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European Union Directive 2014/95 on Non-Financial Reporting: A Successful Experimentalist Governance Architecture?

William De Catelle

I. Introduction

In 2011, the European Commission submitted an ambitious strategy on corporate social responsibility (CSR).¹ Directive 2014/95/EU on non-financial reporting² is one of the most concrete achievements of this strategy, and has been referred to as a historic step forward.³ This article will examine the Non-Financial Reporting Directive through the theoretical lens of experimentalist governance. Like other experimentalist governance analyses, it will first define experimentalist governance, and then apply the theory to the Directive.⁴ The research question is whether the Directive constitutes a successful experimentalist governance architecture (EGA).

Before taking a closer look at the Directive, some terms must be briefly addressed. Directive 2014/95/EU is about non-financial reporting, which must be distinguished from financial reporting. The latter includes the balance sheet, cash flows, and other related information, whereas the former includes the company's social, environmental, and human rights information. Companies will only start reporting according to the Directive after 1 January 2018.⁵ Therefore, this article will primarily investigate if the Directive includes the necessary features to have the full potential of being an effective EGA, rather than being an empirical study of effectiveness. The conclusion reached is positive. Even though the Directive is not a perfectly constructed EGA, most of its necessary features are present. The Directive will have a rather modest impact because of its limited scope, but importantly, the approach taken by the European Union (EU) is refreshing and promising for the future.

II. The Importance of a New Directive for Europe

Why is non-financial reporting important for the EU? The European Parliament stresses the importance of identifying sustainability risks and increasing investor and consumer trust.⁶ The European Commission added: "It can bring benefits in terms of risk management, cost savings, access to capital, customer relationships, human resource management and innovation capacity".⁷

Many thanks to Dr. Megan Bowman (King's College London) for her guidance and to the editors of the King's Student Law Review for their comments. All remaining errors are, of course, my own.

¹ Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681.

² European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1 (Non-Financial Reporting Directive).

³ J. Hojnik, 'Environmental Corporate Reporting under EU Law: Historic Achievement or Just a Moderate Step Forward?' (2017) 14 *JEEPL* 41, 74; GRI, CSR Europe and Accountancy Europe, 'Member State Implementation of Directive 2014/95/EU' (22 November 2017), <https://www.csreurope.org/new-csr-europe-and-gri-publication-implementation-eu-directive-non-financial-information#.WjkuBd_ibtQ> accessed 19 December 2017, 14.

⁴ J. Kenner, K. Peak, 'The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?' (2017) 19 *CYELS* 86, 88.

⁵ *Cf. below*, §3.3.2.

⁶ European Parliament, 'Corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth' Res (2013) 0049; European Parliament, 'Corporate social responsibility: promoting society's interests and a route to sustainable and inclusive recovery' Res (2013) 0050; Non-Financial Reporting Directive, Preamble Recital 3.

⁷ COM (2011) 681, 3; Commission, 'Impact Assessment Accompanying the document 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 nonfinancial and diversity information by certain large companies and groups' (Impact Assessment) SWD (2013) 127, 17-19.

Academics have also confirmed these benefits. Increased supervision of companies by various organisations and civil society makes performing well on non-financial matters important.⁸ Environmental protection and social wellbeing strengthen a company's brand, and thus contribute to its economic performance.⁹ Financial markets are also asking for non-financial reports, and reliable reports increase investment.¹⁰ Similarly, empirical research has shown a positive link between environmental and social disclosures and corporate financial performance.¹¹

Why was a Directive necessary in the first place? Many Member States did not have any form of mandatory reporting requirements, and only around 2,000 companies (<10% of the largest EU companies) disclosed non-financial information regularly.¹² Other Member States had already introduced advanced legislation.¹³ This lack of harmonisation led to much diversity, and limited comparability of non-financial information.¹⁴ Therefore, a Directive was needed to introduce at least a minimum standard throughout the Union.

