ALERT MEMORANDUM

Disclosure of Non-Financial and Diversity Information by Large European Companies and Groups

January 20, 2017

Starting from 2017, large EU public-interest entities (*i.e.*, listed companies, credit institutions, insurance companies and other designated entities) will need to include in their management reports a *"non-financial statement"* on corporate social responsibility matters.

Parents of a group must issue the "*non-financial statement*" on a consolidated corporate basis.

The "non-financial statement" must address, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.

Moreover, starting from 2017, all EU listed companies must include, in their corporate governance statement, a description of the diversity policies applied in relation to the composition of their administrative, management and supervisory bodies.

The obligation to disclose non-financial information and diversity policies is provided by Directive 2014/95/EU. This alert memorandum provides an overview of this Directive and focuses on the current status of transposition of the Directive in Belgium, France, Germany, Italy, and the United Kingdom.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

BRUSSELS

Géraldine Bourguignon
+32 2 287 2143
gbourguignon@cgsh.com

PARIS

Marie-Laurence Tibi
+33 1 40 74 68 00
mtibi@cgsh.com

FRANKFURT

Oliver Schröder
+49 69 97103 0
oschroeder@cgsh.com

Mirko von Bieberstein
+49 69 97103 0
mvonbieberstein@cgsh.com

MILAN

Pietro Fioruzzi
+39 02 72 60 81
pfioruzzi@cgsh.com

Gianluca Atzori
+39 02 72 60 81
gatzori@cgsh.com

LONDON

Sam Bagot
+44 20 7614 2232
sbagot@cgsh.com

clearygottlieb.com

© Cleary Gottlieb Steen & Hamilton LLP, 2017. All rights reserved.

This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

1. **Overview**

1.1 Non-Financial Statement and Diversity Policies

a. Non-Financial Statement

In order to enhance the consistency and comparability of non-financial information disclosed throughout the EU, Directive 2014/95/EU[1] (the "Directive") requires large "public-interest entities" to include in their management report a "*non-financial statement*" (the "Non-Financial Statement").[2]

Public-interest entities include: (i) entities whose securities are admitted to trading on an EU regulated market; (ii) credit institutions; (iii) insurance companies; and (iv) entities designated as such by Member States because of the nature of their business, their size or the number of their employees.[3]

The Non-Financial Statement must be issued by public-interest entities that meet the following criteria: an average of at least 500 employees during the relevant financial year and at least one of the following:

(a) balance sheet total: EUR 20,000,000;

(b) net turnover: EUR 40,000,000 ("Large Public-Interest Entities").

Member States are allowed to require disclosure of non-financial information from entities other than those subject to the Directive.[4]

According to the Directive, non-binding guidelines on the methodology for the reporting of non-financial information should have been issued by the EU Commission by December 6, 2016. However, the EU Commission has clarified that, due to the large number of responses to its spring 2016 *ad hoc* public consultation, the non-binding guidelines will be published "*as soon as possible in the spring 2017*".[5] The Directive provides that, in preparing the guidelines, "[t]*he Commission should take into account current best practices, international developments and the results of related Union initiatives. The Commission should carry out appropriate consultations, including with relevant stakeholders. When referring to environmental aspects, the Commission should cover at least land use, water use, greenhouse gas emissions and the use of materials*".[6]

b. Diversity Policies

In addition, all EU listed companies must describe their diversity policies in their corporate governance statement.[7]

1.2 General Provisions

Deadline for the transposition of the Directive: December 6, 2016. Member States must ensure that the Directive's provisions are applicable as of the fiscal year starting on January 1, 2017 or during the calendar year 2017 (including short fiscal years, *e.g.*, due to mergers or demergers). To date, little more than half of the Member States have adopted implementing measures.[8] Other Member States (including Belgium, France and Germany) are expected to implement the Directive shortly.

The Directive is inspired by the "*comply or explain*" principle (*i.e.*, if the company decides not to adopt certain policies to be described in the Non-Financial Statement or any of the diversity policies to be

[1] 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.
[2] Article 1(1) of the Directive, introducing Article 19a into Directive 2013/34/EU.
[3] Article 2(1) of Directive 2013/34/EU.
[4] Recital No. 14 of the Directive.

