GDPR. This disclosure requirement is not justified, as there is no basis for it within the framework of the draft CSRD. We therefore see a clear breach of the "non-essential elements"-principle in accordance with Art. 290 TFEU. Disclosing the required information could even be considered illegal across the EU.

Further, employees of the company can already find out about the wage structures within the company via the national wage transparency law.

Para. 92a "male-female pay gap"

Current text

"the male-female pay gap, defined as the difference between average gross hourly earnings of male paid employees and of female paid employees expressed as a percentage of average gross hourly earnings of male paid employees"

Proposed amendment

A clear and unambiguous definition of gross hourly earnings is needed and the requirement shall reflect that not all countries allow for the use of gender-specific data.

Justification

Not all countries (e.g. USA) can use gender-specific data for analysis that complies with prevailing anti-discrimination regulations. Further, gross hourly earnings should be extended by the possibility of the logic of monthly earnings and/or annual earnings.

In addition, a gross pay gap says very little unless it is disaggregated by age, education and position level.

Para. 92b "compensation ratios"

Current text

"the ratio of the annual total compensation ratio of the highest paid individual to the median annual total compensation for all employees (excluding the highest-paid individual)"

1 Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

Proposed amendment

To be deleted.

Justification

Obtaining a meaningful KPI is very complex due to the need to consolidate different currencies and types of compensation elements across different markets/countries.

AR. 103b "compensation ratio"

Current text

"consider, depending on the undertaking's remuneration policies, all of the following:

i. base salary, which is the sum of guaranteed, short-term, and non-variable cash compensation;

ii. total cash compensation, which is the sum of the base salary and cash allowances, bonuses, commissions, cash profit-sharing, and other forms of variable cash payments; and

iii. direct compensation, which is the sum of total cash compensation and total fair value of all annual long-term incentives (for example, stock option awards, restricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights, and long-term cash awards).

the ratio of the annual total compensation ratio of the highest paid individual to the median annual total compensation for all employees (excluding the highest-paid individual)"

Proposed amendment

"consider, depending on the undertaking's remuneration policies, all of the following:

i. base salary, which is the sum of guaranteed, short-term, and non-variable cash compensation;

ii. total cash compensation, which is the sum of the base salary and cash allowances, bonuses, commissions, cash profit-sharing, and other forms of variable cash payments; and

iii. direct compensation, which is the sum of total cash compensation and total fair value of all annual long-term incentives (for example, stock option awards, restricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights, and long-term cash awards).

the ratio of the annual total compensation ratio of the ~~**highest paid individual**~~ **CEO** to the median annual total compensation for all employees (excluding the ~~**highest paid individual**~~ **CEO**)"

Justification

It is unclear what exactly needs to be reported here. This is because each year, a different employee can theoretically be the highest-paid individual in each of the individual categories mentioned. In addition, annual identification requires significant administrative effort. The use of the CEO of a company as a basic benchmark should be considered.

Para. 92 (b) "annual total compensation ratio"

Current text

"The disclosure required by paragraph 90 shall include: [...] (b) the ratio of the annual total compensation ratio of the highest paid individual to the median annual total compensation for all employees (excluding the highest-paid individual)."

Proposed amendment

To be deleted.

Justification

It is important to recognise that the usage of the unadjusted total compensation ratio is misleading because it does not take compensation ratio drivers like

country or industry into account. Small engineering companies, for instance, with 100% of their workforce based in Germany would inevitably report a lower ratio than manufacturing firms with employees both inside and outside the EU, as the former typically hires workers with a university education and national compensation level disparities do not factor in, whereas the latter has significant disparities in both dimensions. Unlike the other remuneration-related disclosure obligations, this standard does not ask for country-specific distinctions. Given that the geographic makeup of the workforce has a significant impact on this metric, this does not seem consistent. Explaining the country-specific or industry-specific impact on the pay gap may alleviate the distorted reporting, however with little impact on the underlying targeted problem. Mandating a pay ratio annually for every country would be an immense administrative burden for reporting undertakings confronted particularly with comparability issues.

AR 103 “remuneration policies”

Current text

“When compiling the information required by paragraph 86 (b), the undertaking shall: (a) include all employees; (b) consider, depending on the undertaking’s remuneration policies, all of the following:

i. base salary, which is the sum of guaranteed, short-term, and non-variable cash compensation;

ii. total cash compensation, which is the sum of the base salary and cash allowances, bonuses, commissions, cash profit-sharing, and other forms of variable cash payments; and

iii. direct compensation, which is the sum of total cash compensation and total fair value of all annual long-term incentives (for example, stock option awards, restricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights, and long-term cash awards)."