III. Experimentalist Governance in the EU

Charles F. Sabel and Jonathan Zeitlin have substantially contributed to the notion of experimentalist governance in the European Union.¹⁵ According to these authors, experimentalist governance involves a multi-level architecture, with four elements that are linked in an iterative cycle:

First, broad framework goals are established by a combination of central and local units, in consultation with the relevant civil society stakeholders[...]. Second, local units are given broad discretion to pursue these goals in their own way. These local units will typically be private actors such as firms or territorial authorities such as the Member States in the EU[...]. Third, as a condition of this autonomy, these local units must report regularly on their performance and participate in a peer review. Where they are not making good progress against the agreed indicators, the local units are expected to show that they are taking appropriate corrective measures. Fourth and finally, the goals, metrics, and decision-making procedures themselves are periodically revised by a widening circle of actors in response to the problems and possibilities revealed by the review process, and the cycle repeats.¹⁶

⁸ J. Hojnik (n3) 42.

⁹ P. Davidsson, 'Legal Enforcement of Corporate Social Responsibility within the EU' (2002) 8 *Columbia Journal of European Law* 529, 532.

¹⁰ D. Monsma, J. Buckley, 'Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure' (2004) 11 *University of Baltimore Journal of Environmental Law* 166.

¹¹ Y. Qiu, A. Shaukat, R. Tharyan, 'Environmental and Social Disclosures: Link with Corporate Financial Performance' (2016) 48 *The British Accounting Review* 102; R. Birkey and others, 'Does assurance on CSR reporting enhance environmental reputation? An examination in the US Context' (2016) 40 *Accounting Forum* 143.

¹² Commission, 'Disclosure of non-financial and diversity information by certain large companies and groups (proposal to amend Accounting Directives) - Frequently asked questions' (2017) MEMO/13/336; J. Pütter, 'Impact Factors on Sustainability Reporting' in P. Horváth, J. Pütter (eds.), *Sustainability reporting in Central and Eastern European Companies* (Springer 2017) 217.

¹³ *Ibid.*

¹⁴ P. Iglesias-Rodriguez, 'The disclosure of corporate social responsibility in the EU after Directive 2014/95' (2016) 10 *Company Lawyer* 319.

¹⁵ C. Sabel, J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010) 1-28; C. Sabel, J. Zeitlin, 'Experimentalist Governance' in D. Levi-Faur (ed.), *The Oxford Handbook of Governance* (OUP 2012) 1-17; J. Zeitlin, *Extending Experimentalist Governance? The European Union and Transnational Regulation* (OUP 2015).

¹⁶ C. Sabel, J. Zeitlin, 'Experimentalist Governance' in D. Levi-Faur (ed.), *The Oxford Handbook of Governance* (OUP 2012) 1-2.

After the adoption of the 2001 White Paper on Governance, the European Commission has turned to new modes of governance in order to increase problem-solving capacity and stronger participation of civil society.¹⁷ Whether or not these new forms of governance, such as experimentalist governance, have actually contributed to political accountability and democratic legitimacy remains a contested issue.¹⁸ Zeitlin and Sabel argue that the conventional principal-agent relations have become unworkable. Revisionary rule-making is adapted to an uncertain and rapidly changing environment, while classic principal-agent accountability is not.¹⁹ Evidence for this proposition is found in relatively successful EGAs in difficult policy areas across different jurisdictions: the 2001 educational reform in the United States,²⁰ the 2013 EU-ILO-Bangladesh Sustainability Compact,²¹ the European Data Privacy Directive,²² and the European Union Water Framework Directive.²³

Going beyond the classic top-down approach, it is submitted that EGAs can offer complex solutions to challenging problems by maximizing stakeholder input. The 2015 Paris Agreement is another example where a complex solution has been negotiated by successfully involving all stakeholders.²⁴ However, some scholars have shown that complexity can lead to competition between the different actors involved in monitoring a scheme, for example NGOs competing to oversee election results.²⁵ Other negative effects are: reduced clarity of legal obligation, forum-shopping, and strategically-created inconsistency.²⁶ Complexity also favours the most resourced states or firms, because they can gain expensive legal advice and can engage in lobbying.²⁷ In any case, a flexible approach, even when it is complex, is often the most favourable solution from a political point of view.²⁸

IV. An Evaluation of the Experimentalist Features of the Directive

In this section, the Directive is analysed using the theoretical lens of experimentalist governance. The Directive involves a multi-level structure. The EU is responsible for passing the Directive, after which the Member States transpose the Directive into national law. Then, the companies affected determine their strategies to comply with the national legislation. The European Commission monitors both the transposition by Member States, and the compliance by companies in order to review the Directive if necessary.

