The Non-Financial Information Directive: An Assessment of Its Impact on Corporate Social Responsibility

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1. INTRODUCTION

On 6 December 2016, Directive 2014/95 of the European Union (the 'Directive') [1] will come into effect and will require certain companies to disclose non-financial information in a way similar to their financial reporting obligations. Companies that fall under the scope of the Directive will have to publish information on several aspects of their business associated with Corporate Social Responsibility (CSR) including the environment, social and employee matters and human rights. The rationale underlying the introduction of the Directive appears to be to encourage ethical business practices and corporate accountability.[2] The Directive provides that 'non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection. In this context, disclosure of non-financial information helps the measuring, monitoring and managing of undertakings' performance and their impact on society'.[3] The Directive therefore, seems to have two primary goals, firstly to provide greater information in order to foster long-term sustainability and profitability, and secondly to increase transparency in order to improve CSR practices.

Prior to the Directive there has been very little focus on non-financial reporting at EU level. The Directive is therefore likely to significantly increase the amount of non-financial information that affected organizations must publish, particularly in Member States with no existing regulations on non-financial disclosures. However, this does not necessarily mean that the primary aims of the Directive will be achieved by mandatory reporting. Traditionally CSR has been carried out on a voluntary basis and there is potential for mandatory CSR reporting[4] to become a box-ticking exercise with companies publishing boilerplate responses. Companies may well respond to the Directive by attempting to reach the minimum standards involved in complying with the regulations, rather than truly operating in a socially responsible manner.[5] The aim of this article is to analyse the Directive and assess the likelihood that it will improve CSR practices and achieve its stated goals.

The article is divided into three parts. The first describes the requirements contained in the Directive, such as what organizations fall under the scope of the Directive and the type of information that is required to be published. The second will examine how non-financial reporting has operated in the UK, where there is some existing analysis of the issues related to mandatory reporting of non-financial information. The final part analyses the likely impact of the Directive, based on the rules contained in the Directive and through a comparison with the experience in the UK.

2. THE CONTENTS OF THE DIRECTIVE

The origins of the Directive can be traced back as far as 2002 and a Commission Communication on CSR.[6] However, it was not until 2011 that a legislative-based mandatory CSR reporting requirement began receiving serious consideration. The Commission, in two separate communications, referred to the benefits in improved transparency through non-financial disclosures[7] and that a particular focus should be placed on social and environmental information.[8] These communications

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1 Art. 4, Directive 2014/95/EU, OJ L 330/1.
2 European Parliament Resolution, *Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery* 2012/2097. Commission Communication, *Social Business Initiative – Creating a Favourable Climate for Social Enterprises, Key Stakeholders in the Social Economy and Innovation* COM (2011).
3 Recital 3, Directive 2014/95/EU.
4 For a criticism of mandatory corporate social responsibility *see*, Harish Choudary, *Mandatory Corporate Social Responsibility: An Unwarranted Burden on Business*, 10(4) Eur. Company L. 156 (2013).
5 Kunnawee Thirarungrueang, *Rethinking CSR in Australia: Time for Binding Regulation?*, 55(3) Intl. J. L. & Mgt. 173 (2013).
6 *See* Commission Communication, *Corporate Social Responsibility: A Business Contribution to Sustainable Development* COM (2002).
7 Commission Communication, *Single Market Act – Twelve Levers to Boost Growth and Strengthen Confidence 'Working Together to Create New Growth'* COM(2011) 206 Final.
8 Commission Communication, *A Renewed EU Strategy 2011–14 for Corporate Social Responsibility* COM(2011) 0681 Final.

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ultimately led to the Directive, which amends the primary financial reporting Directive[9] for corporate entities throughout the EU.

