EU reform of Corporate Social Responsibility reporting standards for large companies is due to be implemented in Norway as a result of the introduction of Directive 2014/95/EU, coming into force in the financial year beginning on 1 January 2017.

Will these new disclosure requirements impose additional burdens on companies and what impact will it have on what legal practitioners advise their clients?
Table of Contents

1. INTRODUCTION ........................................................................................................... 3
   1.1 Background .................................................................................................................. 3
   1.2 Aim and Perspective of the Report ............................................................................. 4
   1.3 The European Approach to CSR Reporting ............................................................... 5
2. REFORM .......................................................................................................................... 5
   2.1 Current Legal Framework in Norway .......................................................................... 5
   2.2 What Changes Will Directive 2014/95/EU Bring to the Current Legal Framework? ................................................................................................................................. 6
      2.2.1 Scope of the Reporting Obligation – the Reportable Factors ............................... 6
      2.2.2 Substance of the Reporting Obligation ................................................................. 8
      2.2.3 Reporting Principles ........................................................................................... 11
      2.2.4 Reporting Frameworks ....................................................................................... 12
      2.2.5 Mandatory and Optional Requirements .............................................................. 12
3. IMPACT ON COMPANIES ............................................................................................ 13
   3.1 Consequences for UK Companies Following Implementation ................................ 13
      3.1.1 Wider Access to Non-Financial Information ....................................................... 13
      3.1.2 Business Relationships ...................................................................................... 13
      3.1.3 Flexibility and Discretion .................................................................................... 14
      3.1.4 Implementation and Outcome ............................................................................. 16
      3.1.5 Administrative Burdens and Costs ...................................................................... 16
      3.1.6 Small and Medium Sized Enterprises (SMEs) .................................................... 17
      3.1.7 An Artificial Distinction between Financial and Non-Financial Information? ................................................................................................................................. 17
      3.1.8 Consequences of Non-Compliance – Enforcement ............................................ 18
4. SUMMARY AND NEXT STEPS ..................................................................................... 20
EXECUTIVE SUMMARY

Traditionally, the EU has taken a soft law approach to non-financial reporting with no general legal obligation on companies to adopt Corporate Social Responsibility ("CSR") policies or to report on them. With the introduction of Directive 2014/95/EU ("The Non-Financial Reporting Directive") the European Commission is taking a tougher approach on the European policy agenda on CSR by introducing enhanced reporting requirements on social, environmental and governance issues. Many European companies already publish CSR reports, and indeed, in Norway, the majority of the disclosures in the Directive are already reflected in the reporting requirements in the Norwegian Accounting Act (regnskapsloven). However, certain additional requirements will be introduced. In particular, legal practitioners will have to advise their clients on new disclosure requirements in relation to anti-corruption and bribery issues, and stricter reporting obligations on diversity in the board of directors. In addition, companies within the scope of the Directive will have to disclose information on policies, risks and outcomes as regards environmental matters, social and employee-related aspects and respect for human rights. These are not new concepts in Norwegian law; however, the Directive introduces an increased focus on implementation and outcome of such policies. The impact of a company's activities on the external environment is also placed firmly in focus under the new provisions. Further, the Directive makes reference to risks related to a company's "business relationships". It is thus expected that the reporting requirements will extend to activities in companies' supply chains.

Member states are required to implement the Directive's provisions into national law by 6 December 2016, with undertakings reporting under the new requirements for financial years beginning 1 January 2017.

Norwegian companies that are already in compliance with established Norwegian and international guidelines are unlikely to incur significant additional burdens or expenditure following implementation of the Directive. However, for companies that do not have established reporting processes in place, the road to compliance is likely to be both time and resource consuming.

Lastly, this report explores the distinction between financial and non-financial information and the move towards a more integrated reporting framework.
1. INTRODUCTION

1.1 Background

The amount of companies in the EU reporting on environmental, social and governance issues in their annual reports has grown rapidly over the last few decades, with the scope and content of such reports mainly evolving through voluntary reporting by companies. The main driver for this increase has been an emerging trend for greater corporate accountability and transparency. With a rapidly rising demand for responsible business from a society increasingly more aware of the impact of aggressive profit-oriented business strategies there has been a corresponding recognition by companies that responsible business has the potential to bring significant bottom-line benefits. Consequently, many companies have realised that a strategic approach to CSR and non-financial transparency is increasingly important to the competitiveness of their undertaking. Stakeholders and regulators expect companies to disclose information relevant to how organisations conduct their business in the context of sustainable development, and shareholders expect to see a return on their investment. Hence both parties expect the undertaking to manage environmental and social risk relevant to the particular business model. The impact of an environmental disaster can be costly for an undertaking, both in terms of public sanctions and clean-up costs. Disclosure of non-financial information is therefore an important consideration for investors looking to make sound, long-term investments.

Although voluntary guidelines, frameworks and recommendations have been widely available, the law in this area has evolved slowly. The European Commission has been reluctant to adopt legislation on non-financial reporting, and prior to 2011 there was no general legal obligation under EU law to adopt CSR policies or to report on them, with the system being based solely on the voluntary adoption of codes of conduct developed by the EU by means of resolutions, communications and recommendations, so-called ‘soft laws’. Current EU legislation, in particular the Accounting Directive,¹

---

addresses the disclosure of non-financial information. However, these disclosure requirements have proved to be unclear and ineffective, and are applied inconsistently between Member States.