¹⁷ Commission, 'European governance – a white paper' (Communication) COM (2001) 428; P. Graziano, C. Halpern, 'EU Governance in Times of Crisis: Inclusiveness and Effectiveness Beyond the 'Hard' and 'Soft' Law Divide' (2016) 14 *Comparative European Politics* 1, 2, 5; A. Heritier, M. Rhodes, *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave Macmillan 2011).

¹⁸ R. Bellamy, 'Symposium on Democracy and New Modes of Governance' (2011) *Government and Opposition* 56; J. Klabbers, 'The Undesirability of Soft Law' (1998) *Nordic Journal of International Law* 381.

¹⁹ C. Sabel, J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010) 25.

²⁰ C. Sabel, J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union: towards a new architecture?' (2008) 14 *European Law Journal* 271, 324; J. Liebman, C. Sabel, 'A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform' (2003) 28 *New York University Review of Law and Social Change* 183; J. Liebman, C. Sabel, 'The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda' (2003) 81 *North Carolina Law Review* 1703.

²¹ Kenner, Peak (n4) 104-114.

²² A. Newman, 'Innovating European Data Privacy Regulation: Unintended Pathways to Experimentalist Governance' in C. Sabel, J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010) 29-42.

²³ I. von Homeyer, 'Emerging Experimentalism in EU Environmental Governance' in C. Sabel, J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010) 143-150.

²⁴ R. Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92 *International Affairs* 1107.

²⁵ K. Alter, S. Meunier, 'The Politics of International Regime Complexity' (2009) 7 *Perspectives on Politics* 13, 19.

²⁶ *Ibid.* 13, 16, 17.

²⁷ *Ibid.* 22.

²⁸ D. Ahern, 'Turning Up the Heat? EU Sustainability Goals and the Role of Reporting under the Non-Financial Reporting Directive' (2016) 13 *European Company & Financial Law Review* 599, 603.

3.1 EGA Feature 1: Initial Stakeholder Consultation

Experimentalist governance always starts with a stakeholder consultation. The European Commission received 260 responses from diverse categories of stakeholders in a public consultation on non-financial reporting, and published the results.²⁹ Apparently, discussions with stakeholders also took place through the Expert Group on Disclosure of Non-Financial information,³⁰ the Member States High-Level Group on CSR, the Multi-Stakeholders Forum Coordination Committee, the Accounting Regulatory Committee³¹ and 26 bilateral meetings with companies.³² Unfortunately, not all the results of these consultations were published. Several Member States have also decided to conduct an impact assessment on their own in order to formulate their national legislation and guidance in the most appropriate way.³³ This proves once again the multi-level structure and complexity of the Directive. However, analysis of the results of the impact of national consultations falls outside the scope of this article.

Interestingly, the Directive has adopted a narrower approach than the consultation rounds at the EU level would suggest. The final Directive confines the scope to public-interest entities with more than 500 employees, thus, applying to 6,000 companies in the EU.³⁴ This means that some very large companies do not fall within the scope of the Directive if they are not considered of 'public-interest', although stakeholders seemed to agree that all large companies should be included.³⁵

The initial proposal by the European Commission extended the scope to 18,000 companies, with no reference to public-interest companies.³⁶ It seems that the Council has had a decisive influence in limiting the scope of the directive.³⁷ It was, indeed, the Council who came up with the notion of the

²⁹ Commission, 'Summary Report of the responses received to the Public Consultation on disclosure of non-financial information by companies' (2011) <http://ec.europa.eu/finance/consultations/2010/non-financial-reporting/docs/summary_report_en.pdf> accessed 18 December 2017.

³⁰ Expert Group on Disclosure of non-financial information by EU Companies, 'Meeting Report' (20 September 2011), <http://ec.europa.eu/internal_market/accounting/docs/news/24012012-expert-group-minutes_en.pdf> accessed 18 December 2017.

³¹ SWD (2013) 127, 44.

³² *Ibid.* 88.