The original Commission draft of the Directive had targeted all companies, however, the scope of the Directive was reduced due to concerns that it would place undue costs on smaller companies. The obligations contained in the Directive now apply only to 'public interest entities' who have a minimum number of 500 employees.[10] Public interest entities are defined as those with: (1) securities traded on stock exchanges[11], (2) certain credit institutions, (iii) insurance undertakings, and (iv) and any other entity designated as such by Member States. The option given to Member States to designate companies as public-interest entities has the potential to significantly broaden the scope of the Directive. Certain Member States have included entities ranging from pensions trust to investment companies and asset management vehicles in this definition,[12] while in other Member States the size of the organization alone could determine if it meets the definition of a public-interest entity.[13] It is estimated that Directive 2014/95/EU will initially apply to circa 6,000 entities on implementation.[14]

The Directive mandates that all companies defined as public interest entities must include in their management report certain non-financial information. The reasoning provided for the mandatory nature of the Directive was that the disclosure of non-financial information was not only beneficial to CSR, but emphasis was also placed on the potential benefits for investors[15] This can be identified in the recitals, which note the likely benefit to the long-term profitability of the company from such disclosures.[16] Non-financial corporate reporting is also regarded as an important instrument to improve long-term sustainability.[17] The information to be included is that which is necessary for an understanding of the undertaking's 'development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters'.[18] Throughout the EU legislative process, these specific matters remained constant throughout the drafting of the Directive.[19] While these headings are broad it is provided in the Directive that the Commission[20] is obliged to prepare guidelines on what information should be reported under these headings.[21] However, it is important to note that the guidelines shall in all instances be 'non-binding'.[22]

The Directive itself provides a brief outline of what will be expected under the above headings. In relation to the environment, the Directive states that land use, water use, greenhouse gas emissions, health and safety, and use of renewable energy should be included.[23] In relation to social and employee-related matters, the disclosure requirements aim to include details on the actions taken to ensure gender equality, suitable working conditions, as well as implementation of international labour-related conventions on the protection of employees.[24] The Directive states that the report could include information on the prevention of human rights abuses.[25] This inclusion of human rights seems to have been driven in part by international movement in this area and the impact of international trade and business on human rights[26] as the Directive specifically refers to UN principles on business' interaction with human rights standards.[27] The final CSR matter covered by the Directive is related to anti-corruption and bribery matters. Many organizations will already be familiar addressing these issues throughout their corporate governance regimes due to international[28] and national law.[29] This legislation, along with a raft of measures to tackle money-laundering,[30] are primarily aimed at ensuring that company law does not become abused for fraud, terrorism or other criminal activities. The Directive states that instruments in place to fight corruption and bribery could be included in the non-financial statement.[31]

9 Directive 2013/34/EU, OJ L 182/19.
10 Art. 1, Directive 2014/95/EU.
11 Specifically, *Regulated Markets* as defined by point (14) of Art. 4(1) of Directive 2004/39/EC, OJ L 145.
12 Federation of European Accountants, *Definition of Public Interest Entities (PIEs) in Europe – FEE Survey*, Oct. 2014, http://www.fee.be/images/publications/public_sector/PIE_definition_survey_outcome_1410_BE-GE_changed_141112.pdf (accessed 15 Aug. 2016).
13 *Ibid.*, at 4.
14 Commission, *Disclosure of Non-financial Information: Europe's Largest Companies to be More Transparent on Social and Environmental Issues* (2014) Statement/14/291.
15 Commission Communication, *supra* n. 7.
16 Recital 3, Directive 2014/95/EU.
17 Tineke Lambooy, *Reforming Company Law for Sustainable Companies*, 11(2) Eur. Company L. 54, 55 (2014).
18 Art. 1, Directive 2014/95/EU.
19 *See* originally the Explanatory Memorandum of the Commission Proposal. Commission, *Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Non-financial and Diversity Information by Certain Large Companies and Groups* COM(2013) 207 Final.
20 *See* European Commission, *Consultation Document – Non-binding Guidelines for Reporting of Non-financial Information by Companies* (15th Jan. 2016).
21 Art. 2, Directive 2014/95/EU.
22 *Ibid.*
23 Recital 7, Directive 2014/95/EU.
24 *Ibid.*
25 *See* Koen de Roo, *The Role of the EU Directive on Non-Financial Disclosure in Human Rights Reporting*, 12(6) Eur. Co. L. 278 (2015).
26 United Nations, *Protect, Respect and Remedy*, Framework (2010). *Infra* fn. 31.
27 United Nations Human Rights Council, Global Compact, *Guiding Principles on Business and Human Rights* (A/HRC/17/31).
28 OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD 1997).
29 E.g. Bribery Act (UK) 2010.
30 Directive 91/308/EEC OJ L 166/77; Directive 2001/97/EC OJ L 344/76; Directive 2005/60/EC OJ L 309/15; Directive 2015/849 OJ L 141/73.
31 Recital 7, Directive 2014/95/EU.