Over time some Member States have introduced disclosure requirements that go beyond the obligations prescribed by EU law. In Norway, legislation on CSR reporting was introduced in 2013 following the implementation of the Accounting directive, prior to which there was no general legal obligation to disclose non-financial information. Today, most large Norwegian companies are subject to a statutory duty to report on some aspects of their environmental and social performance.

There is currently no uniform international standard that specifies the content of non-financial reports, but a number of different frameworks and guidelines. Consequently there is great variation in disclosures between companies, making comparisons difficult. CSR reporting standards also vary considerably between enterprises of different sizes and industries. Directive 2014/95/EU is an attempt by the European Council to set minimum reporting requirements in relation to non-financial information and to provide clarity regarding the nature and scope of such disclosures.

The 2014 Directive applies only to ‘large’ ‘public interest entities’ (“PIEs”) with more than 500 employees and a balance sheet total of at least €20 million or a net turnover of at least €40 million.\(^2\) This includes EU exchange listed companies as well as some unlisted, such as credit institutions, insurance undertakings, and others selected by Member States (based on size, number of employees and/or activities). The large companies affected are mainly those incorporated in EU Member States. However, the Directive may also have an impact on others that are listed on an EU stock exchange and potentially foreign companies with a presence in an individual Member State significant enough for that Member State to designate the company as an entity subject to the reporting requirements. It is estimated that around 6000 undertakings will be directly affected once national regulations are in place.\(^3\) A Commission impact assessment carried out in 2013 revealed that only 2,500 out of the total 42,000 large EU companies formally disclosed non-financial information on a yearly basis.\(^4\) The introduction of the Directive will thus mean a notable increase in the amount of companies being subject to a mandatory obligation to report on CSR considerations in their annual reports.

1.2 Aim and Perspective of the Report

The aim of this report is firstly to assess the applicable Norwegian law on non-financial reporting and then to determine how the provisions of Directive 2014/95/EU fit in with, and complement, the current legal framework. This will be examined in Part 2 below. Next, I will consider the practical impacts of these new disclosure requirements on companies operating in Norway. This assessment will take place in Part 3 before the report summarises in Part 4. I will examine only the reporting

---

\(^2\) Non-Financial Reporting Directive, Preamble pt 14, the Accounting Directive Arts 2(1) and 3.4.


obligations and not the underlying rules on CSR. Most of the companies likely to be affected by the new requirements are companies listed on a stock exchange within the EU/EEA. This report will therefore mainly focus on how the requirements will affect the reporting standards of large public companies.

1.3 The European Approach to CSR Reporting

In 2011 the Commission identified the need to raise the transparency of social and environmental information provided by undertakings. The European Parliament also recognised the need for CSR reform and in 2013 adopted two resolutions in which they acknowledged that the disclosure of non-financial information was crucial for managing the transition towards a sustainable global economy. The Commission concluded that the most effective option for legal reform in this area was enhanced reporting requirements on social, environmental and governance issues.

A legislative proposal on non-financial reporting was adopted in 2013, which lead to the publication of the Accounting Directive. The 2013 Directive harmonised Europe’s legal framework for accounting and introduced a requirement that certain companies include CSR disclosures in their management reports as well as a corporate governance statement. However, following two recent public consultations with stakeholders, there was evident support to further improve business transparency, particularly in the areas of social, environmental and governance issues. The consultations showed that few EU undertakings regularly disclosed non-financial information, and the quality of the information disclosed varied largely, making it difficult for investors and stakeholders to understand and compare companies’ position and performance. An impact assessment carried out by the Commission also revealed a lack of diversity at board level. The Non-Financial Reporting Directive was adopted to provide additional clarity regarding the nature and scope of CSR disclosures.

2. REFORM

2.1 Current Legal Framework in Norway

Today, the management of companies (other than small companies) must prepare an annual management report for each financial year containing a fair review of the business and a description of principal risks. The management report must further include a non-financial statement. A prerequisite for the obligation to arise is that the company is characterised as a “large” company.

---

8 Årsberetning
9 The Accounting Act (regnskapsloven) § 3-3c
pursuant to § 1-5 of the Accounting Act (regnskapsloven). The non-financial statement must include information on what the company is doing to integrate policies on human rights, social and employee related matters, the environment and anti-corruption in their business strategies, in their daily operations and in relation to its stakeholders. Undertakings must further report on steps taken to convert these policies into action, the results achieved and the expectations for this work for the future.

A further requirement under the Accounting Act is the publication of a corporate governance statement. The statement must contain a description of the composition and operation of the company’s administrative, management and supervisory bodies, including the board of directors.

Norwegian exchange listed companies also have to comply with the Oslo Stock Exchange Code of Conduct. The Code sets out standards of good practice for listed companies, including its relations with shareholders and specific requirements for disclosure, regardless of whether they are incorporated in Norway or elsewhere.