Proposed amendment

Clear-cut definitions of key terms like “base salary”, “variable cash payments”, “total cash compensation”, “pensions” need to be provided.

Justification

It is unclear why pensions are not considered in this standard. If pensions were to be considered, it would be important to know how to determine the valuation, e.g., accruals-based valuation or contribution-based valuation. The standards lack clear-cut definitions concerning compensation-related terms: “base salary”, “variable cash payments”, “total cash compensation”.

In addition, there remains uncertainty as to how employees who have been with the company for less than a year and thus not eligible for certain allowances or bonus payments should be treated in the data collection and calculations. This also applies to employees in companies (M&A) purchased or sold in the middle of the year and to employees who switched positions during the year if this resulted in a change concerning their compensation package. In practice, it is also necessary to determine which exchange rate should be used to convert the wage. Likewise, there is some clarification needed as to which figures should be considered in terms of variable payments because often the performance period and the pay-out take place in different years: should the target/grant values of the years in which the instrument was granted be considered or the payouts, which may – in case of long term incentive models – take place years later.

Most companies do not have the requested data at the required level of granularity, e.g., currently payroll systems are not apt to deliver data as required, such as compiling different kinds of wages into one wage category to differentiate information. Additionally, standardising data even within one country is challenging due to differing interpretations of a full working week, which may e.g. comprise of 35 hours for some employees, but 40 hours for other employees. These differences are magnified immensely when standardisation on an international level is required. Substantial implementation efforts will be required to comply with this new regulation, especially at a global level. Employees are

based on different countries, languages; likewise on pay bands. It is difficult to report a meaningful KPI as different currencies and purchasing powers need to be consolidated in addition to different types of compensation elements in different markets referring to different countries.

S1-17 Incidents, complaints and severe human rights impacts and incidents

Para. 97 "incidents", discrimination grounds"

Current text

"The disclosure required by paragraph 95 shall include, subject to the relevant privacy regulations, work-related incidents of discrimination on the grounds of gender, racial or ethnic origin, nationality, religion or belief, disability, age, sexual orientation, or other relevant forms of discrimination involving internal and/or external stakeholders across operations in the reporting period. This includes incidents of harassment as a specific form of discrimination."

Proposed amendment

"The disclosure required by paragraph 95 shall include, subject to the relevant privacy regulations, **severe** work-related incidents of discrimination on the grounds of gender, racial or ethnic origin, nationality, religion or belief, disability, age, sexual orientation, or other relevant forms of discrimination involving internal and/or external stakeholders across operations in the reporting period **(severe meaning complaints to which the company has reacted with a sanction, or a coordinated action plan)**. This includes **severe** incidents of harassment as a specific form of discrimination **(severe meaning complaints to which the company has reacted with a sanction, or a coordinated action plan)**."

Justification

These grounds for discrimination overlap with para. 25(b); the distinction between the two disclosure requirements needs further clarification in order to avoid double reporting. There is no clear definition of incidents. According to the wording, even unfounded complaints are not excluded from the disclosure requirement. Depending on the accuracy of the recording and system, comparability of the figures is not guaranteed. This requires a sharpening of the reporting limits (e.g. complaints in which it turns out that no substance was given should not be included). In addition, it should be clarified that only complaints that reach the company via formal complaint channels are meant and are considered at all. Verbal complaints, informal e-mail complaints, etc. cannot be evaluated from a company perspective. It would be advantageous if it were stated that only ("severe") complaints to which the company has reacted with a sanction, or a coordinated action plan must be counted. It is important to make sure that the term "remediation plan" used in para. 100 denotes the same concept.

ESRS S2 Workers in the Value Chain

The value chain reporting requirements in the ESRS are very extensive. This includes inter alia the requirements in ESRS S2 to consult with workers in the value chain. The current draft standard does not give any boundary regarding the value chain, neither upstream nor downstream. If all workers in the value chain have to be covered, an almost infinite number of workers in the value chain of large companies would fall under this requirement. Some companies already have a five-digit number of suppliers at Tier 1 level. Particularly for the value chain outside the EU/EE, this will be a huge challenge for many years to come. It would be even more challenging to disclose information related to workers in the downstream value chain. We support maintaining disclosure requirements on policy and management systems for how to handle the value chain, but we believe that many of the more detailed requirements are premature. We would strongly recommend guidelines for preparers to properly identify "materially affected value chain workers".

ESRS G1 Business Conduct

ESRS G1-4 requires the undertaking to provide information on confirmed incidents of corruption or bribery during the reporting period. This would violate the fundamental right protecting against self-incrimination and should therefore be deleted.

The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €2 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €60 billion annually in R&D, largely in Europe.

This Expert Paper has been prepared by the ERT CFO Platform.

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