In providing this information, the reports must include five key details about the undertaking.[32] The five details are (1) a description of the organization's business model, (2) a description of the organization's policies addressing the above-mentioned CSR matters, (3) the outcome of those policies, (4) the principal risks faced by the organization concerning those matters, and (5) non-financial key performance indicators (KPIs) relevant to the organization's particular business. In relation to the risks that need to be disclosed, the Directive specifies that these should relate to those that are likely to have a severe impact on the organization, based on their gravity and scale.[33] However, it is noted that this requirement should not place 'undue additional administrative burdens for small and medium-sized undertakings'.[34] Recital 6 of the Directive states that not only is the nature of the risks to be detailed, but also information should be provided as to how these risks are managed and any actions taken to avoid and mitigate potential risks.[35] There is little description of what form the KPI information will take; these indicators are only referred to as 'non-financial' in nature but details may be provided in the Commission's guidelines.

The Directive will operate on a comply or explain model that will allow organizations to choose between the actual reporting requirements, or alternatively disclosing reasons for not doing so. Its inclusion in the Directive appears to have arisen due, in part, to it being the easiest method to achieve a base level of uniformity throughout the EU. The European Commission, in its initial draft on the Directive[36] noted that certain Member States have 'report or explain', whilst others target large companies, or certain listed companies or government-owned companies only. In addressing this fragmentation of the legislative framework across the EU and in the need of establishing a level playing field (whilst limiting costs for organizations subject to the Directive), the comply or explain approach was the option chosen.

3. NON-FINANCIAL CORPORATE REPORTING: THE UK EXPERIENCE

Prior to analysing the potential effects of the Directive, it is instructive to examine existing legal requirements for the disclosure of non-financial information. Both Denmark and France have had laws on mandatory reporting of CSR related information for some years but this article will briefly examine the UK rules and their impact. The reason for selecting the UK as a comparator is that the UK laws on non-financial disclosure are, in a broad sense, similar to those included in the Directive. In addition, the UK reporting requirements and the reasons behind the establishment of the legal reporting requirements have received a significant degree of analysis that deal with many of the same issues as the Directive.

As part of the reform that led to the UK Companies Act 2006, the UK introduced a detailed mandatory non-financial reporting requirement called the Operating and Financial Review (OFR).[37] The intention behind enacting the OFR was for mandatory reporting to work in conjunction with an expanded set of directors' duties to ensure a more stakeholder orientated approach to business.[38] The directors' duties in section 172(1) of the Companies Act 2006 requires directors to have regard to a wide range of stakeholder interests, such as employees, the community and the environment.[39] The group leading the reform, the Company Law Review Steering Group (CLRSG), hoped that the OFR would ensure the transparency needed to underpin the broader approach to directors' duties by requiring companies to publish detailed information on stakeholder issues.[40] The CLRSG stated that the OFR would enable 'shareholders and the community as a whole to monitor performance by directors of the broadly expressed inclusive duty and for all concerned to develop flexible and responsive standards for reporting on the matters covered'.[41] The intended consequence appeared to be that by legally requiring detailed reporting from companies on stakeholder issues, companies would want to be in a position to disclose positive reports and so would improve practices in relation to the community, the environment and employee matters. The CLRSG seemed to take the view that the requirement on directors to have regard to various stakeholder interests would acquire its force through corporate transparency rather than the threat of litigation.[42]

