

## Consultation response

# EFRAG's consultation on draft European Sustainability Reporting Standards (ESRS) Implementation Guidance

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) fully supports regulatory efforts to provide a common framework for companies to report on sustainability, resulting in reliable, decision-useful, interoperable and comparable information. The European Financial Reporting Advisory Group (EFRAG)'s investment into providing valuable implementation guidance is a positive step. For the maximum usefulness of the implementation guidance, EFRAG should consider the following refinements:

1. Reconcile inconsistencies between the draft IG and the ESRS, in particular with respect to stakeholder engagement, types of information and value chain information.
2. Review and revise the IG on how mitigation actions should be considered in assessing gross vs net environmental impacts.
3. Ensure that companies are guided to use independent quality sources of external data.
4. EFRAG and the European Commission should ensure consistency between the ESRS and the Corporate Sustainability Due Diligence Directive (CS3D) in particular in relation to value chain/ 'chain of activity' disclosures.

## Introduction

Regulatory efforts to provide a common framework for companies to report on sustainability are important for disclosing reliable, decision-useful, interoperable and comparable information. The Corporate Sustainability Reporting Directive (CSRD) and the recently adopted Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU as regards sustainability reporting standards (the 'Delegated Act') including the European Sustainability Reporting Standards (ESRS) set such a framework for coherent and consistent reporting. In that context, we welcome EFRAG's effort to help and guide preparers in their implementation journey, and appreciate the opportunity to comment on EFRAG draft Implementation Guidance (IG).

This position paper is divided into two parts: (1) general comments and (2) concrete proposals for modification referring to specific chapters of the materiality assessment implementation guidance (IG1), the value chain implementation guidance (IG2) and the ESRS datapoints implementation guidance (IG3).

## General comments

### 1. Useful and valuable implementation guidance

In our responses to previous ESRS consultations, we asked for more guidance. This first set of draft IG provides useful and valuable additional support to companies for implementing the ESRS. For

example, the draft IG2 provides helpful support by explaining the difference between a value chain worker vs a non-employee. The drafts are generally clear and useable.

### Financial and impact materiality

Financial and impact materiality are key concepts which are further explained and in need of additional clarification. Firstly, the draft IG1 provides useful guidance on distinguishing financial materiality used for financial reporting versus sustainability reporting and states that the approach to impact materiality under GRI and ESRS is the same. It illustrates (Figure 1 (c)) that financial and impact materiality are separate. To avoid confusion, it should also be stated explicitly in the guidance. This would support the understanding that financial materiality is not reliant on stakeholder engagement (see further below). This is also important to ensure interoperability with IFRS S 1 and S 2.

Finally, the description of materiality with respect to the value chain is concerning. The draft provides that relevant impacts are defined as those that are ‘connected’ with the undertaking, which ‘includes when they are either **caused by** or **contributed to** or that are **directly linked**’ to the undertaking. The notions of ‘caused by’, ‘contributed to’ and ‘directly linked’ are neither defined nor used in the Delegated Act. However, the definition provided in this paragraph seems to suggest the existence of a causal link between the actions of the undertaking and the relevant impacts, which has far-reaching implications from a legal and litigation standpoint.

### ESRS standard is ‘materiality’, not ‘relevance’ (including for the value chain)

In multiple places, the IGs refer to ‘relevant information’ to be analysed or disclosed (eg, IG 1, paras 3, 23, 76, 105). These references should be replaced with ‘material information’, as materiality of information is the basis of all information to be analysed as part of the double materiality and to be reported under the ESRS (eg ESRS 1, para 31; ESRS 1, QC 17).

In addition, only material elements of the value chain need to be reported under the ESRS (ESRS 1, para 64). Currently, the IG 2 refers to ‘all relevant actors’, which in our view should be changed to ‘material actors’ (IG 2, 28).

## 2. Reconcile inconsistencies between the draft IG and the ESRS

EFRAG expressly acknowledges that it cannot develop concepts and reporting requirements that go beyond the content of the ESRS as published in the OJEU on 22 December 2023 or interpret Union law. The guidance should support the application of sector agnostic ESRS and not introduce inconsistencies. As stated in the IG, ‘new provisions can only result from future standard setting activities (eg future possible amendments to draft ESRS), if applicable in accordance with the EFRAG due process’.