2.2 What Changes Will Directive 2014/95/EU Bring to the Current Legal Framework?

2.2.1 Scope of the Reporting Obligation – the Reportable Factors

The Directive requires covered enterprises to provide an additional non-financial statement in their annual management report containing information relating to, at a minimum:

- environmental matters,
- social and employee-related matters,
- human rights (specifically “respect for human rights”), and
- anti-corruption and bribery issues (including information on the instruments a company has in place to fight bribery and corruption).

The majority of the disclosures above are already reflected in the non-financial statement requirements under the Norwegian Accounting Act. However, the substance requirements in the Accounting Act are likely undergo certain changes following implementation of the Directive.

The Directive will apply to “public-interest entities” (including some unlisted companies) with a balance sheet total of at least €20 million or a net turnover of at least €40 million. The current reporting obligation pursuant to the Accounting Act § 3-3c applies to all “large entities”. Large entities are defined as public limited companies and listed companies, as well as other entities if provided for by Ministry Regulation. There are no turnover thresholds relating specifically to the definition of a large company under Norwegian law. However, § 1-6 of the Accounting Act sets out the requirements

---

10 The Accounting Act (regnskapsloven) § 3-3b
11 “Løpende forpliktelser for borsnoterte selskaper”
12 Non-Financial Reporting Directive, Art 1(1)
to qualify as a small entity. These thresholds are significantly lower than those prescribed by the Directive. It is thus unlikely that implementing legislation will impose obligations on Norwegian companies not previously required to report on non-financial considerations in their annual reports.

Denmark has already become the first country to transpose the Directive. The full implementation will come into effect in 2018 and will require all large companies (more than 1,000 overall) to comply. This illustrates that across the EU, the number of companies ultimately affected may be much higher than initially expected.

Moreover, it is necessary to examine what is embedded in the reportable factors. With regard to “environmental matters” the Preamble to the Directive refers to matters including, but not limited to, current and foreseeable impacts on environment, health, and safety issues, the use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution. Exactly what environmental information is necessary for an understanding of the company’s business under Norwegian law is unclear. Norwegian companies are required to comply with obligations that aim to limit the negative environmental impacts of their activities. The environmental duties to which companies are subjected are laid down in § 3-3a of the Accounting Act, the Environmental Information Act (miljøinformasjonsloven) and the Pollution Act of 1981 (forurensningsloven).

As regards “social and employee-related matters” the Preamble to the Directive refers to matters including, but not limited to, gender equality, implementing fundamental conventions of the International Labour Organization, trade union rights, health and safety at work and engagement with local communities. It is unclear from this whether the obligation warrants non-financial indicators on broader social issues like labour rights in a company’s supply chain, or social concerns outside the workforce. However, from the wording of Article 1(1)(d), which refers to a company’s business relationships, it seems likely that companies must report on principal risks in relation to contracting parties, including in their supply chain. Paragraph 3-3a of the Accounting Act requires companies to report on injuries and accidents at the workplace, as well as their statistics on sick leave. Other than this, the Norwegian government does not suggest specific disclosures on social and employee-related matters and respect for human rights. In § 3-3c of the Accounting Act there is a requirement to report on the company’s implementation of CSR considerations in their business strategies and towards its stakeholders. From the wording of this provision there seems to be no specific requirement on an entity to disclose risks in relation to its supply chain.

The Directive requires covered enterprises to report on anti-corruption and bribery issues, including information on the instruments a company has in place to fight bribery and corruption. In Norway corruption is governed by §§ 387 - 388 of the General Civil Penal Code (straffeloven). These provisions entered into force on the 1st of October 2015, and have been classified amongst the world’s most stringent rules against corruption. On the reporting side, companies are required to make publicly available a description of the instruments it has in place to fight corruption, the results of their
anti-corruption work and predictions for future efforts. This provision mirrors the reporting requirements imposed by the new Directive.

2.2.2 Substance of the Reporting Obligation

“Necessity”

The non-financial statement must contain all information “necessary” for an understanding of the undertaking’s development, performance, position and impact of its activity. As derived from earlier communications it seems clear that the Commission’s thinking behind this provision is that companies will be required to disclose concise, useful information rather than extensive and detailed reports covering factors which are irrelevant to the particular business, thereby reducing administrative burdens. Furthermore, disclosures may be provided at group level, rather than by each individual affiliate within a group.

The standard imposed by the Norwegian Accounting Act is slightly different and appears more comprehensive; the management report shall as a minimum include a fair review of the development and results of the entity’s operations. The overview shall be a balanced and comprehensive analysis. Further, to the extent necessary to understand the company’s business, the analysis shall include both financial and, where appropriate, non-financial key performance indicators (“KPIs”). There is thus no general necessity-requirement. Under the Norwegian Accounting Act companies may instead elect to omit information on KPIs where it is not considered a necessity in the process of understanding the company’s business. KPIs are discussed in more detail below.

The group accounting exception introduced by the Directive is the same as that under the Accounting Act § 3-3a (13) and 3-3c (4).