To expect mandatory disclosure to ensure a more stakeholder focused approach to business was an ambitious plan from the CLRSG, however the OFR was an extremely comprehensive reporting requirement. The OFR was enacted into law in 2005 through the UK Companies Act 1985 (OFR and Directors Report etc.) regulations 2005.[43] Schedule 7ZA(1) of the regulations required a 'balanced and comprehensive analysis' of the develop-

32 Art. 1, Directive 2014/95/EU.
33 Recital 8, Directive 2014/95/EU.
34 *Ibid.*
35 Recital 6, Directive 2014/95/EU.
36 Commission, *Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Non-financial and Diversity Information by Certain Large Companies and Groups* COM(2013) 207 Final.
37 UK Companies Act 1985 (Operating and Financial Review and Directors Report etc.) Regulations 2005 Statutory Instrument No. 1011.
38 CLRSG, *Modern Company Law for a Competitive Economy: The Strategic Framework* (DTI 1999), para. 5.1.44.
39 The UK Companies Act 2006, s. 172(1).
40 CLRSG, *Modern Company Law for a Competitive Economy: Developing the Framework* (DTI 1999), para. 2.22.
41 *Ibid.*
42 John Lowry, *The Duty of Loyalty of Company Directors; Bridging the Accountability Gap Through Efficient Disclosure*, 68 Cambridge L.J. 607, 621 (2009).
43 UK Companies Act 1985 (Operating and Financial Review and Directors Report etc.) Regulations 2005 Statutory Instrument No. 1011 Part 3.

ment and performance of the company; the position of the company at end of year and the main trends and factors underlying the development, performance and position of the business as well as the main factors likely to affect it in the future.[44] The review was also to include a statement of the business objectives and strategies of the company, a description of its resources, principal risks and uncertainties as well as outlining its capital structure and liquidity.[45] The OFR was intended to cover all that is material to achieve a proper assessment of the performance and future plans and prospects of the business.[46] The main CSR elements of the regulations were set out as follows:

4.(1) The review must include —

(a) information about environmental matters (including the impact of the business of the company on the environment),
(b) information about the company's employees, and
(c) information about social and community issues.

4.(2) The review must, in particular, include —

(a) information about the policies of the company in each area mentioned in sub-paragraph (1), and
(b) information about the extent to which those policies have been successfully implemented.[47]

The OFR regulations further provided for disclosure on CSR matters by requiring that the 'review must include analysis using financial and, where appropriate, other key performance indicators, including information relating to environmental matters and employee matters'.[48] The OFR would need to be audited and the auditors would have had to state whether the information contained in the OFR was consistent with the company's annual accounts and whether any matters have come to their attention that is inconsistent with the information in the OFR.[49] These requirements are broadly similar to the Directive, however there was one main difference between the OFR and the Directive. Disclosure of the information under the OFR would need to be prepared in accordance with a detailed reporting standard. The relevant standard came from the Accounting Standards Board who released a specific reporting statement and provided details on what directors were to include in their OFR.[50] Unlike the Directive, the accompanying standard was not a guideline and companies were required to adhere to the standards set by the Accounting Standards Board or give reasons for any departure.[51] It remains to be seen the level of detail that will be provided on the Commission's accompanying standard, but even if it is as detailed as the standard accompanying the OFR, its non-binding nature may limit compliance.