Given these acknowledged limitations, EFRAG should reconcile inconsistencies between the IG and the ESRS. Both IG1 and IG2 contain several instances where their proposed guidance goes beyond what is contained in the ESRS Delegated Act.

## Stakeholder engagement

As stated in the draft IG1 explicitly (and by EFRAG representatives publicly), neither CSRD nor ESRS mandate a specific form of engagement with stakeholders (page 5, para 7). As stated in AR 8 ESRS 1: ‘Materiality assessment is informed by dialogue with affected stakeholders. The undertaking may engage with affected stakeholders or their representatives (such as employees or trade unions), along with users of sustainability reporting and other experts, to provide inputs or feedback on its conclusions regarding its material impacts, risks and opportunities.’ Despite this language, AR 9 clarifies that stakeholder engagement is relevant for the assessment of impact materiality. Specifically, AR 9 ESRS 1 lit b) provides, ‘identification of actual and potential impacts (both negative and positive), including through engaging with stakeholders and experts. In this step, the undertaking may rely on scientific and analytical research on impacts on sustainability matters’.

Neither the discussion of financial materiality in section 3.5 of ESRS 1 nor the application requirements that are related to the assessment of financial materiality, reference stakeholder engagement. We are therefore concerned to see guidance on stakeholder engagement in the IG (IG1 – Chapter 3.5) suggesting that such engagement may be a necessary part of the assessment of financial materiality. In practice, the value of direct stakeholder engagement is dependent on the business and specific circumstances of individual companies, and, in some cases, can be limited, as third-party stakeholders do not necessarily have the insight into the specific Impacts, Risks and Opportunities (IRO) applicable to individual companies.

In addition, the reliability and usefulness of direct engagement methods, such as questionnaires, is questionable as they create a burden on both the private sector and NGOs, which should not be underestimated. The use of standardised tools and formats (such as industry-wide ESG questionnaires) to collect information could help avoid supplier fatigue and potentially conflicting requests from various members of the value chain (which will all be sending each other their own questionnaires). In summary, companies are best placed to decide which form of stakeholder engagement is most suitable in the individual case. The guidance should reinforce that undertakings ‘may’ engage with affected stakeholders when it comes to assessing impact materiality.

## Values of types of information

The ESRS place quantitative and qualitative information on equal footing. The drafts of IG1 and IG2 introduce a hierarchy of information that places quantitative above qualitative information (IG1 - Chapter 5.3., FAQ 10 – page 37, para 168; IG2 – Chapter 3, FAQ 7, para 125). For example, draft IG1 FAQ 10 implies that a quantitative IRO assessment should be pursued first if ‘possible’ notwithstanding that there is no such a preference for quantitative assessment approaches in the ESRS. The ESRS correctly do not make a distinction between the value of different types of information, as the value of quantitative or qualitative information depends heavily on the circumstances.

## Value chain information

The draft IG2 introduces an additional requirement on the collection of information from the value chain by assuming that companies are always able to directly request and obtain information from ‘tier 1 suppliers’ and end users. For example, IG2 (FAQ 7, para 131) appears to suggest that it is only appropriate to estimate data with respect to ‘tier 1 suppliers when they are excessively high in

number...'. The introduction of such a requirement is neither in line with the ESRS (ESRS 1 para 68) nor realistic.

Whether a company is able to obtain the necessary value chain information from its tier 1 suppliers and end users will depend on the nature of the relationship and power dynamics between the company and such parties, with (1) available leverage; and (2) existing commercial practices being key factors. A direct relationship, even with a tier 1 supplier or end user, does not necessarily mean that the undertaking would be able to easily collect value chain information at all or on its required reporting timeline. Although one might presume that companies have the necessary leverage to extract information from their 'major tier 1 suppliers', they may, depending upon the circumstances, have greater difficulty negotiating a contractual right to information from such suppliers, especially if the request could jeopardise or otherwise adversely affect the business relationship. Legal restrictions may also affect a company's ability to gather such information. For example, German law restricts the ability of companies that are party to supply contracts to ask certain questions about the supplier's own supply chain.