[5] See the EU Commission's webpage dedicated to this issue: http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#news.
[6] Recital No. 17 of the Directive.
[7] Article 1(3) of the Directive, introducing Article 29a into Directive 2013/34/EU.
[8] Bulgaria, the Czech Republic, Denmark, Estonia, Greece, Croatia, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Romania, Slovakia, Sweden and the UK.

described in the corporate governance statement, the company must explain why this is the case).[9]

2. Relevant Provisions of the Directive

2.1 Non-Financial Statement and Diversity Policy

a. Non-Financial Statement

i. General provisions

The Non-Financial Statement must contain *"information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including:*

(a) a brief description of the undertaking's business model;

(b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;

(c) the outcome of those policies;

(d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;

(e) non-financial key performance indicators relevant to the particular business.

Where the undertaking does not pursue policies in relation to one or more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so".[10]

If so provided by Member States, certain relevant information may be omitted in exceptional cases, with the approval and under the responsibility of the management and supervisory bodies of the Large Public-Interest Entity, provided that the omission does not prevent a fair and balanced understanding of the entity's development, performance and position and of the impact of its activity.[11]

In providing the information, Large Public-Interest Entities may rely on recognized national and international frameworks for the reporting of corporate social responsibility matters.[12]

---

[9] The EU Commission, on 9 April 2014, issued Recommendation No. 2014/208/EU on the quality of corporate governance reporting ("*comply or explain*"). According to this recommendation, when departing from an applicable provision, companies should clearly state which specific recommendations they have departed from. For each departure, companies should: explain the manner in which the company has departed from the recommendation; describe the reasons for the departure; describe how the decision to depart from the recommendation was taken within the company; where the departure is limited in time, explain when the company envisages complying again; and describe any measure taken instead of compliance and explain how that measure achieves the underlying objective of the specific recommendation or of the code as a whole or clarify how it contributes to the good corporate governance of the company.

[10] Article 1(1) of the Directive, introducing Article 19a into Directive 2013/34/EU.

[11] Article 1(1) of the Directive provides that "*Member States may allow information relating to impending developments or matters in the course of negotiation to be omitted in exceptional cases where, in the duly justified opinion of the members of the administrative, management and supervisory bodies, acting within the competences assigned to them by national law and having collective responsibility for that opinion, the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking, provided that such omission does not prevent a fair and balanced understanding of the undertaking's development, performance, position and impact of its activity*".

[12] Recital No. 9 of the Directive mentions, by way of example, the following frameworks: EU-based frameworks such as the Eco-Management and Audit Scheme (EMAS), or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN "Protect, Respect and Remedy" Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organization for Standardization's ISO 26000, the International Labour Organization's Tripartite Declaration of principles concerning multinational enterprises and social policy, and the Global Reporting Initiative.

Companies may opt to issue Non-Financial Statements as separate reports, not included in their management reports. If they do so, the Non-Financial Statements must be made publicly available on the companies' website within a reasonable period of time, not exceeding six months after the balance sheet date, and must be referred to in the management reports.[13]

The auditors of Large Public-Interest Entities need only to confirm whether the Non-Financial Statement has been provided. They do not need to verify its content. Member States, however, may require that the information included in the Non-Financial Statement be verified by an independent assurance services provider.

ii. Consolidated Non-Financial Statement

Public-interest entities that are the parent companies of a group that meets on a consolidated basis the same criteria set for Large Public-Interest Entities[14] ("Large Public-Interest Group") must include in their consolidated management report a consolidated Non-Financial Statement ("Consolidated Non-Financial Statement"). The Consolidated Non-Financial Statement must include on a consolidated basis the type of information that is required for the Non-Financial Statement.

Large Public-Interest Entities that are subsidiaries within Large Public-Interest Groups are exempted from the obligation to issue their own Non-Financial Statement if they are included in the Consolidated Non-Financial Statement of their group, drawn up in accordance with the provisions of the Directive.[15]

iii. Responsibility

The Directive provides that the members of the:

i. administrative body;

ii. management body; and

iii. supervisory body

have "*collective responsibility*" for ensuring that the Non-Financial Statement and the Consolidated Non-Financial Statement are drafted and released in accordance with the Directive, and where applicable, the International Accounting Standards.[16]

b. Diversity Policy

All EU listed companies must include, in their corporate governance statement, "*a description of the diversity policy applied in relation to the* [composition of the] *undertaking's administrative, management and supervisory bodies"*.[17] The description should address matters such as:

i. age;

ii. gender;

iii. educational and professional backgrounds;

iv. the objectives of the diversity policy; and

v. how the policy has been implemented and the results in the reporting period.