Just a few months after its enactment into law the OFR was withdrawn[52] on the basis that it imposed a disproportionate and unnecessary burden on companies.[53] This decision to remove the OFR was seen as a significant blow to those advocating stakeholder interests.[54] The OFR was replaced by a Business Review that had general similarities to the OFR but there were significant differences when it came to disclosure on CSR related topics. The Business Review was introduced through section 417 of the Companies Act 2006 and still required information about environmental matters, the company's employees and social and community issues. The Business Review was also to include information about any policies of the company in relation to the above stakeholder matters and the effectiveness of those policies. However, in comparison to the OFR, the Business Review required much less detailed reporting.[55] The most notable change is that the disclosures on stakeholder issues were no longer mandatory and are now only to be reported to the extent that directors deemed them relevant for an understanding of the business. There was no requirement for directors to say why particular matters are not necessary for an understanding of the company[56] thus allowing directors to freely decide whether or not to disclose information relating to stakeholder issues.[57] The other primary change in the Business Review is that compliance with the Accounting Standards Boards reporting standard was no longer mandatory. As a result, there was no longer a legal requirement to comply with the detail set out in the standard and there will not be uniformity of information disclosed between companies. This lack of a requirement to comply with a reporting standard undermined the Business Review's practical effectiveness.[58] The final

44 *Ibid.*, Part 3 Schedule 7ZA (1).
45 *Ibid.*, Part 3 Schedule 7ZA (2).
46 CLRSG, *supra* n. 40, para. 2.19.
47 UK Companies Act 1985 (Operating and Financial Review and Directors Report etc.) Regulations 2005 Statutory Instrument No. 1011 Part 3 Schedule 7ZA (4).
48 *Ibid.*, Part 3 Schedule 7ZA (6).
49 *Ibid.*, Part 3 Schedule 7ZA (10).
50 Accounting Standards Board, *Reporting Statement: Operating and Financial Review*, Jan. 2006, http://www.frc.org.uk/Our-Work/Publications/ASB/UITF-Abstract-24-Accounting-for-start-up-costs/Reporting-Statement-Operating-and-Financial-Review.aspx.
51 UK Companies Act 1985 (Operating and Financial Review and Directors Report etc.) Regulations 2005 Statutory Instrument No. 1011 Part 3 Schedule 7ZA (8).
52 UK Companies Act 1985 (Operating and Financial Review)(Repeal) Regulations 2005 Statutory Instrument No. 3442.
53 Explanatory Memorandum to The UK Companies Act 1985 (Operating and Financial Review) (Repeal) Regulations 2005 Statutory Instrument No. 3442, para. 7.2.
54 Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach*, 20 Sydney L. Rev. 577, 604 (2007).
55 Paul Davies, *Gower and Davies Principles of Modern Company Law* 740 (8th ed., Sweet and Maxwell 2008).
56 Keay, *supra* n. 54.
57 Shuangge Wen, *Exploring the Rationale of Enlightened Shareholder Value (ESV) in the Realm of UK Company Law – The Path Dependence Perspective*, 14 Intl. Trade & Bus. L. Rev. 153, 163 (2011).
58 David Williamson & Gary Lynch-Wood, *Social and Environmental Reporting in UK Company Law and the Issue of Legitimacy*, 8 Corp. Governance 128, 137 (2008).

difference between the OFR and the Business Review was the aims of each, while the OFR was aimed at benefiting stakeholders, the Business Review was focused on providing information to shareholders[59] and the disclosures in the Business Review were not designed to promote social responsibility but rather for the information's value to the business.[60]

A Statutory Instrument[61] in 2013 has altered some elements of the Business Review, which is now named the Strategic Report, but it remains identical to the Business Review on CSR related disclosures. While there is an accompanying standard to the Strategic Report,[62] which outlines what directors are to include in the Strategic Report, compliance is at a voluntary level.[63] The Statutory Instrument which introduced the Strategic Report stated that '[t]he purpose of the Strategic Report is to inform members of the company and help them assess how the directors have performed their duty under section 172'.[64] Hence, similar to the Business Review, the purpose of the information disclosed is to benefit shareholders rather than achieve a broader stakeholder orientated approach. The Financial Reporting Council's standard would back up such view as it states 'the Strategic Report should only contain information which is material to shareholders'.[65]