With regard to end users, companies may not have the same footing to extract information from their own end users given the nature of the commercial relationship. In addition, it is important to note that companies conducting due diligence on their 'major tier 1 suppliers' has been a more established practice, whereas companies conducting diligence on their end user relationships is a more novel concept and it will take time for this type of diligence to gain traction and become established commercial practice. The IG2 should acknowledge these facts.

There are also competitive/antitrust issues and trade secret/sensitive commercial information issues that affect the ability of companies to obtain information from parties in its value chain. This is a highly sensitive issue, for example, under the German supply chain act.

Finally, the terms 'major tier 1 supplier' and 'tier 1 supplier' are neither defined in the ESRS nor in the IG. EFRAG should align the IG2 with ESRS 1 and delete the references to 'major tier 1 supplier', 'tier 1 supplier' and end users and any unrealistic assumptions (FAQ 7, para 127 and 131).

### **Additional administrative burden**

The draft IG 1 and IG 2 introduce additional administrative burden by going beyond what is prescribed in the ESRS. For example, IG1 states that companies have to report on the materiality assessment process and the outcome of this process (IG 1 pg.9, para 29, pg 23 para 97 pg.39, para 186). However, according to para 32 ESRS 1, reporting on the outcomes of the materiality assessment process is only required with regard to the topic 'climate change', to the extent that climate change is not considered a material topic. For all other topics, reporting on the outcome of the materiality assessment in the context of a finding of non-materiality is voluntary. Similarly, neither the CSRD nor the ESRS set out any specific documentation obligations and thus the decision as to how companies document the DMA process is left up to the companies and cannot be regulated by IG 1 (FAQ 12 - pg.38, para 176 / 177 and pg.42, para 206. Similarly, the draft IG2 (FAQ 8 - Page 28, para 141), refers to the documenting of the 'reporting process'. While companies may document the material decisions related to the 'reporting process', there is no requirement in the ESRS to do so. In addition to correcting the guidance to prevent it from going beyond the ESRS, we encourage EFRAG to minimise administrative burden, which in turn enhances the ability of companies to focus on the management of material risks and opportunities.

EFRAG should bring the drafts in line with the ESRS on the above-raised points. Finally, and to support consistency between ESRS and the IG, the guidance should use the same terms as the ESRS to ensure clarity and avoid the creation of new concepts, such as 'hot spot' which does not exist in the Delegated Act (e.g. in IG1 – Chapter 3.5. – page 25, para 106; or in IG2 – Summary in 7 key points, Chapter 2.3 – page 4, para 7 and page 12, para 50, page 13 para 52).

### **3. Review and revise the IG on how mitigation actions should be considered in assessing gross vs net environmental impacts**

The IG should include more and clearer information on how mitigation factors should be considered in the materiality assessment, ie governance impacts, risks and opportunities across Environmental, Social and Governance pillars. We are concerned about uncertainty on how to assess mitigation action as well as how and when to take them into account. In particular, the draft IG1 (FAQ 23) includes conflicting guidance on how to measure the impact of mitigation actions, as well as conflicting examples. In one case, the example states that a technology can be considered as a part of the management of the material impact but cannot be taken into account in the materiality assessment. This is inconsistent with the statement that mitigation actions can be taken into consideration for the materiality assessment (as long as technical and economic feasibility is met and is accurately described). We therefore ask EFRAG to review and revise the IG in this area.

### **4. Ensure that companies are guided to use independent quality sources of external data**

The draft IG2 (FAQ 9 - Page 28, para 144 – 145) explicitly lists 'non-profit organisations such as the World Justice Project, or other NGOs' as an example for external data sources. From our perspective, only independent sources shall be used as external sources. Additionally, there is no legal basis for explicitly mentioning a specific NGO – in this case the World Justice Project – so this reference should be deleted. We therefore suggest replacing the phrase 'non/profit organisations such as the World Justice Project or other NGO' with 'other independent reports'. On a more general level, the guidance should spell out that with regard to the type of third-party data an undertaking can rely on, ESRS allow the undertaking to provide information in the sustainability statement that comports with the data quality standards included in ESRS 1.