“Non-financial key performance indicators”

Key performance indicators are quantifiable measures that reflect the non-financial performance of an organisation in the context of achieving its wider objectives. The Directive introduces a mandatory requirement that companies measure and report on their CSR performance using KPIs. The Accounting Act § 3-3a requires companies to include KPIs only where this is considered necessary and appropriate. There is no universally accepted set of performance indicators, however, the Commission

---

13 Regnskapsloven § 3-3 c første ledd.
16 The Accountig Act (regnskspsloven) § 3-3a.
is due to publish guidance on general and sectorial non-financial key performance indicators by December 2016.\textsuperscript{18}

“Business relationships”

Under the new EU regime companies are to report on principal risks in relation to, amongst other things, the company’s business relationships. By including a reference to “business relationships” the Commission implies that companies are expected to address risks linked to their operations outside the EU.\textsuperscript{19} The European Parliament emphasised in its resolution of 6 February 2013 that when assessing the social responsibility of a company, it is necessary to take into account the behavior of companies operating within its supply chain and, where applicable, of its subcontractors.\textsuperscript{20} It also made clear that CSR must extend to enterprises’ behavior towards, and in, third countries. Under the new Directive, companies must therefore not only assess the impact of their own activities, but also that of their business relationships, which will include information on subcontracting and supply chains. There is no reference to business relationships in the Accounting Act. However, the Norwegian Working Committee on Corporate Responsibility Reporting has stated that, in principle, occurrences in the supply chain fall within an entity’s CSR responsibilities, and as such the entity should report on the actual or potential impacts arising through its business relationships.\textsuperscript{21} This is thus currently a non-statutory requirement under Norwegian law.

\textsuperscript{18} Ibid, Art 2 D.
\textsuperscript{19} European Coalition for Corporate Justice, Assessment of the EU Directive on the disclosure of non-financial information by certain large companies (ECC] Briefing, May 2014).
\textsuperscript{21} “Krav til rapportering om samfunnsansvar” - Rapport til Finansdepartementet fra arbeidsgruppen for rapportering om samfunnsansvar.
“Policies – A Focus on Outcome”

Directive 2014/95/EU requires companies to report on the policies pursued and the due diligence processes implemented in relation to the reportable factors, and the outcomes of those policies. In comparison, the Accounting Act requires company boards to provide information on the policies pursued, how they are integrated, how the company works to translate them into action, an assessment of the outcome of this work, and the company’s expectations for this work in the future. On the face of it the obligation under the Accounting Act appears more extensive than that introduced by the new Directive in that it includes a requirement to disclose predictions on the entity’s future CSR efforts.

Reporting on CSR policies and management programs that aim to reduce the company’s negative social and environmental impact is widespread in practice. However, many large undertakings have in the past been criticised for selective or misleading information. The reason for this is that many companies publish CSR reports with a focus on statements of management intent and qualitative claims which are not generated in response to internal information needs but produced solely as a means of improving public relations and to defuse external pressures. In the lead up to the publication of the Directive both the Commission and the European Parliament have stressed that CSR must move from process to outcome. The European Parliament has emphasised that corporate responsibility must not be reduced to a marketing tool - the only way to develop CSR to the full is to embed it in a company’s overall business strategy and to implement it and translate it into reality in its day-to-day operations. It seems clear, therefore, that a mere description of goals and strategies is no longer sufficient under the new provisions.

The Commission’s purpose behind the obligation to report such measures is that account users will be able to see the extent to which environmental and other considerations are integrated into the company’s policies and activities. If reporting of such information leads to CSR considerations being portrayed as more integral to the business than they are in reality, such reporting practice will be contrary to its purpose. Reporting will also be contrary to the overriding principle that accounts shall give a true and fair review of the company’s business.

In Norwegian legislation there is already a focus on outcome-based reporting. To what extent this is imbedded in companies’ reporting practices is somewhat unclear. What is clear, however, is that a more outcome-focused scheme at an EU level will provide clarity and help shift the focus from mere information-sharing to implementation and result. By placing an emphasis on qualitative content and moving away from quantitative reports in lack of actual progress, monitoring and result, more

---

22 § 3-3c
companies are likely to be encouraged to implement instruments, monitor performance and report on the outcomes.

“Diversity”

Leading up to the enactment of the Directive the Commission conducted an impact assessment which revealed a lack of diversity at board level throughout the EU. Consequently, the 2014 Directive requires large companies to include in their annual report, a description of the diversity policy applied in relation to the undertaking’s administrative, management and supervisory bodies with regards to factors such as age, gender, or education and professional backgrounds, the objective of that policy, how it has been implemented and the results in the reporting period.

Diversity reporting is not a new concept in Norwegian law. However, the requirements in the Directive arguably go further than the applicable law in Norway when it comes to substance. Under § 3-3b of the Accounting Act companies are only obliged to disclose information on the composition of the management in relation to gender equality. Further, the Public Limited Liability Companies Act (Allemennaksjeloven) obliges companies to appoint a board of directors consisting of representatives of at least 40 per cent from each sex. There is no specific mention of other relevant criteria. The Directive sets out a broader range of factors to be disclosed in relation to diversity. There is also a stronger focus on objective, implementation and result of such policies as the Commission believes enhanced transparency on diversity will contribute to the promotion of equal treatment and reduce discrimination in corporate decision-making.