³³ Direction Générale du Trésor, 'Consultation sur le projet de transposition de la directive 2014/95/UE relative à la publication d'informations extra-financières par les entreprises' (7 February 2017), <https://www.tresor.economie.gouv.fr/Ressources/15700_consultation-sur-le-projet-de-transposition-de-la-directive-201495-ue> accessed 19 December 2017; Financial Reporting Council, 'Invitation to comment: Draft Amendments to Strategic Report' (17 August 2017), <<https://www.frc.org.uk/news/august-2017/frc-consults-on-non-financial-reporting-guidance>> accessed 19 December 2017; Department for Business, Energy & Industrial Strategy, 'Non-Financial Reporting Directive: UK implementation' (16 February 2016), <<https://www.gov.uk/government/consultations/non-financial-reporting-directive-uk-implementation>> accessed 19 December 2017.

³⁴ MEMO/13/336.

³⁵ SWD (2013) 127, 13.

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 nonfinancial and diversity information by certain large companies and groups' COM (2013) 207; Amnesty International, 'New Directive marks important step towards ensuring EU companies "Know and Show" respect for human rights, But Member States still need to demonstrate true commitment to business and human rights protections' (2014), <<https://www.amnesty.org/en/documents/ior61/005/2014/en/>> accessed 19 December 2017.

³⁷ European Parliament Rapporteur on Corporate Social Responsibility Richard Howitt, 'The EU law on non-financial reporting – how we got there' *The Guardian* (London, 16 April 2014), <<https://www.theguardian.com/sustainable-business/eu-non-financial-reporting-how-richard-howitt>> accessed 19 December 2017; Amnesty International (n36).

'public-interest company',³⁸ and not the Commission.³⁹ This influence must be understood from a political perspective; a qualified majority in the Council was necessary to pass the directive.⁴⁰

To conclude, many different voices have been heard (NGOs', companies', consultancy firms' and the Member States'). The result is a compromise between what stakeholders have asked for, and political reality. The Directive leads to some minimum harmonisation, and the fact that several Member States have extended the scope of the Directive in their own national legislation is reassuring.⁴¹

3.2 EGA Feature 2: Framework Goals

The Directive is formulated in a very broad way, and it does not go into specifics regarding the reporting content. It does, however, set a minimum requirement: a description of environmental, social, and labour issues, respect for human rights, anti-corruption and bribery matters, including a description of the business model, policies, due diligence processes, outcome, related risks and non-financial key performance indicators.⁴²

Reporting is only compulsory to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity.⁴³ Reporting should be done in the 'management report', which should be understood as being included in the annual report. A separate sustainability report is also acceptable under certain conditions.⁴⁴ Companies can also choose not to have any policies, and explain why that is the case: the so-called "report or explain approach".⁴⁵ According to the European Commission, companies "retain significant flexibility to disclose relevant information in the way they consider most useful".⁴⁶ They may use international, European or national guidelines according to the characteristics of their own business environment.⁴⁷ These frameworks include the UN Global Compact, ISO 26000, and the Global Reporting Initiative (GRI).⁴⁸

The flexible approach of EGAs in their application can cause a certain degree of uncertainty.⁴⁹ These uncertainties used in the framework goals have also been addressed in the guidelines on non-financial reporting by the Commission, which will in turn be addressed in the review section.⁵⁰ However, as a result of the broad framework goals, there is enormous diversity in scope, content and evaluation of the national transposition legislation.⁵¹ In addition, there exists a wide variety in reporting practice on the level of the undertaking, which causes difficulties with comparing sustainability reports of different

³⁸ Council of the European Union, '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 – Presidency compromise text' COD 2013/0110, 4.

³⁹ European Parliament, 'Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups' A7-0006/2014.

⁴⁰ Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU), Article 294.

⁴¹ *Below*, §3.3.1.

⁴² Non-Financial Reporting Directive, Article 1(1).

⁴³ *Ibid.*

⁴⁴ *Ibid.*, Article 1(4).

⁴⁵ Iglesias-Rodríguez (n14) 320; Non-Financial Reporting Directive, Article 1(1).

⁴⁶ MEMO/13/336.

⁴⁷ *Ibid.*

⁴⁸ Commission, 'Guidelines on Non-Financial Reporting (Methodology for Reporting Non-Financial Information) (Communication)' [2017] OJ C215 (Guidelines on Non-Financial Reporting), 3.

⁴⁹ C. Sabel, J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010) 309.

⁵⁰ *Below*, §3.5.