To achieve the original aims described by the CLRSG, the standards of non-financial reporting needed to be extremely high and there can be little doubt that the requirements outlined in the Business Review/Strategic Report are not enough be able to significantly improve transparency and prevent boilerplate responses. In Keay's view there was nothing in the UK's Business Review to stop companies making quite 'neutral statements which give little detail about their thinking and discussions at board level'[66] and Davies argues that the Business Review would produce a 'self-serving and vacuous narrative rather than analytical material which is of genuine use'.[67] The conclusion of the Department of Business, Innovation and Skills is that when it comes to disclosures on stakeholder issues such as their relations with employees and the environment, companies will insert generic boilerplate material in the Business Review.[68] These concerns appear to have been played out in practice as empirical evidence gathered in 2011 found that the Business Review had made little difference to the quality of reports.[69]

The Directive seems to fall somewhere between the OFR and the Strategic Report. Reporting under the Directive is mandatory and so it is not the decision of the organizations themselves whether or not to publish information. While potential benefits for investors have been mentioned by the Commission[70] there can be little doubt that the primary aim of the Directive is to improve CSR and not solely to improve information for investors. However, the Directive falls short of the standards set under the OFR, primarily due to compliance with the accompanying standard not being binding, so while reporting is mandatory, companies will still have a significant scope about what information can be included and what can be left out of the reports.[71]

4. ANALYSIS OF THE DIRECTIVE AND CSR ISSUES

The aspects of CSR that are expressly mentioned by the Directive are the environment, social and employee matters, respect for human rights, anti-corruption and bribery matters. The question is to what degree will the Directive improve conduct in these areas? This is a difficult question but certain tentative conclusions can be reached about the potential effects of the Directive based on the detail that the Directive requires. As evident from the UK experience, a high level of detail is required in order achieve comparisons between similar companies or to stop generic boilerplate responses and neither was achieved in the UK by The Business Review or Strategic Report. If the Directive is to significantly improve CSR it must not become a box ticking exercise.

While the Directive is more demanding than the Strategic Report, there are several reasons to be sceptical about the level of improvement it will provide on CSR issues. The preliminary issue is in relation to the demands of the comply or explain model used by the Directive. The comply or explain model has been heavily debated as to its effectives in numerous approaches to corporate governance. Certain research does show that where it is used in relation to the UK Corporate Governance Code, there are high

59 Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* 171 (Routledge 2012).
60 Robert Goddard, *Modernising Company Law: The Governments White Paper*, 66 Modern L. Rev. 402, 418 (2003).
61 UK Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (SI 2013/1970).
62 Financial Reporting Council, Exposure Draft: Guidance on the Strategic Report, https://www.frc.org.uk/Our-Work/Publications/Accounting-and-Reporting-Policy/Exposure-Draft-Guidance-on-the-Strategic-Report.aspx.
63 *Ibid.*, at 3.
64 UK Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (SI 2013/1970) Ch. 4A s 414C(1).
65 Financial Reporting Council, Exposure Draft: Guidance on the Strategic Report 15, https://www.frc.org.uk/Our-Work/Publications/Accounting-and-Reporting-Policy/Exposure-Draft-Guidance-on-the-Strategic-Report.aspx.
66 Andrew Keay, *The Duty to Promote the Success of the Company: Is It Fit for Purpose*, University of Leeds, *Centre for Business Law and Practice*, Working Paper at 21, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662411 (accessed 05 Nov. 2014).
67 Davies, *supra* n. 55.
68 Department of Business, Innovation and Skills, *A Long-Term Focus for Corporate Britain – A Call for Evidence* (2010), para. 2.8; Department of Business, Innovation and Skills, *The Future of Narrative Reporting* (2011), para. 3.2.
69 Olaojo Aiyegbayo & Charlotte Villiers, *The Enhanced Business Review: Has it made Corporate Governance More Effective*, 7 J. Bus. L. 699, 713 (2011).
70 Commission Communication, *Single Market Act – Twelve Levers to Boost Growth and Strengthen Confidence 'Working Together to Create New Growth'* COM(2011) 206 Final.
71 De Roo, *supra* n. 25, at 278, 283.

levels of compliance[72] and even where an explanation is provided, these explanations are usually informative.[73] However for comply or explain to work it is central that it provides a thorough explanation in order to justify the failure to comply. The UK's Financial Reporting Council has published guidance on what constitutes an explanation under the UK Corporate Governance Code, noting that they should be specific to the company's position and not generic.[74] Unfortunately the Directive provides little guidance, only specifying that any explanation should be 'clear and reasoned', which is not very demanding and provides the organizations that do fall under the Directive a relatively easy avenue not to disclose information if they wish not to do so.