### **5. EFRAG and the European Commission should ensure consistency between the ESRS and CS3D in particular in relation to value chain / chain of activity disclosures**

Consistency between CSRD/ESRS, its application guidance, and the CS3D is key to ensure consistent and workable disclosures. With the CS3D political agreement having been reached, we urge EFRAG and the Commission to ensure such consistency. In particular, we highlight that CSRD and subsequently ESRS aim at disclosure of information about the upstream and downstream value chain, whereas at the same time, CS3D limits the downstream disclosure with the notion of chain of activity. While ESRS and the related disclosures cannot establish due diligence requirements, the IG should provide clarity as to related disclosures.

## Suggested edits to Materiality Assessment Implementation Guidance (IG1)

Chapter and Subchapter	Page number and reference	What is the concern?	What are we proposing?
General Comment		The guidance should overall avoid unnecessary repetition of the standards unless clearly justified, so that the guidance is as concise as possible.	Check whether restatement is justified.
Chapter 1	Pg 9, para 3	The meaning of the second sentence of this paragraph is not clear ('Consistency with sustainability management policies...').	Consider deleting or revising to clarify what EFRAG means by this sentence.
Chapter 2	Pg 13 Figure 1 (c), and pg 15, para 40	While illustrates (Figure 1 (c)) that financial and impact materiality are separate and that the materiality flow is totally separate even if the matter ends up as both impact and financially material. The related paragraphs do not make this point clear. Para 40 seems to suggest that they are, at the outset, not always separate.	For the avoidance of doubt, the guidance should explicitly state that financial and impact materiality are separate, ie the materiality flow is totally separate even if the matter ends up as both impact and financially material.
Chapter 2	Pg 14	'Most of the materials also give rise to financial risks and/or opportunities.' 'materials' should be clarified.	Clarify 'materials'.
Chapter 2	Pg 9, para 29, pg 23 para 97 pg 39, para 186	These paragraphs state that companies have to report on the materiality assessment process and the outcome of this process. However, according to para 32 ESRS 1, reporting on the outcomes of the materiality assessment process is only required with regard to the topic 'climate change', to the extent that climate change is not considered a material topic. For all other topics, reporting on the outcome of the materiality assessment is voluntary.	Remove '[...]' and the outcome of this process./ '[...]' and its outcome.'
Chapter 2.4	Pg 17, para 53	Currently states 'The following paragraphs illustrate how the undertaking <b>shall</b> apply...'  This should be reworded to show the guidance is non-binding and each entity can make its own double materiality process.	Consider stating for example '...illustrate how an undertaking may choose to apply...'
Chapter 3.4	Pg 18 para 62	This paragraph states that 'an undertaking shall consider the full scope of environmental, social and governance matters as listed in ESRS 1 paragraph AR16) as well as any other matter that is material	Replace 'the full scope of environmental, social and governance matters' with

		from an entity-specific perspective.' By referring to 'the full scope of environmental, social and governance matters' the terminology used by the guidance is broader than the ESRS that use the term 'sustainability matters' as defined in Annex 2. However, we do not want the guidance to potentially expand the scope of sustainability matters that companies must report on.	the term 'sustainability matters'.
Chapter 3.2	Pg 21 para 74	It should be clarified that disclosure is only required for material IROs no all IROs.	Replace 'for each identified IRO' by 'for each identified material IRO'.
Chapter 3.5	Pg 25 para 105	This paragraph could lead to some confusion when it comes to step C.	Ensure that language clarifies that engagement of stakeholders in Step C is not required if a topic is already deemed material (eg climate change if material based on scientific consensus).
Chapter 3.5	Pg 25, para 108	This paragraph can be read as implying that the financial materiality assessment requires engagement with users [of the sustainability statement], which is not the case under the ESRS. Users of the sustainability statements are defined in para 22(b) ESRS 1 by reference to a wide range of stakeholders (both economic and otherwise) that may use sustainability information on an undertaking. AR13 et seq ESRS 1 (financial materiality)-do not refer to stakeholder engagement, whether that be all stakeholders or the subset of stakeholders described as 'users of the sustainability statement'. In addition, financial materiality is defined as information that is material for primary users of financial information, and the definition of 'users of the sustainability statement' is considerably broader than primary users of financial information.	Ensure that language does not imply that financial materiality assessment is linked to stakeholder engagement.
Chapter 3.5	Pg 25, para 106	The paragraph inappropriately creates a hierarchy regarding the use of different types of stakeholder engagement. It says that when 'consultation' (which implies a direct, 2-way conversation) with stakeholders is not possible, only then should companies resort to other alternatives to understand the stakeholder perspective. This hierarchy does not exist in the ESRS's - there are no gating mechanisms or preferential methods of engagement defined.	EFRAG should use consistent language by only referring to 'stakeholder engagement/engagement of stakeholders' rather than using different terms such as 'consultation, input, feedback' etc. For the avoidance of doubt, the language used by EFRAG shall in any event not indicate that there is a hierarchy between different