2.2.3 Reporting Principles

“Comply or explain”

The reporting requirements in the Directive are based on a “comply or explain” regime. Where the company does not report on, or pursue policies in relation to the reportable factors it must provide a clear and reasoned explanation for the non-disclosure. Under the Accounting Act, companies that fail to disclose non-financial information in the management report, must include a statement to that effect. There is no requirement under the Act to set out the reasons for the non-disclosure.

---

24 Commission, ‘Executive Summary of the Impact Assessment’ (Commission Staff Working Document) SWD (2013) 128 final, para 2.2. Insufficient diversity in boards often leads to similarity of views of the board members (the so-called phenomenon of "group think"), more resistance to innovative ideas and eventually a negative impact on the performance of the company.


26 Non-Financial Reporting Directive, Art 1(1)

27 § 3-3c of the Accounting Act (regnskapsloven)
“Safe harbour”

The Commission acknowledges that risk reporting is sensitive and might have an adverse impact on the business and future development of an undertaking. Therefore, to the extent that the disclosure would be seriously prejudicial to the commercial position of the undertaking, the company management can decide to hold back the disclosure of information relating to impeding developments or matters in the course of negotiation and provide a statement to that effect. Such a “get out of jail free card” does not currently exist in Norwegian legislation.

2.2.4 Reporting Frameworks

No official guidelines for the preparation of the non-financial statement are currently in existence. The 2014 Directive gives companies significant flexibility in tailoring their CSR disclosures, including through the use of recognised international, European or national guidelines. The Directive references various standards that companies can rely on in their reporting, including the UN Guiding principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Yet, any national, EU or international framework can be used.

In terms of external assurance the Directive requires an auditor to verify whether or not a non-financial statement has been provided. However, there is no requirement as to verification of content. Moreover, the assurance requirement is an optional one and may be dropped by Member States in transposition. A much more stringent assurance requirement can be found in the Norwegian Auditors Act (revisjonsloven) § 5-6, where the auditor must give an opinion on the accuracy of the information contained in the report.

2.2.5 Mandatory and Optional Requirements

Certain aspects of Directive 2014/95/EU are mandatory, such as the minimum scope of companies affected. The Directive sets the minimum scope as “Public Interest Entities” with an average of 500 employees during the financial year. This may mean that on an EU level more companies will fall within the scope of the Directive than was the case under the Accounting Directive. Further, the scope and substance of the non-financial statement are mandatory requirements. This is a combination of disclosures already required under the Accounting Directive such as principal risks, environmental, social and employee matters, and some new content such as anti-corruption, bribery and diversity policies, as well as a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented. Other provisions are optional and will be maintained or dropped in transposition into national law. This includes the “safe harbour clause”, the possibility for the company to provide a separate report rather than integrating the non-financial statement in the management report, and the verification by an independent assurance service provider.

29 European Coalition for Corporate Justice, Assessment of the EU Directive on the disclosure of non-financial information by certain large companies (ECC] Briefing, May 2014).
In the past the Norwegian Government has gone further than the minimum requirements prescribed by EU Directives when it comes to non-financial reporting. Stricter provisions apply in the Norwegian Accounting Act than was required by the Accounting Directive. By implication it is thus likely that the Norwegian Government will choose a stringent implementation strategy.

3. IMPACT ON COMPANIES

3.1 Consequences for UK Companies Following Implementation

3.1.1 Wider Access to Non-Financial Information

The greatest impact of the above changes is that companies may be forced to report on issues they would not otherwise disclose, and in a consistent form. By disclosing information that is comparable from year to year, the trends and performance of the firm’s operations become very visible to outsiders. Transparency on CSR-related matters creates a need to show continuous improvements – or face questions from stakeholders. The requirement to use non-financial key performance indicators relevant to the particular business will further enhance the comparability of enterprises at an industry level.

Wider access to non-financial information will also make it easier to hold the company accountable for negative impacts. Those affected by business operations will be better equipped to assert their rights as more vigorous reports will enable them to better assess the impacts of companies’ operations on society and to monitor their progress. The information on a company’s due diligence (or the lack of such) can be used by victims of corporate misconduct to argue in judicial, and similar procedures, that the company in question was negligent and thus liable for the harm.

Lastly, as the extent and comparability of non-financial information increases, those companies disclosing misleading or insufficient information will become more visible to investors, who may view such companies less favourably. In today’s increasingly globalised society we are progressively witnessing an overlap between financial and non-financial information - reduced access to the non-financial information of a company will therefore correlate to higher risk. This will be discussed in more detail below.