⁵¹ *Below*, §3.3.1.

companies.⁵² One of the initial goals of the Commission, which was to harmonise legislation in order to enhance efficiency and comparability, has clearly been missed.⁵³

3.3 EGA Feature 3: Lower-level Plans

3.3.1 Implementation on the Member State-level

A "Directive" sets out objectives Member States must achieve. However, it is up to the individual countries to devise their own laws, and transpose the Directive into national law.⁵⁴ The Directive on non-financial reporting achieves minimum harmonisation.⁵⁵ This means that Member States are free to go further than what the Directive itself requires. France is a good example, because it requires third-party verification of the contents of the report, a requirement that is not in the Directive.⁵⁶ In addition, recent French legislation has required companies to report in much more detail than what the Directive prescribes for.⁵⁷

Within the transposition itself, there is significant freedom for the Member States. For instance, Member States can add companies to the scope of the Directive if they consider them of 'public-interest'.⁵⁸ Research by GRI, CSR Europe, and Accountancy Europe shows that the scope of non-financial reporting requirements is different in almost all Member States.⁵⁹ Member States that have transposed in their national legislation stricter standards than those set by the Directive are listed in the table below. The safe harbour principle which is mentioned therein refers to the option granted by the Directive to companies to refuse reporting under certain conditions, when disclosure would be seriously prejudicial to their commercial position.⁶⁰

The table shows that the flexible approach by the EU has not demotivated individual Member States to go further, which is certainly a positive achievement.

| <u>Stricter Measure</u> | <u>Countries⁶¹</u> |
|--------------------------------|---|
| No safe harbour | Denmark, Estonia, Hungary, Luxembourg, Norway (EEA), Slovakia |
| Non-compliance | Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland (EEA), Ireland, Italy, Latvia, Lithuania, |

⁵² *Below*, §3.3.2.

⁵³ SWD (2013) 127, 24, 62.

⁵⁴ Article 288 TFEU; Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (CUP 2014) 112.

⁵⁵ Non-Financial Reporting Directive, Article 1(1).

⁵⁶ SWD (2013) 127, 12.

⁵⁷ Loi n°2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre JORF n°0074; Debevoise, 'French Corporate Human Rights and Environmental Due Diligence Legislation' (29 March 2017) <https://www.debevoise.com/~media/files/insights/publications/2017/03/20170328b_french_law_on_duty_of_due_diligence.pdf>, accessed 19 December 2017.

⁵⁸ European Parliament and Council Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182 (Accounting Directive), Article 1(1).

⁵⁹ GRI, CSR Europe and Accountancy Europe, 'Member State Implementation' (n3) 10.

⁶⁰ *Ibid.*, 8.

⁶¹ *Ibid.*

| | |
|--|--|
| penalties introduced | Luxembourg, Malta, Norway (EEA), Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, United Kingdom |
| Companies with <500 employees included | Denmark, Greece, Luxembourg, Sweden, Iceland (EEA) |

3.3.2. Implementation on the level of the undertaking: Case Study

This section examines how undertakings deal with the Directive. This differs from country to country. For most undertakings, the new Non-Financial Reporting Directive only becomes relevant on and after 1 January 2018, and therefore, it is very early for a sample study of these results. However, the Danish government was the first to transpose the Directive, and, as a result, a small part of its national legislation has already entered into force.⁶² State-owned companies and companies on the Danish stock exchange with more than 500 employees –approximately 50 companies – already have to comply with the new rules since 1 January 2016.⁶³ Ten companies were selected for a sample survey in this article on the basis of the following criteria: publicly listed with more than 500 employees and maximal diversity in sector and size.⁶⁴

An overview of the case study can be found in the appendix, and the findings will be discussed in this section. The scope is limited to certain areas (for example, excluding boardroom diversity), and the questions asked for both 2015 and 2016 are straightforward:

- Has the company reported on its policy?
- Has the company reported on the outcome?
- Does the report mention key performance indicators (which should be a balanced mix between quantitative data and narratives)?⁶⁵

Only when these three questions have been answered positively does the company comply with the new Danish Financial Statement Act for the purposes of this survey. A comparison is made between 2015 (before the Directive) and 2016 (after it), in order to measure the impact of its transposition.