			types of stakeholder engagement, in particular not between engaging with stakeholders directly and engaging with their representatives.
Chapter 5.3, FAQ 8	Pg 36, para 165	Missing the word 'not'.	'... as long as the sector standards are not released.'
Chapter 5.3, FAQ 10	Pg 37, para 168	DMA FAQ10 implies that a quantitative IRO assessment methodology should be pursued first if 'possible'. The ESRS do not explicitly designate a preference between quantitative or qualitative assessment approaches.	Remove the preferential/gating language around quantitative assessment approaches.
Chapter 5.3, FAQ 12	Pg 38, para 176 / 177 pg 42, para 205 and 206	This FAQ states that even though the ESRS do not prescribe specific documentation, it is reasonable to expect a certain level of documentation to be needed for internal purposes. However, this goes beyond the requirements set out by the CSRD and ESRS. It is ultimately left up to the in-scope companies to determine if and to what extent they document the DMA process.	The answer to this FAQ should be limited to the information that neither the CSRD nor the ESRS set out any documentation obligations and thus the decision on how companies document the DMA process is left up to the companies.
Chapter 5.5, FAQ18	P 40-47 (para 196)	Paragraph 196 a) references 'significant variations' and b) references 'significant site' or "significant asset.' It should be clear 'significant' is not a defined term.	Delete the term 'significant'.
Chapter 5.6, FAQ23	P 44-45	This FAQ states that mitigation can be considered when assessing the materiality of actual impacts if it occurs before the incident; however, the example provided in para 217 notes 'mitigation activities, such as pollution containment or immediate stop of operations that were put in place before the incident are considered when assessing the severity of the actual impact'. This statement includes examples of mitigation activities that we would expect to occur while the incident is occurring, not before.	Include 'before and during the incident' within paragraph 217.a. when discussing how mitigation measures can be considered when assessing severity.

<p>Chapter 5.6, FAQ23</p>	<p>P 44-45</p>	<p>The FAQ states that technical or other management measures for avoiding or mitigating potential impacts can be considered within the materiality assessment only when the assumptions around the adoption of such measures can be proven to be technically feasible, economically viable and accurately described in the report. We are not certain how this test work in practice: If the mitigating action is being used to determine that the potential impact is immaterial, then presumably you would not have to disclose the potential impact in the sustainability report, and if you don't have to disclose the immaterial potential impact, why would you have to disclose the related assumptions regarding mitigation measures?</p> <p>The examples provided do not help to clarify the matter.</p> <p>The example provided in <b>para 218.a.</b> explains that a treatment technique is available and the company plans to install this technology to mitigate a new production process with a hazardous substance. The example further states that this technology can be considered as a part of the management of the material impact but cannot be taken into account in the materiality assessment. This is inconsistent with the statement that mitigation actions can be taken into consideration for the materiality assessment (as long as technical and economic feasibility is met and is accurately described). It is not clear in this example whether, if there was sufficient management/leadership documentation of the plans for this technology to be implemented (to mitigate the potential impact), it could then have been considered within the materiality assessment.</p> <p>The example provided in <b>para 218b</b> is inconsistent with the guidance as to when mitigation can be taken into account for purposes of materiality assessment. In that case, the draft states that a company could not take account of its emergency response protocols with respect to an adverse environmental incident when assessing the severity and likelihood of potential impacts. Given that the protocols, unlike the treatment technique in the other example, are already in place, it seems even more odd that the protocols could not be taken into account when assessing materiality, especially since the protocols would otherwise presumably satisfy the three-part test.</p>	<p>EFRAG should review and revise the IG on how to measure the impact of mitigation actions</p> <p>Revise examples. Include an example as to where technical or other management measures to avoid or mitigate potential impacts in the future could be included within the materiality assessment. This would ideally include a use-case where 'standard operating practice' i.e., operating within existing environmental permitting requirements could be considered.</p>
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## Suggested edits to Value Chain Implementation Guidance (IG2)