2.2 Safe Harbor

The Directive foresees the possibility for the Member States to allow information relating to impending developments or matters in the course of negotiation to be omitted in exceptional cases, *i.e.*, where the disclosure of this information would be

[13] Article 19a(4) of Directive 2013/34/EU. Article 29a(4) provides for the described option for Consolidated Non-Financial Statements.

[14] More than 500 employees on average during the relevant financial year, and exceeding the limits of at least one of the two following criteria on the balance sheet date: (a) total assets: EUR 20,000,000; (b) net turnover: EUR 40,000,000.

[15] Article 1(1) of the Directive, introducing Article 19a into Directive 2013/34/EU, and Article 1(3) of the Directive, introducing Article 29a into Directive 2013/34/EU.

[16] Article 1(4) of the Directive, amending Article 33(1) of Directive 2013/34/EU. The International Accounting Standards must be adopted in accordance with Regulation (EC) No. 1606/2002.

[17] Article 1(2) of the Directive, amending Article 20(1) of Directive 2013/34/EU. Member States may exempt undertakings that have only issued securities other than shares admitted to trading on a regulated market within the meaning of Article 4(1)(14) of Directive 2004/39/EC from this obligation, unless such undertakings have issued shares that are traded in a multilateral trading facility within the meaning of Article 4(1)(15) of Directive 2004/39/EC.

seriously prejudicial to the commercial position of the company ("Safe Harbor"). This circumstance can only occur following a duly justified opinion of the members of the administrative, management and supervisory bodies (acting within their competences under the applicable national law and having collective responsibility for that opinion) and, in any event, provided that the omission does not prevent a fair and balanced understanding of the undertaking's development, performance and position and of the impact of its activity.[18] The Safe Harbor provision does not apply to the obligation to disclose the applied diversity policies.

2.3 Penalties

Member States must provide for penalties applicable to infringements of the national provisions implementing the Directive and must ensure that those penalties are enforced. The penalties must be effective, proportionate and dissuasive.[19]

3. Belgium

The Directive has not yet been implemented in Belgium. A draft law was approved by the Belgian Government on December 23, 2016, but has not been released to date. It is expected that the law will be adopted and published in the first quarter of 2017.

Based on the limited publicly available information, it is anticipated that the Belgian legislation will incorporate the content of the Directive without adding to the minimum requirements.[20] Where the Directive leaves discretion to Member States in the implementation, it is expected that the Belgian law will be adopted along the following lines:

3.1 Subjective Scope

Only those entities that are subject to the Directive, *i.e.*, Large Public-Interest Entities, are expected to fall under the obligation to publish a Non-Financial Statement. Belgium is unlikely to extend the scope of the Directive to other companies.[21]

3.2 Preparation, Publication and Assessment

The Belgian Ministry of Economy will specify which corporate social responsibility frameworks companies will be entitled to rely on when preparing the Non-Financial Statement.

It is expected that Belgium will allow Large Public-Interest Entities to publish the Non-Financial Statement in a report separate from the management report, and that the information published will not need to be verified by an independent assurance services provider. The law is expected to merely reflect the requirement of the Directive that the auditors confirm the delivery of the Non-Financial Statement.

3.3 Safe Harbor

Belgium is likely to make use of the Safe Harbor foreseen in the Directive.

3.4 Penalties

The implementation of the Directive will in all likelihood occur by way of an amendment to the Belgian Company Code.[22] Infringements of the new disclosure obligations may trigger directors' liability and give rise to both civil[23] and criminal[24] penalties, pursuant to the currently applicable rules.

4. France

The Directive has not yet been implemented in France. A draft law is being prepared by the French Government, following a public consultation by the French Ministry of the Economy that took place from June 23, 2016 to July 25, 2016. It is expected that a French order (*ordonnance*) implementing the Directive will be adopted in 2017.

[18] Article 1(1) of the Directive, introducing Article 19a into Directive 2013/34/EU.

[19] Article 51 of Directive 2013/34/EU.

[20] See "Disclosure of non-financial information by certain large companies", Press Release of the Belgian Council of Ministers of December 23, 2016; and Opinion 2016 - 2140 of the Belgian Central Economic Council on the draft law implementing the Directive, September 21, 2016.