Denmark already had an obligation on reporting and legal compliance-rates of above 90%,⁶⁶ so the Directive did not have a very large impact. Before its transposition, companies had to report on climate and human rights impacts. According to the new Danish Financial Statement Act, as a minimum, reports must be compiled on the following policy areas: environmental conditions, including climate issues,

⁶² Danish Financial Statement Act (7 June 2001), Danish Act No.448, Article 7(1), (4) and 99(a); European Coalition for Corporate Justice, 'Denmark leading the way on implementation of new EU rules on corporate transparency' (17 June 2015) <<http://corporatejustice.org/news/178-denmark-leading-the-way-on-implementation-of-new-eu-rules-on-corporate-transparency>> accessed 19 December 2017.

⁶³ *Ibid.*

⁶⁴ *Below*, Appendix 1.

⁶⁵ Non-Financial Reporting Directive, Article 1(1); Guidelines on Non-Financial Reporting, 13.

⁶⁶ Danish Business Authority, 'Corporate Social Responsibility and Reporting in Denmark' (2013) <https://samfundsansvar.dk/sites/default/files/csr_rapport_2013_eng.pdf?> accessed 21 December 2017.

social conditions and employee conditions, respect for human rights, and measures to fight bribery and corruption.⁶⁷ In this article's survey, five companies out of ten had already fully complied with these new requirements in 2015.⁶⁸

I will now sum up some other conclusions from this sample study. Firstly, there is an enormous diversity in reporting standards, not only in the size of the report, but also content-wise. Most companies use the UN Global Compact as their guideline, but this is clearly not a guarantee for a uniform outcome. Secondly, the quality of the report depends highly on the key performance indicators. I submit that the more quantitative data is provided, the more valuable and comparable the report becomes. Finally (this is not included in the table in the appendix, but was a constant in the research), companies keep reporting on matters above the legal requirements, ranging from Carlsberg's responsible drinking program to Lundbeck's global patient summit.⁶⁹

At last, it is important to recall that the compliance tested in this survey is not a legal one. Indeed, the requirements of the Danish Financial Statement Act are flexible (as is the Non-Financial Reporting Directive), and the survey does not examine whether these companies legally comply with Danish and EU law. The purpose of this sample study was just to see how these companies interact with the Non-Financial Reporting Directive.

3.4 EGA Feature 4: Reporting, Monitoring & Peer Review

The European Commission will firstly monitor the correct transposition of the Directive into national legislation.⁷⁰ However, the major form of monitoring and enforcement lies on the level of the Member State. Article 1(4) of the Non-Financial Reporting Directive requires that the Member States enforce the provisions of the Directive and monitor compliance by undertakings. The Directive does not specify any sanction for non-compliance.⁷¹

Neither does the Directive mention any form of peer review. The Peer Review Meeting of Member States in 2013 and the EU CSR Multi Stakeholder Forum in 2015 only discussed reporting in general and cannot replace a proper peer review.⁷² Stakeholders also regret that the Directive does not include any peer review or an exchange of best practices.⁷³ This is only in part compensated by the fact that non-financial reports are published online or through other actors such as the UN Global Compact.⁷⁴ The goals of peer review in an EGA are both learning systematically from diverse experience as well

⁶⁷ Danish Business Authority, 'Implementation in Denmark of EU Directive 2014/95/EU on the disclosure of non-financial information' (2015) <<http://csr.gov.dk/file/557863/implementation-of-eu-directive.pdf>> accessed 19 December 2017; KPMG, 'Reporting on corporate social responsibility' (2017) <<https://home.kpmg.com/content/dam/kpmg/dk/pdf/DK-2017/06/Reporting-on-corporate-social-responsibility.pdf>> accessed 19 December 2017.

⁶⁸ *Below*, Appendix 1.

⁶⁹ *Below*, Appendix 1, 'Sources' (n93).

⁷⁰ Article 260 TFEU.

⁷¹ *Above*, §3.3.1.

⁷² Commission, 'Reports of the Peer Review meetings on CSR' (2013) <<http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=CSRpreport&mode=advancedSubmit&langId=en>> accessed 20 December 2017; Commission, 'Executive Summary: EU Multi Stakeholder Forum on Corporate Social Responsibility' ARES (2015) 580495.

⁷³ European Coalition for Corporate Justice, Amnesty International and WWF, 'Getting Non-Financial Reporting Right: EU Commission Guidelines Clarify Expectations Towards Business' (30 June 2017) <http://www.amnesty.eu/content/assets/Joint_statement_ECCJ_WWF_AI_on_NFR_guidelines.pdf> accessed 19 December 2017.