3.1.2 Business Relationships

The obligation to report on risks in relation to the company’s business relationships will further increase the extent of information available to stakeholders, as this may extend to a company’s operations outside Europe. Going beyond the narrower application of Norway’s quoted companies regime, this new requirement will place greater emphasis on a company’s need to be aware of the activities of its supply chain.
There has been a rise in publicised allegations of human rights violations occurring in companies’ supply chains in third countries and associated claims that corporations be held accountable for failing to properly manage such supply chains. Publicity around human rights abuses or environmental violations can be very damaging to corporate goodwill, which may again lead investors not to view the company as a viable investment option. There is also a significant legal risk surrounding a company’s supply chain as governments and pressure groups are continually working to facilitate better access to justice for individuals who have suffered harm as a consequence of corporate-related human rights abuses. There is thus a greater need for effective supply chain management under the new Directive. Supply chain due diligence allows companies to identify and assess risks and monitor compliance. In carrying out supply chain due diligence businesses must not only assess the impacts of their own activities, but they must also assess the impacts of their business relationships. This means that companies must know their suppliers and have effective measures in place to assess and monitor their suppliers’ CSR performance.

3.1.3 Flexibility and Discretion

Under the Directive companies have the discretion to disclose only such information as is necessary. Whilst this leaves an uncertainty as to content, it also offers a necessary level of flexibility. CSR considerations and risks vary considerably between different types of companies, and the practical realities of a particular business may make implementation of certain reporting requirements unfeasible, unnecessary and inappropriate. Enterprises involved in oil and gas extraction need to pay close attention to environmental risks, whilst companies operating in countries with high levels of corruption need effective instruments in place to oversee the conduct of its workforce and that of its business relationships. A business model that requires high levels of outsourced labor necessitates an increased focus on thorough supply chain due diligence.

Having the discretion to report on matters that are necessary and relevant means the company’s resources will not be wasted reporting on CSR considerations which is not relevant to the particular business. Disclosure of concise, useful information also benefits investors and other stakeholders as the time spent assessing a company’s performance will be kept to a minimum. However, some might argue that this requirement leaves too much discretion with the management of companies. The
precise extent of the information necessary to come within compliance, and thus the scope of
management’s legitimate discretion is unclear as a result of the uncertainties surrounding the scope
and content requirements discussed above. Accordingly, business leaders may be unsure of precisely
what is required of them under the Directive.

As discussed above, the standard of disclosure required under the Accounting Act is more
comprehensive, requiring undertakings to provide a balanced and comprehensive overview of the
company’s operations. Whether the wording of § 3-3a will be amended so as to align with the Directive
remains to be seen, but is perhaps unlikely given the government’s previous strict legislative approach
to non-financial reporting.

The Commission is to publish non-binding guidelines by 6 December 2016. These should help clarify
responsibilities and expectations under the Directive.

The Directive also gives companies flexibility to disclose relevant information in the way that they
consider most useful. Companies may use international, European or national reporting frameworks
which they consider appropriate.31 Further flexibility comes as a consequence of the ‘comply or
explain’ regime on which the requirements are based, as well as the ‘safe harbour’ exception. Although
CSR reporting rules are now mandatory, companies may avoid reporting on risks if they provide a
“clear and reasoned” explanation for the non-disclosure, or if such disclosures are considered seriously
prejudicial to the position of the undertaking. So, whilst some of the reporting requirements in the
Directive appear quite extensive, companies should bear in mind that they do come with a certain level
of discretion. How extensively these ‘get out’ clauses are going to be used in practice is difficult to
predict. However, managers should take into account the potential negative inferences that may be
drawn from such non-disclosures. Pre-implementation, the extent of such inferences is difficult to
quantify precisely, however, managers are advised to keep stakeholder expectations and societal
pressures in mind when considering withholding significant information from the annual report.

These new reporting requirements are the European Commission’s response to an increased demand
from stakeholders for non-financial information. Meeting stakeholder expectations are therefore just
as important as compliance with regulatory requirements, and the scope and content of the disclosures
may vary depending on the reason for which information is disclosed. Information disclosed with
stakeholder expectations in mind are likely to exceed the minimum requirements prescribed by both
EU and domestic law. Any large undertaking making certain information available to the public,
whether financial or not, must assess the impact of disclosure in strategic terms and question whether
such information could be used by competitors, regulators, the media or others. There is therefore a
right balance to look for between compliance, voluntary disclosure and risk considerations, and this
can be a difficult exercise for companies. Exactly what is required from various stakeholders and/or
investors will depend on the nature of the company’s business and the industry in which it operates.

31 Commission, ‘Disclosure of non-financial information by certain large companies: European Parliament and
Council reach agreement on Commission proposal to improve transparency’ (Press release, 26 February 2014).
In addition to EU and national reporting rules, companies need also pay regard to the network of non-financial reporting requirements applicable in different industries and jurisdictions. Companies operating in more than one Member State need to get an overview of the varying implementing legislation in the states in which they operate. In addition, an increasing number of stock exchanges are now requiring companies to disclose and report on CSR issues and risks. Listed companies must therefore make sure they have the necessary processes in place to ensure compliance with the listing rules.

### 3.1.4 Implementation and Outcome

Compliance with the Directive is likely to rest on a company’s ability to adopt policies and integrate those policies into all aspects of operations and management. For many companies CSR information is boilerplate, and the utilisation of non-financial reporting as a marketing tool is widespread in practice. Stricter reporting requirements and an increased focus on outcomes will mean that companies need to pay closer attention to implementation, monitoring and outcomes in order to comply with the regulatory requirements, but also in order to live up to stakeholder expectations.