[21] This is in line with the Belgian Governmental Agreement, in which a clear statement is made against *gold-plating* when implementing EU Directives (see Belgian Governmental Agreement of October 9, 2014).

[22] In particular Articles 96 and 119 of the Belgian Company Code.

[23] Article 528 of the Belgian Company Code.

[24] Articles 126 and 128 of the Belgian Company Code.

French law, as currently applicable, already provides for many of the obligations set out in the Directive.[25] There are, however, certain differences with the Directive, in particular as regards the scope of entities subject to these requirements, the contents of the requirements and the applicable publicity regime. A few examples of these differences are set out below.

4.1 Subjective Scope

French law currently imposes a reporting obligation on all companies with securities listed on a regulated market without any requirement as to size, and on joint stock companies (*SAs*, *SCAs* and *SEs*) exceeding certain thresholds (500 employees and a net turnover or assets totaling EUR 100,000,000).[26] The Directive requires that additional non-listed companies be subject to the reporting obligations since the thresholds are lower and the Directive also applies to financial institutions and insurance companies. It is unclear at this stage whether France will continue to apply the reporting requirements to entities whose securities are listed on a regulated market but that do not exceed the thresholds that the Directive sets to be considered a Large Public-Interest Entity.

The implementation of the Directive will also lead to a more extensive exemption of reporting for consolidated subsidiaries whose data is included on a consolidated basis in the report of a Large Public-Interest Entity.

4.2 Content of the Reporting

French law already provides for a detailed list of items to be covered in the Corporate Social Responsibility (CSR) report,[27] while the Directive only refers to four general themes. In addition, the contents of the report of the Chairman on the composition of the administrative or supervisory board in the Chairman's report[28] will have to be relatively expanded following implementation of the Directive. Indeed, the implementation of the Directive might require several amendments to the existing national law.

4.3 "*Comply or explain*" principle

French law already provides for the "*comply or explain*" principle in relation to the disclosure of non-financial information.

4.4 Safe Harbor

French law also provides that companies are authorized not to include certain information if that information is not material in light of the activity or organization of the company. This will have to be coordinated with the new provisions that will be enacted following the implementation of the Directive.

4.5 Publication and Assessment

In the existing legal framework, the CSR report[29] is generally a schedule to the annual report.

5. Germany

On September 21, 2016, the German Government issued a bill (*Regierungsentwurf*)[30] to transpose the Directive into German law. The bill had its first readings in the Lower House of the German Parliament (*Bundestag*) and the Upper House of the German Parliament (*Bundesrat*) in 2016 and has subsequently been passed on to various committees (*Ausschüsse*) where it is undergoing further discussions to date. Therefore, the transposition of the Directive into German law will be delayed but is expected in January 2017. Nevertheless, the provisions shall be applicable for fiscal years starting on January 1, 2017 or during the calendar year 2017.

[25] Article L. 225-102-1, §5, of the French Commercial Code.
[26] Article L. 225-102-1, §6, of the French Commercial Code.
[27] Article L. 225-102-1, §5, of the French Commercial Code.
[28] Article L. 225-37, §6, and Article L. 225-68, §7, of the French Commercial Code.
[29] Article L. 225-102-1, §5, of the French Commercial Code.
[30] BT-Drs-18-9982 – *Entwurf eines Gesetzes zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten*.

Transposition into German law will lead to changes mainly concerning the reporting related sections of the German Commercial Code (*HGB*).

According to the bill, the Directive shall predominantly be transposed into German law “1:1”, without significantly going beyond what is requested under the Directive, especially with regard to the content of the Non-Financial Statement. However, in the course of the legislative process, the bill has received criticism from opposition parties, certain groups and experts,[31] which may lead to last minute changes to the bill.

According to the bill, the addressees of the new Non-Financial Statement obligation are large capital market-oriented companies pursuant to Section 267, paragraph 3, sentence 1 and Section 264d of the German Commercial Code (*Große Kapitalgesellschaften*) having, on an annual basis, an average number of employees in excess of 500. Whereas this would mainly cover Stock Corporations (*AG*), *Societas Europaea*, partnerships limited by shares (*KGaA*), limited liability companies (*GmbH*) and, regardless of their capital market-orientation, credit institutions and insurance companies, it may also cover cooperatives (*Genossenschaften*) and certain partnerships (*OHG* or *KG*) where no individual is a partner with unlimited personal liability (in particular a *GmbH & Co.KG*).