Chapter and Subchapter	Page number and reference	What is the concern?	What are we proposing?
General Comment		The guidance should overall avoid unnecessary repetition of the standards unless clearly justified, so that the guidance is as concise as possible.	Check whether restatement is justified.
Summary in 7 key points	Page 4, NB, page 4, para 1	The IG2 only refers to a company's upstream and downstream value chain. Therefore, the definition of value chain used in the IG doesn't fully correspond to the definition of value chain set out in Annex 2 to the ESRS.	Clarify this fact to avoid confusion. A clarification is included on p. 6 para 16 – but we suggest to introduce the definition earlier, e.g. in the NB on p. 3.
Summary in 7 key points, Chapter 2.3	Page 4, para 7 page 12, para 50	This para refers to 'associates and other <u>investees</u> ' included in the consolidated financial statements. This does not correspond with the ESRS (in particular para 67 ESRS 1) which refer to 'associates and JVs'. The term 'investee' is broader than 'associates and JVs' and is only used in para 50 ESRS E1.	Stick to the official terminology used in the ESRS and only refer to 'associates and JVs' when making general recommendations.
E.g. Chapter 2	Page 6, para 20d page 7, para 21a FAQ 4, para 94, 106 et seq.	According to this para, the ESRS requires disclosures concerning the process <u>and outcomes</u> of the materiality assessment. Please refer to our comments with regard to the IG1 regarding the reporting on outcome of materiality assessment.	Cf. our comment on IG1 - reference to the outcome shall be deleted.
Chapter 2.1	Page 9, para 28, para 99, and para 110	In general we welcome this paragraph but recommend citing whole para 64 ESRS for completeness and considering the following.  We think the guidance should clearly state that <del>members of</del> <b>actors in</b> the VC that are not 'material' (ie, which do not have a material impact on the business, operations or financial position of the company), should not <b>have to</b> be included in VC	Clarify the term 'hot spot' and explain that this is not a new notion that needs to be considered as a specific point in the materiality assessment.

		reporting. Similarly, elements of the VC that are not ‘material’ (ie, which do not have a material impact on the business or operations of the company) <b>should not have to be included in VC reporting either</b> . The term ‘hot spot’ does not exist in the ESRS and appears to be a new concept that is introduced into the materiality assessment. The notion of ‘hot spots’ is also mentioned at paragraph 99.	
Chapter 2.2	Page 10, 33(c)	The statement is that ‘Scope 3 greenhouse gases (GHG) emissions are expected to be material for many or most undertakings’ is a conclusive statement on materiality but is sitting in the IG2. The guidance should not make any assumption of materiality which is for the company to make.	We consider this line is an overstep from what ‘guidance’ should be and is making a conclusion.  Delete the phrase to bring the guidance in line with the ESRS.
Chapter 2.3	Page 11, para 40	Paragraph 40 needs to be aligned with the GHG protocol. The GHG protocol allows for exceptions for de minimis emissions (eg not accounting for the emissions from fertilizers used for landscaping) but this guidance has a ‘shall’ statement which seemingly conflicts w/GHG protocol guidance.	Clarify that para 40 does not mean that ‘all’ emissions have to be reported (as this would not be aligned with the rest of the ESRS nor with the GHG protocol).
Chapter 2.3	Page 13, para 52		Rephrase to 'shall indicate'.
Chapter 3, FAQ 3	Page 18, para 80	It is not clear which due diligence process is referred to.	We recommend citing the whole para 45 ESRS 1 to clarify which due diligence process is referred to.
Chapter 3, FAQ 3	FAQ 3	In some parts the language used in this para indicates that the proposed materiality process is mandatory.	First it shall be expressly stated that the proposed double materiality assessment (DMA) process set out in the guidance and the IG1 is a mere suggestion and that neither the CSRD nor the ESRS oblige companies to carry out the DMA in a specific way. Secondly, the overall wording should be rephrased to make this clear, i.e. by using 'may' or 'can' etc.