One significant way in which the Directive could have an impact and achieve its ends of improving CSR is if it has the ability to affect a company's reputation. A company's reputation is widely regarded to be one of its most important intangible assets[75] and if the disclosure required by the Directive actually affected a company's reputation then there may be a willingness to improve CSR within organizations in order to publish better CSR related policies and so improve its reputation. Environmental matters are often seen as one of the most central CSR elements in organizations[76] and one of key areas that could affect a business' reputation. Research has demonstrated that markets have become ever more sensitive to environmental news affecting security-traded entities,[77] with investors now significant drivers for the adoption of environmental management systems.[78] The reputation argument would be that because companies must make environmental information available to the public and therefore investors, companies may be keen to improve their environmental practices in order to release information that reflects better on the company. A further extension of this argument is that increased reporting could allow similar companies to be objectively compared on CSR issues. This was one of the proposed effects of the OFR; Arsalidou argued that the OFR was so detailed that it would have allowed similar companies to be compared on issues like community concerns and employee welfare and set the standards within a particular industry.[79] Competing companies would not wish to be compared unfavourably with a competitor and so would be likely to improve CSR practises in order to improve the information that could be published. This kind of comparison is expressly mentioned in the Directive as one of the aims is to 'enhance the consistency and comparability of non-financial information disclosed throughout the Union'.[80]

However, there are numerous reasons to suggest that the Directive will not work in this way. Firstly, the reputation argument assumes that investors and other stakeholders will alter their behaviour based on the information published by companies, for example by placing pressure on management or by removing their investment in the company. As De Roo notes, 'the effectiveness of targeted transparency is dependent on the existence of a moral community which members share common values'[81] Szabo and Sorensen claim that the Directive assumes that investors and other stakeholders will pressure the management into conducting business in a more sustainable way.[82] They then point out several sub-assumptions, firstly that investors and stakeholders are interested in CSR information at all and secondly whether management of organizations will pay much attention if they do.[83] In order for a company to improve CSR practises based on this reputation argument you need sufficiently detailed information to allow companies to be compared, stakeholders and investors paying attention to such information and a management team conscientious enough to be concerned about its reputation and wiling to alter their behaviour as a result. This requires a lot of steps before the desired effect occurs. However, it is submitted that at least some of the companies who fall under the Directive would have investors and stakeholders who are concerned about CSR issues, particularly on the environment, and management who are sufficiently concerned about their company's reputation to change their behaviour. The major stumbling block would appear to be whether the demands of the Directive's disclosure requirements are sufficient to provoke this response given that adherence to the Commission's standard is non-binding.

Inter-company comparisons are dependent on extremely detailed reporting of the exact same information. While Arsalidou may have been correct that the OFR could have achieved such a goal, the fact that adherence to the reporting standard is not binding would greatly decrease the chances that companies will disclose the exact same type of information that would allow for such comparisons. Even where CSR data is currently being disclosed on a