As regards the description of diversity policies in the corporate governance statement, the bill provides that large listed companies, as well as large credit institutions and insurance companies, are obliged to provide statements regardless of the number of their employees.

According to the bill, the Non-Financial Statement can be made part of the company’s management report (*Lagebericht*) or can be reported separately, in which case it either has to be published together with the management report or within six months after the balance sheet date at the latest.[32]

In accordance with the Directive, the bill provides that a company is exempted from issuing its own Non-Financial Statement if it is part of a group, its reporting is consolidated into the group’s reporting and the group’s parent company issues a Consolidated Non-Financial Statement pursuant to applicable law consistent with the Directive.[33]

Where the Directive gives the Member States discretion as to whether or how to implement its provisions, the bill includes the following noteworthy provisions:

5.1 Safe Harbor

The bill incorporates the Safe Harbor provided for by the Directive. Accordingly, it would be possible to omit the disclosure of certain information, following the company’s management conclusion, based on a reasonable commercial assessment (*vernünftige kaufmännische Beurteilung*) that the disclosure would be detrimental and provided that the omission still allows a fair and balanced understanding of the company.

However, if the non-disclosure is no longer justified after the Non-Financial Statement is published, the respective information has to be included in the subsequent Non-Financial Statement.

5.2 Preparation and Assessment

The company’s management is responsible for the preparation of the Non-Financial Statement. Under the bill, the supervisory board (*Aufsichtsrat*) of the company has the obligation to assess the accuracy of the Non-Financial Statement’s contents and has to

[31] Criticism included, in particular, that not only capital market-oriented companies but rather any large companies should be addressed, that the scope of reporting items should include consumer related matters, that no exemptions from reporting should apply, that the audit of the Non-Financial Statement should become mandatory and that penalties for an infringement of the new reporting rules are too extensive.

[32] If a company is already exempted from issuing a management report pursuant to Section 264, paragraph 3 of the German Commercial Code, such company has no obligation to provide the Non-Financial Statement.

[33] Such parent company may also be incorporated in another EEA country, provided that it reports in accordance with applicable national law consistent with the Directive. The exemption does not apply if the parent company is incorporated outside the EEA, in which case the German company would have to issue its own Non-Financial Statements, unless other exemptions apply.

inform the shareholders' meeting about the results of its assessment. In accordance with the minimum requirements of the Directive, the bill does not stipulate a mandatory audit of the Non-Financial Statement's contents by an external auditor. The auditor of the company only needs to confirm whether the Non-Financial Statement has been provided at all. This results in a great responsibility of the supervisory board. However, the supervisory board can decide that an external audit of the Non-Financial Statement's contents is to be conducted, in which case the auditor's opinion has to be published together with the Non-Financial Statement.

5.3 Penalties

In case of infringements, significant penalties may apply for the company as well as for the individual management or supervisory board members.[34] A capital market-oriented company may be fined the higher of:

i. EUR 10,000,000;

ii. an amount equal to 5% of the annual turnover of the prior financial year; or

iii. an amount equal to two times the economic benefit arising out of the infringement.

Non-capital market-oriented companies may be fined up to EUR 10,000,000.

An individual management or supervisory board member of a capital market-oriented company may be fined the higher of:

i. EUR 2,000,000; or

ii. an amount equal to two times the economic benefit arising out of the infringement.

In exceptional cases, where the individual management or supervisory board members deliberately make wrong statements or conceal information in the Non-Financial Statement, an infringement of the reporting obligations can constitute a criminal offense, which may result in up to 3 years' imprisonment.

[34] These penalties also apply to infringements of other financial reporting obligations. The new penalties are significantly higher than those under the current law.

6. **Italy**

In Italy, the Directive is being implemented by means of Legislative Decree No. 254 of December 30, 2016 (the "Legislative Decree"), which was published in the Official Gazette on January 10, 2017 and will enter into force on January 25, 2017.

The Legislative Decree largely incorporates the content of the Directive, with certain minor discrepancies.[35]

Where the Directive gives the Member States discretion as to whether or how to implement its provisions, the Legislative Decree includes the following noteworthy provisions:

6.1 Subjective Scope

The definition of public-interest entities also includes: reinsurance companies, issuers of financial instruments, central depositories for financial instruments, regulated markets management companies, settlement and deposit-guarantee systems management companies, real-estate brokerages, asset management companies, open-ended investment companies, payment institutions, electronic money institutions, and financial intermediaries.