New implementing legislation on business relationships and supply chain disclosures will inevitably lead to a reform of companies’ policies and reporting processes as this is a requirement which has not previously existed in Norwegian law.

The enhanced reporting obligation relating to corporate diversity is another area in which change is easy to predict following implementation. Covered enterprises that do not currently report on the object, implementation and results of such policies must put in place measures so that they are positioned to provide appropriate disclosures by the 2017 deadline. The process of identifying, preventing and mitigating negative CSR impacts is an ongoing process and should be integrated as much as possible into existing company policies, training and operations.

### 3.1.5 Administrative Burdens and Costs

Although reporting systems have been primarily designed to help prepare financial information, undertakings are now faced with new challenges such as the collection, compilation and preparation of accurate and comprehensive non-financial information. There are therefore change management considerations and this may either include developing new systems or adapting existing reporting systems. High levels of expenditure can be involved in creating or updating policies as effective compliance is, as discussed above, reliant on the implementation of such policies. This may involve, amongst other things, management time in creating or revising policies, training of employees, communications with stakeholders and business relationships, and the setting up of channels for the collection of data. Companies should also bear in mind that apart from the direct costs of preparing, certifying, and publishing corporate information, disclosures may also have indirect costs, for instance,
because the information could also be used by other parties, such as competitors, employees, politicians and regulators.

Moreover, as mentioned above, standards of CSR disclosures vary greatly between Member States as a consequence of different implementing legislation. There is a possibility here that different national requirements could create additional costs for enterprises operating in more than one Member State.\(^{32}\) This is a consideration that corporate clients should be aware of when considering entering a new market in the EU. A solution for enterprises with affiliates across Member States is to publish one consolidated report covering all of its operations in the EU.\(^{33}\) Such a report would have to comply with the most stringent of the national requirements.

Generally, experts do not believe that the new rules will present significant additional administrative or regulatory burdens on Norwegian companies. Norway has already made great steps towards narrative reporting and the advantages of providing meaningful, transparent disclosure. This means that companies which are already in compliance with established Norwegian guidelines, are unlikely to experience significant regulatory deviations from existing reporting practices.

### 3.1.6 Small and Medium Sized Enterprises (SMEs)

The new rules will only apply to some large undertakings with more than 500 employees, as the costs for requiring small and medium-sized enterprises ("SMEs") to apply them could outweigh the benefits.\(^{34}\) However, the European Parliament has communicated its intention to extend the rules to smaller enterprises with talks of introducing a simplified framework.\(^{35}\) Many SMEs have already incorporated CSR reporting frameworks, and stricter rules on disclosures for larger companies may force smaller companies to comply with similar standards in order to live up to stakeholder expectations, but also in order to be able to form part of the supply chains of a larger enterprises - if those companies required to report start asking their suppliers to provide them with CSR information for their reports, all companies doing business with them will feel pressured to increase their own CSR disclosure. Lawyers advising smaller companies should be aware of these developments.

### 3.1.7 An Artificial Distinction between Financial and Non-Financial Information?

Is CSR considerations really purely non-financial information? As discussed above, investors increasingly take account of non-financial information when making investment decisions. Insufficient or misleading disclosures on CSR matters or a reputation for poor CSR performance will heavily


\(^{33}\) Non-Financial Reporting Directive, Art 1(1) - the disclosure requirements may be fulfilled once at group level, rather than by each affiliate in the group.


influence the investor’s financial decision as to whether or not to invest in a company. Therefore, in practice, financial and non-financial information are closely interlinked.

The distinction between information that belongs in the management report and information to be included in the notes to the financial statements is of particular interest here. ‘Notes to the financial statements’ is defined as additional information which can have material effects on the bottom-line return that a shareholder can expect from an investment in a company. This has traditionally included information on such things as the accounting methodologies used for recording and reporting transactions, pension plan details and stock option compensation information. It seems clear that, in today’s society, CSR considerations have at least the potential to materially affect a company’s bottom line. Additionally, financial statements are prepared on the assumption that the business will continue in operation in the foreseeable future (‘the going concern concept’). Arguably, non-compliance with laws and regulations on the sustainability factors has the potential to affect the continuance of an entity as a going-concern. There is thus a strong argument here that CSR information ought be collected, monitored and disclosed in the financial statement.

Recently the European Parliament has encouraged undertakings to establish a strong link between its environmental, social and human rights performance and its financial results, and the International Integrated Reporting Council (“IIRC”) has indicated that corporate sustainability reporting integrated into financial accounts (‘integrated reporting’) will become the global norm within less than a decade. Integrated reporting links CSR data to the information on a company’s business model, strategy, performance and future outlook including risks and opportunities. This involves taking a more holistic view on the information the company is producing – management must assess how non-financial factors may influence the strategic direction of the company, and the impact of such considerations on the company’s financial performance and prospects. The Directive does not require companies to comply with integrated reporting, but there are strong indications that such a reporting structure will become customary within the next few years.

3.1.8 Consequences of Non-Compliance – Enforcement

The Directive provides that Member States shall ensure that effective national procedures are in place to enforce compliance. This leaves significant discretion to national Governments to choose the method and extent of enforcement.