Chapter 3, FAQ 3	Page 19, para 85	The paragraph is vague.	Consider deleting.
Chapter 3, FAQ 3	Page 20, para 90	The paragraph contains an incomplete sentence.	Rephrase the sentence.
Chapter 3, FAQ 7	Para 125	This para states quantitative measures of the impact are the most objective. However, the ESRS do not provide for a hierarchy of qualitative and quantitative information.	We are very concerned that para introduces a hierarchy on the value of quantitative over qualitative information where the ESRS treats them equally.
Chapter 3, FAQ 7	Para 126	The CSRD does not <u>require</u> actors to conduct due diligence, it requires companies to include a description of the due diligence process. Requiring due diligence, is the domain of the Corporate Sustainability Due Diligence Directive. As stated in para 186 of the draft IG 2, the 'ESRS require disclosure on the assessment and its outcomes <b>but do not mandate</b> specific behaviour on stakeholder engagement <b>or the due diligence process</b> '.	The guidance contained in FAQ7 should clarify that it does not impose due diligence requirements.
Chapter 3, FAQ 7	Para 127 and 131 as well as paras 29-31 on page 9	The draft IG2 introduces an additional requirement on the collection of information from the value chain by assuming that companies are always able to directly request and obtain information from 'tier 1 suppliers' and end users. For example, IG2 (FAQ 7, para 131) appears to suggest that it is only appropriate to estimate data with respect to 'tier 1 suppliers when they are excessively high in number...' The introduction of such a requirement is neither in line with the ESRS (ESRS 1 para 68) nor realistic.  Whether a company is able to obtain the necessary value chain information from its tier 1 suppliers and end users will depend on the nature of the relationship and power dynamics between the company and such parties, with (1)	This para should be aligned with para 68 ESRS 1 which states: 'The undertaking's ability to obtain the necessary upstream and downstream value chain information may vary depending on various factors, such as the undertaking's contractual arrangements, the level of control that it exercises on the operations outside the consolidation scope and its buying power. When the undertaking does not have the ability to control the activities of its upstream and/or downstream value chain and its business relationships, obtaining value chain information may be more challenging'. EFRAG should align the IG2 with ESRS 1 and delete the references to 'major tier 1 supplier', 'tier 1 supplier' 'end