⁷⁴ Global Compact, 'Transparency builds trust' <<https://www.unglobalcompact.org/participation/report/cop/create-and-submit/active>> accessed 21 December 2017.

as holding actors accountable.⁷⁵ The current lack of peer review can be detrimental for the goal of more harmonisation, consistency and comparability.

3.5 EGA Feature 5: Periodical Review

The Directive contains two forms of periodical review. Firstly, it required the Commission to prepare guidelines by 5 December 2016⁷⁶ (which the Commission published on 26 June 2017), and secondly, the Directive prescribes an evaluation of its effectiveness by 6 December 2018.⁷⁷ The Commission guidelines were accompanied by a new public consultation.⁷⁸ The guidelines solve some uncertainties in the Directive and were accordingly warmly welcomed by stakeholders.⁷⁹ First, the guidelines clarify the definition of 'material information',⁸⁰ which was by some considered 'vague'.⁸¹ Second, the guidelines explain the difficult phrase "to the extent necessary for an understanding of the [...] impact of the activity" in Article 1(1) of the Directive.⁸² Third, the guidelines address the concept of 'due diligence',⁸³ a term that led to confusion with stakeholders.⁸⁴

The second round of review will take place by 6 December 2018, in accordance with the 'REFIT Evaluation Strategy', which is a new strategy by the Commission for a more thorough evaluation.⁸⁵ This will happen in close cooperation with the Member States.⁸⁶ Adapting and learning by experience is a key characteristic of an EGA,⁸⁷ and the question remains open whether the Directive and its guidelines will be easily adapted after review.

V. Conclusion

As illustrated above, the overall feeling of the Directive is positive. It constitutes a relatively successful EGA as most experimentalist features are present. It is, however, not a very ambitious piece of legislation due to its modest scope, but it will introduce a mandatory minimum standard where none previously existed, mostly in Central and Eastern Europe.⁸⁸ I can make two policy recommendations to the European Union based on the above. Firstly, harmonise the reporting standards by companies, for example by limiting the number of international frameworks that can be used, and recommend the more detailed ones such as the Global Reporting Initiative⁸⁹ instead of the UN Global Compact which can

⁷⁵ G. De Burca, R. Keohane, C. Sabel, 'Global Experimentalist governance' (2014) 44 *British Journal of Political Science* 477, 479.

⁷⁶ Non-Financial Reporting Directive, Article 2.

⁷⁷ Non-Financial Reporting Directive, Article 3.

⁷⁸ Commission, 'Feedback statement on the public consultation on the non-binding guidelines for reporting on non-financial information by companies having taken place from 15 January to 15 April 2016' (2016) FISMA/B3.

⁷⁹ European Coalition for Corporate Justice and others (n62).

⁸⁰ Guidelines on Non-Financial Reporting; Accounting Directive, Article 2(16).

⁸¹ Iglesias-Rodriguez (n14) 322; Guidelines on Non-Financial Reporting, 5.

⁸² Guidelines on Non-Financial Reporting, 5, 6.

⁸³ Guidelines on Non-Financial Reporting, 10, 11.

⁸⁴ PwC, 'New non-financial reporting regulations – are you prepared?' (3 August 2017)

<<http://pwc.blogs.com/corporatereporting/2017/08/new-non-financial-reporting-regulations-are-you-prepared.html>> accessed 19 December 2017.

⁸⁵ Commission, 'Commission's Forward Planning of Evaluations and Studies 2017 and beyond' (2017) <https://ec.europa.eu/info/sites/info/files/20170504-studies-and-evaluations-2017-planning_en.pdf> accessed 19 December 2017; Commission, 'Refit – making EU law simpler and less costly' <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en> accessed 19 December 2017.

⁸⁶ SWD (2013) 127, 17-19.

⁸⁷ C. Sabel, J. Zeitlin, 'Experimentalist governance' (n16) 8.

⁸⁸ P. Horváth, J. Pütter (n12) 217.

⁸⁹ J. Hojnik (n3) 48.

lead to very mixed results.⁹⁰ Secondly, introduce a form of peer review and exchange of best practices which can enhance the quality of the reporting.

⁹⁰ *Above*, §3.3.2.