Under the Accounting Act, failure on behalf of a company to prepare and publish a management report which is in compliance with the requirements of the Act or publishing a management report which contains untrue or misleading statements or omits material facts, is an offence punishable by a fine or

---

36 IIRC is a global coalition of regulators, investors, companies, standard setters, the accounting profession and NGOs.
imprisonment for a term not exceeding 2 years. A gross accounting violation is punishable by imprisonment for a term not exceeding 6 years.

Moreover, where a company publishes a management report which contains untrue or misleading statements or omits material facts its management, CEO or others may be liable to the company under The Public Limited Liability Companies Act (allmennaksjeloven) if the company suffers loss as a result. To be liable, it is not necessary to prove that the loss was caused intentionally. Negligent conduct will suffice.

For comparative reasons it is pointed out that the extent of the above liability is limited in many jurisdictions. For instance, in the UK, directors are only liable to the company if they knowingly published misleading statements or concealed a material fact.

In Norway, it is likely that the sanctions in the Public Limited Liability Companies Act will remain unaltered and apply equally to the new obligations once implemented.

The bodies responsible for policing corporate governance and reporting in Norway is the Financial Supervisory Authority (Finanstilsynet) and the Oslo Stock Exchange. Økokrim is the body responsible for investigating accounting violations and may take criminal enforcement action. Økokrim can start an investigation on its own initiative, but it will also investigate complaints from third parties.

Inaccurate disclosure also makes the company vulnerable to private action. Arguably, where investors are able to show reliance on misstatements to their detriment, they will be able to claim against both the company and the responsible individuals. For individual victims of corporate misconduct cost is, however, still prohibitive in the pursuit of a remedy against large corporations.

---

38 § 8-5 of the Accounting Act (regnskapsloven) and §§ 392-394 of the General Civil Penal Code (straffeloven).
39 § 17-1(1).
4. SUMMARY AND NEXT STEPS

In summary, the following are the key areas that should be of concern to companies and their legal advisors as a result of the new Directive;

- stricter reporting requirement on diversity in the undertaking’s administrative, management and supervisory bodies,
- increased focus on implementation and outcome reporting,
- non-financial key performance indicators are made mandatory,
- reporting requirements now extend to risks in companies’ supply chains,
- the system is based on a “comply or explain” regime requiring undertakings to provide an explanation where they choose not to pursue policies in relation to one or more of the reportable factors, and
- the introduction of a safe harbour exception may exempt an undertaking from disclosing certain information where the publication of such information would be seriously prejudicial to the commercial position of the undertaking (this may, however, be dropped in transposition into Norwegian law).

As a result, companies need to get a comprehensive picture of all reporting requirements applicable depending on the particular circumstances of the entity, and to understand what its corporate reporting strategy is. For instance, some undertakings tend to combine all kinds of reporting into a more comprehensive piece and should consider new forms of reporting such as integrated reporting. Moving to a different mix of financial versus non-financial information and less traditional forms of corporate reporting may mean a new risk mapping and reform of current policies.

Pre-implementation it is impossible to assess the exact impact on Norwegian companies, and the transfiguration required will inevitably depend on the company’s current CSR reporting practices. It is safe to say, however, that the impact of the Directive on a company complying with all the current requirements of the Norwegian Accounting Act will be subtle. The only notable change is likely to be in the areas of diversification, risks in the supply chain and the requirement to provide an explanation for non-disclosures. On the other end of the spectrum, companies which do not have such a reporting culture in place, for instance due to not being caught by previous legislation, is likely to find the new requirements fairly extensive. The process leading to compliance in such a scenario will be both time and resource consuming. In any case, the introduction of new requirements on non-financial reporting represents a good opportunity for companies to do a complete revision of their corporate reporting strategy.

Since the full extent of the changes is still unclear, partly due to the uncertainties surrounding the Government’s implementation strategy, companies, even those with well-established CSR polices, should be aware that this is an area which should be kept under review. Norway has a history of
extensive reporting and has, in the past, incorporated more substantial requirements than that required by EU Directives.

For lawyers, the new Directive is an opportunity to review and ‘future-proof’ their clients’ CSR policies and reporting procedures. The level of compliance, and whether the client wishes to go beyond regulatory requirements, will be a balancing act between the risk of sanctions in the form of enforcement action and damage to corporate goodwill, and potential benefits to the company by complying with a higher standard of disclosure. We, as lawyers, have to make sure our corporate clients are not exposed to unnecessary risk relating to their disclosures by providing advice on drafting the management report in a way which benefits the client whilst at the same time safeguarding the client’s chosen level of transparency.

The Directive was considered by the EEA Committee and found EEA relevant and acceptable on 5 February 2016. The transposition deadline is 6 December 2016, with undertakings reporting under the new requirements for financial years beginning 1 January 2017. Companies likely to fall within the ambit of the Directive should be advised to consider the implications of the new requirements in good time to ensure compliance by the January 2017 deadline. Leaving the setting up of necessary systems and processes to the last minute will be a much more costly exercise than building a CSR infrastructure step by step with sufficient time to find the option best suited to the company.