		<p>available leverage; and (2) existing commercial practices being key factors. A direct relationship, even with a tier 1 supplier or end user, does not necessarily mean that the undertaking would be able to easily collect value chain information at all or on its required reporting timeline. Although one might presume that companies have the necessary leverage to extract information from their ‘major tier 1 suppliers’, they may, depending upon the circumstances, have greater difficulty negotiating a contractual right to information from such suppliers, especially if the request could jeopardise or otherwise adversely affect the business relationship. Legal restrictions may also affect a company’s ability to gather such information. For example, German law restricts the ability of companies that are party to supply contracts to ask certain questions about the supplier’s own supply chain.</p> <p>With regard to end users, companies may not have the same footing to extract information from their own end users given the nature of the commercial relationship. In addition, it is important to note that companies conducting due diligence on their ‘major tier 1 suppliers’ has been a more established practice, whereas companies conducting diligence on their end user relationships is a more novel concept and it will take time for this type of diligence to gain traction and become established commercial practice. The IG2 should acknowledge these facts.</p> <p>There are also competitive/antitrust issues and trade secret/sensitive commercial information issues that affect the ability of companies to obtain information from parties in its value chain. This is a highly</p>	<p>user’ and any unrealistic assumptions.</p> <p>In addition, EFRAG should confirm that estimation is an acceptable approach.</p>
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		<p>sensitive issue, for example, under the German supply chain act.</p> <p>Finally, we also note that the terms 'major tier 1 supplier' and 'tier 1 supplier' are neither defined in the ESRS nor in the IG. We ask EFRAG to align the IG2 with ESRS 1 and delete the references to 'major tier 1 supplier', 'tier 1 supplier' and end users and any unrealistic assumptions (FAQ 7, para 127 and 131).</p>	
Chapter 3, FAQ 7	Page 25, para 130	This paragraph could include an example of actors downstream of the value chain for illustration purposes.	Include an example of actors downstream of the value chain.
Chapter 3, FAQ 7	Page 26, para 131		Rephrase to 'examples may include'.
Chapter 3, FAQ 7	Page 27, para 137	The 'word' deep could be deleted.	Consider deletion of the word 'deep'.
Chapter 3, FAQ 8	Page 28, para 141	<p>This para states that companies shall document its efforts, the outcomes and how the information has been incorporated in the reporting process for the company's own governance and for auditors. However, neither the CSRD nor the ESRS oblige companies to document the reporting process. If and how companies document the process shall be left up to the companies. Further, in practice especially documenting all efforts is not feasible because this would mean that every call, meeting etc. would need to be documented. This would be an unbearable burden for companies. In addition, but explicitly referring to the auditing process, it is likely that auditors - who will use this guidance in practice - will expect companies to provide documentation even though companies are generally not obliged to provide such documentation.</p>	<p>Delete this para.</p> <p>If not deleted, the para shall at least be more generalised, eg by only stating that 'Companies may document the reporting process' or 'Companies may document the material decisions related to the reporting process.'</p>
FAQ 9	Page 28, para 144 - 145	This para explicitly lists non-profit organisations such as the World	We welcome the clarification that companies are not required

		Justice Project, or other NGOs' as an example for external data sources. However, only independent sources shall be used as external sources. Further, there is no legal basis for explicitly mentioning the World Justice Project.	to use fee-based external sources.  We suggest to delete example 'non/profit organisations such as the World Justice Project or other NGO' and replace with 'other independent reports'. In any event, the explicit reference to the World Justice Project shall be deleted.  The guidance should spell out that with regard to the type of third-party data an undertaking can rely on, ESRS allow the undertaking to provide information in the sustainability statement that comports with the data quality standards included in ESRS 1.
Chapter 3, FAQ 9	Pages 28-29, para 147	Phrasing could be made more neutral.	Replace 'therefore has an issue' with 'therefore seeks to collect data on'.
Chapter 2.3	Page 7, para 4; page 12, para 50; page 13, para 52	References to 'investees' – this should be amended to 'associates and JVs' to align to ESRS. 'Investees' is not a term and concept that the relevant business would recognise nor use.	Change 'investees' to this 'associates and JVs' to align to ESRS.

## Suggested edits to IG 3

Overall, we found the draft useful. In particular, the way in which the excel is broken out provides a very useful tool to facilitate internal assessments and facilitates users' understanding of the way in which the ESRSs are to be broken out. However, we found that further improvements are necessary to ensure usability by a wide range of users.

### Improvements:

- Appendix B, Section 1 General Context on page 8 and 9 (paragraph 5-6) provides the breakdown between mandatory irrespective of materiality assessment (MA) and data points subject to MA. This is not found in the corresponding excel provided by EFRAG and would be a valuable addition.
- The application would be further facilitated by spelling out abbreviations and clarifying headings and the use and clarification of significance of colours.



## Conclusion

The EFRAG's draft implementation guidance is a helpful step towards coherent and consistent reporting. To maximise the benefits of this implementation guidance, EFRAG should reconcile inconsistencies between the draft IG and the ESRS, revise the IG on how mitigation actions should be considered in assessing gross vs net environmental impacts, guide the companies to use independent quality sources of external data and together with the European Commission ensure consistency between the ESRS and the CS3D.