72 Lewis, *The 'Comply or Explain' Regime – Corporate Governance*, 36(1) Company Sec. Rev. 6 (2012).
73 *Ibid.*, at 7.
74 Financial Reporting Council, *What Constitutes an Explanation Under 'Comply or Explain'?* (2012), https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/What-constitutes-an-explanation-under-comply-or-ex.pdf (accessed 20 Feb. 2016).
75 Steve Letza & Sun Kirkbride, *Shareholding and Stakeholding: A Critical Review of Corporate Governance*, 12 Corp. Governance 242, 255 (2004); J. Dean, *Directing Public Companies: Company Law and the Stakeholder Society* 107 (Cavendish 2001).
76 Jose Moneva & Beatriz Cuellar, *The Value Relevance of Financial and Non-Financial Environmental Reporting*, 44 Envtl. & Resource Econ. 441, 442 (2009).
77 Denis Cormier & Michael Magnan, *The Revisited Contribution of Environmental Reporting to Investors' Valuation of a Firm's Earnings: An International Perspective*, 62 Ecological Econ. 613 (2007).
78 Wilma Anton, George Deltas & Madhu Khanna, *Incentives for Environmental Self-Regulation and Implications for Environmental Performance*, 48 J. Envtl. Econ. & Mgt. 632 (2004).
79 Demetra Arsalidou, *The Withdrawal of the Operation and Financial Review of the Companies Bill 2006: Progression or Regression?*, Co. L. 131, 133 (2007).
80 Recital 6, Directive 2014/95/EU.
81 De Roo, *supra* n. 25, at 278, 279.
82 Dániel Gergely Szabó & Karsten Engsig Sorensen, *New EU Directive on the Disclosure of Non-Financial Information (CSR)*, 12(3) Eur. Co. & Fin. L. Rev. 307, 316 (2015).
83 *Ibid.*

voluntarily basis and is being assimilated by different institutions (e.g. Thomas Reuters Research Data, the Calvert Social Index and the Dow Jones Sustainability Indices), evidence has demonstrated[84] that the ratings issued can vary to a significant degree. The lack of a mandatory standard can therefore have an adverse effect on the quality of reporting, ultimately undermining the *raison d'etre* of the Directive itself. Monciardini points out that by failing to verify the quality of information disclosed, there is a substantial risk of 'cherry picking' information and 'boilerplate disclosure'.[85] Providing companies with a significant degree of flexibility in adhering to the Directive may ultimately lead to the loss of the ability to carry out an accurate comparative analysis between competing companies.[86] Furthermore, the lack of a detailed standard can also lead to over-reporting and therefore unnecessary data may be included in such reports which can make it difficult to compare non-financial reports of competing organizations.[87] In these circumstances, the lack of standardized reporting will make it considerably more difficult to allow any meaningful comparisons be drawn between non-financial reports of competing organizations which is a significant weak point of the Directive, particularly when 'comparability' of reports is one of its key aims.[88]

5. CONCLUSION

It is difficult not to conclude that the Directive represents a significant missed opportunity for reporting on CSR activities. In the face of considerable opposition throughout its inception, the Directive suffered a raft of amendments which ultimately served to limit its application.[89] However, given the lack of non-financial reporting in the EU and in most Member States, the Directive will increase the amount of CSR related information being made public by the organizations affected by it enactment. Whether the diretcive will actually make companies become more socially responsible is another question entirely. Many organizations already engage in CSR activities and publish such information; the question is will the Directive improve CSR for those organizations who have not been voluntarily engaged in CSR related activity. Szabo and Sorensen claim that an approach to non-financial reporting based 'on minimum harmonization, not supported by detailed rules and standards on the collection and processing information, is not likely to have a significant effect'[90]: it is difficult to disagree with their conclusion.

84 Xiaobei Huang & Luke Watson, *Corporate Social Responsibility Research in Accounting*, 34 J. Acctg. Lit. 1 (2015).
85 David Monciardini, *Regulating Accounting for Sustainable Companies: Some Considerations on the Forthcoming Directive*, 11(2) Eur. Co. L. 121 (2014).
86 Stefan Müller, Martin Stawinoga & Patrick Velte, *Stakeholder Expectations on CSR Management and Current Regulatory developments in Europe and Germany*, 4 Corp. Ownership & Cont. 505 (2015).
87 *Ibid.*, at 835. *See also* Lawrence Mitchell, *Corporate Irresponsibility* 246 (Yale University Press 2001).
88 Recitals 3, 6, Directive 2014/95/EU.
89 Daniel Kinderman, *Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance*, 35(1) Policy & Socy. 29 (2016).
90 Szabó & Sorensen, *supra* n. 82.