Appendix 1: Table of Compliance by Danish Companies, Reporting Class D > 500 Employees, based on the English version of the reports⁹¹

| Company - Sector - Number of employees | Impact on Environment - Policy - Outcome - Non-financial key performance indicators (KPIs) | | Anti-Corruption & Bribery - Policy - Outcome - KPIs | | Social & Staff Matters - Policy - Outcome - KPIs | | International frameworks used? | | Number of pages | |
|---|---|---|--|------|---|------------------------------|--------------------------------|------------------------|-----------------|------|
| | 2015 | 2016 | 2015 | 2016 | 2015 | 2016 | 2015 | 2016 | 2015 | 2016 |
| Bang & Olufsen - Consumer audio - 2,400 | No (not complied), because limited to energy efficiency | Yes (complied), but still very focused on energy efficiency | Yes | Yes | Brief | Yes, but still limited scope | Global Compact | Same as in 2015 (Idem) | 20 | 15 |
| Carlsberg Group - Brewery - 41,000 | Yes | Yes | Yes | Yes | Yes | Yes | Global Compact GRI | Idem | 63 | 69 |

⁹¹ See below, 'Sources'.

| | | | | | | | | | | |
|---|---|-----|-----|-----|----------------|--------------------------------------|--------------------|------|----|----|
| Chr. Hansen - Bioscience - 3,000 | Yes | Yes | Yes | Yes | Yes | Yes | Global Compact | Idem | 18 | 19 |
| Coloplast - Medical equipment - 9,800 | Yes | Yes | Yes | Yes | Yes | Yes | Global Compact GRI | Idem | 40 | 41 |
| Lundbeck - Pharmaceuticals - 5,500 | No, performance indicators limited to emissions | Yes | Yes | Yes | Yes, but brief | Yes, improved performance indicators | Global Compact | Idem | 15 | 14 |

| | | | | | | | | | | |
|--|------------|------------------------------|-----|----------------|-------------------|------|--------------------|------|----|----|
| Maersk - Marine transport/ energy industry - 88,000 | Yes | Yes | Yes | Yes | Yes | Yes | Global Compact | Idem | 25 | 50 |
| Matas - Consumer cosmetics and healthcare - 2,300 | Very brief | Improved, but still brief | No | Yes, but brief | Yes, but brief | Idem | UNGP ⁹² | Idem | 4 | 6 |
| Norden A/S - Shipping - 900 | Yes | Yes | Yes | Yes | Yes | Yes | Global Compact | Idem | 35 | 32 |

⁹² UN Guiding Principles on Business & Human Rights.

| | | | | | | | | | | |
|------------------------------------|--|------------------------------------|----------------|------|-----|-----|----------------|------|----|----|
| Ørsted - Energy - 5,600 | Yes | Yes | Yes, but brief | Idem | Yes | Yes | Global Compact | Idem | 32 | 21 |
| Pandora - Jewellery - 21,200 | Yes, but brief on performance indicators | Yes, better performance indicators | No | No | Yes | Yes | Global Compact | Idem | 15 | 19 |

⁹³Sources (accessed 20 December 2017):

Bang & Olufsen, CSR Report <<https://www.bang-olufsen.com/en/corporate/responsibility/corporate-social-responsibility>>

Carlsberg, Sustainability Report <<https://carlsberggroup.com/sustainability/download/>>

Chr. Hansen, Sustainability Report <<https://www.chr-hansen.com/en/sustainability/reporting-and-disclosure>>

Coloplast, Corporate Responsibility Report <https://www.coloplast.com/about-coloplast/responsibility/policies/#section=Corporate-Responsibility-Report-2016%2f17_421975>

Lundbeck, UN Global Compact Report <<http://www.lundbeck.com/global/sustainability>>

Maersk, Sustainability Report <<https://www.maersk.com/business/sustainability/sustainability-reports-and-publications/reports>>

Matas, Annual Report <<http://investor.en.matas.dk/financials.cfm>>

Norden A/S, Corporate Social Responsibility Report <<https://www.ds-norden.com/investor/reportspresentations/csreports/>>

Ørsted, Sustainability Report <<https://orsted.com/en/Sustainability/Governance/Reporting#0>>

Pandora, Ethics Report <<http://pandoragroup.com/CSR/Publications>>