6.2 Content of the Reporting

In addition to the items described in Section 2.1.a above, Article 3 of the Legislative Decree specifies that the Non-Financial Statement must include information concerning at least:[36]

i. the use of energy resources, distinguishing between renewable and non-renewable energy, and the water use;

[35] For example, the Legislative Decree arguably resembles the English version of the Directive more closely than the Italian version of the Directive. Indeed, whereas the English version of the Directive fixes the employees' benchmark triggering the obligation to include the Non-Financial Statement in the management report at an average "*exceeding*" 500, the Italian version provides for an average number "*pari a*" (*i.e.*, equal to) 500. The Legislative Decree imposes the issuance of the Non-Financial Statement obligation on companies that have employed *more than* 500 employees on average.

[36] This additional information is merely recommended by the Directive (see Recital No. 7).

ii. greenhouse gas emissions and air pollution;

iii. the impact, including in the medium-term, of the principal risks linked to the company's operations on the environment, and on health and safety measures;

iv. social and employee-related matters, together with the actions taken to ensure gender equality, implementation of relevant conventions of supranational and international organizations,[37] and social dialogue;

v. respect for human rights, measures implemented to prevent violations and actions taken to prevent forms of discrimination; and

vi. instruments in place to fight corruption, both active and passive, and bribery.

6.3 Voluntary Compliance

Companies not subject to the reporting obligation may include in their management report a Non-Financial Statement on a voluntary basis.[38] In this case, the Non-Financial Statement must comply with all the rules of the Legislative Decree, except for the one providing for the statutory audit of the Non-Financial Statement, providing that certain thresholds are met (see Article 7(3) of the Legislative Decree). Despite this exception, if a Non-Financial Statement is issued on a voluntary basis, penalties for non-compliance are reduced by 50% as explained in Section 6.6 below.

6.4 "*Comply or explain*" principle

The Legislative Decree adopts the "*comply or explain*" principle (see Article 3(6) of the Legislative Decree).

6.5 Safe Harbor

The Legislative Decree includes the Safe Harbor option foreseen in the Directive. If the company avails itself of this option, it has to explicitly make reference to the relevant article of the Legislative Decree (*i.e.*, Article 3(8)) in the Non-Financial Statement.

6.6 Penalties

Article 8 of the Legislative Decree provides for five types of administrative monetary penalties:

i. Penalties ranging from EUR 20,000 to EUR 100,000 against the management body[39] for omitting to file the Non-Financial Statement with the companies registry. If the submission occurs during the first 30 days after the deadline has expired, the penalty is reduced by one third. The penalty is reduced by 50% if the Non-Financial Statement is issued on a voluntary basis (see Section 6.3 above).

ii. Penalties ranging from EUR 20,000 to EUR 100,000 against the management and control bodies for approving Non-Financial Statements that do not comply with the Legislative Decree. This penalty applies to non-compliance different from that listed under point "iii" below (*i.e.,* it applies to lack of important material facts and/or false representations in the Non-Financial Statement).[40] For instance, this penalty is applicable to the omission of non-material facts in the Non-Financial Statement. The penalty is reduced by 50% if the Non-Financial Statement is issued on a voluntary basis (see Section 6.3 above).

iii. Penalties ranging from EUR 50,000 to EUR 150,000 against the management and control bodies for approving Non-Financial Statements that do not include important material facts that must be included pursuant

[37] Conversely, Recital No. 7 of the Directive specified that the conventions were from the International Labour Organization.

[38] See Article 7 of the Legislative Decree. It should however be noted that such a possibility was already foreseen by the recast Directive 2013/34/EU.

[39] In the present Section 6.6, *management body* refers to both the administrative and the management bodies identified in Section 2.3 above.

[40] This *caveat* did not appear in the draft version of the Legislative Decree. It has been introduced following the Parliament's concerns over the difference between the conduct described in "ii" and in "iii". In particular, it was not clear where the line should be drawn between non-compliance and omission/false statement.

to the Legislative Decree or that include false material facts. The penalty is reduced by 50% if the Non-Financial Statement is issued on a voluntary basis (see Section 6.3 above).

iv. Penalties ranging from EUR 20,000 to EUR 50,000 against the control body that omits to verify that the Non-Financial Statement has been drafted.

v. Penalties ranging from EUR 20,000 to EUR 100,000 against the control body for failing to certify the conformity of the Non-Financial Statement, or for certifying the conformity of a Non-Financial Statement that does not comply with the Legislative Decree, in violation of a specific code of conduct, to be drafted by the Italian Securities and Exchange Commission ("CONSOB").

Pursuant to Article 9 of the Legislative Decree, CONSOB is entrusted with the investigation of infringements and the imposition of penalties, after hearing the Bank of Italy and the Italian Authority for the Supervision of Insurance Companies ("IVASS").

7. The United Kingdom

Under the UK Companies Act 2006, companies that are "quoted" companies for the purposes of the Companies Act[41] are already subject to certain non-financial reporting requirements (this existing regime is referred to here as the "Quoted Companies Regime"). The Quoted Companies Regime is broadly similar to the requirements of the Directive.

The Directive has been implemented in the UK. A statutory instrument called the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 (the "Regulations") was laid before Parliament in November 2016, and came into force in mid-December. The Regulations apply in relation to the financial years of companies and qualifying partnerships beginning on or after January 1, 2017.[42]

The Regulations transpose the Directive into UK law without adding to the minimum requirements set out in the Directive. The Regulations effect the implementation by inserting additional sections into the UK Companies Act 2006 (the "Companies Act"). There will now therefore be two separate reporting regimes: one for companies falling within the scope of the Directive (*i.e.*, Large Public-Interest Entities) and one for companies falling within the definition of a quoted company under the Companies Act but not within the scope of the Directive.

7.1 The Two Regimes

The Regulations insert two new sections, 414CA and 414CB, into the Companies Act. The new sections require a company established in the UK that at any time within the financial year was a Large Public-Interest Entity to include a Non-Financial Statement in the strategic report (the "Large Public-Interest Entity Regime").[43] The strategic report is required by the Companies Act, and its purpose is to help shareholders assess how the directors have performed their duty to promote the success of the company.

Meanwhile, the requirements for companies that are quoted companies for the purposes of the Companies Act (see above) but that are not Large Public-Interest Entities remain unchanged.

The reporting requirements of the two regimes are largely the same, although there are some key differences:

[41] Pursuant to Section 385(2) of the Companies Act 2006, a "quoted" company is a company whose equity share capital has been included in the Official List, officially listed in an EEA state or is admitted to dealing on either NYSE or Nasdaq.
Please note that, in accordance with the wording of the EU legislator, in the present Alert Memorandum preference has been given to the term "*listed* companies". However, given that the Companies Act 2006 specifically defines "*quoted* companies", this term is used in the present Section 7.

[42] Regulation 1(2)(a) of The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016.

[43] Regulation 4 of The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016.

i. the Large Public-Interest Entity Regime requires specific disclosure of anti-corruption and bribery matters;

ii. the Large Public-Interest Entity Regime requires disclosure of the principal risks relating to non-financial matters and how the company manages those risks;[44]

iii. the Quoted Companies Regime requires specific disclosure of "community" issues;[45]

iv. the Large Public-Interest Entity Regime requires a description of non-financial key performance indicators relevant to the company's business,[46] while the Quoted Companies Regime requires disclosure of information concerning the effectiveness of its non-financial policies;[47] and

v. while both regimes require companies to state where they do not have a relevant policy, only the Large Public-Interest Entity Regime requires companies to explain why.

7.2 Avoidance of Duplication

Large Public-Interest Entities that comply fully with the requirements of the new regime will be treated as complying with certain sections of the Companies Act relevant to the Quoted Companies Regime to avoid duplication of information.[48]

7.3 Choice of Regime

Companies may choose to comply with the Large Public-Interest Entity Regime on a voluntary basis. This prevents companies at the margin of the regime from having to switch reporting regimes on account of changes in their size from year to year.

7.4 Safe Harbor

The Large Public-Interest Entity Regime also includes Safe Harbor provisions. Information regarding impending developments or matters in the course of negotiation need not be disclosed if the disclosure would be seriously prejudicial to the commercial interests of the company, provided that the non-disclosure does not prevent a fair and balanced understanding of the company's development, performance or position or the impact of the company's activity.[49]

…

CLEARY GOTTLIEB

[44] Section 414CB(2)(d).
[45] Section 414C(7)(b)(iii).
[46] Section 414CB(1)(e).
[47] Section 414C(7) of the Companies Act 2006.
[48] Section 414CB(7).
[49] Section 414CB(9).