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EuropeanIssuers' Comments on the
Proposal of the European Commission of a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC

(Revision of the Transparency Directive)

Position Paper

March 2012

Summary

1) Notification requirements of investors
   a) **We support the inclusion of „instruments of similar economic effect" in the regime of major holding notifications;**
   b) **We suggest to narrow the criteria of independence which define exemptions from the obligation to aggregate major holding notifications in order to better align them to current voting practices;**
   c) **We support clarification of Art. 17 para. 2a**
   d) **We favour a rule that encourages institutional investors to publish their general voting policies;**
2) Transparency duties of listed companies
   a) **We support the elimination of the duty to prepare interim management statements but companies should be able to publish them if they wish to do so;**
   b) **We do not support the introduction of duty on companies to report on payments to governments;**
   c) **We support the elimination of the requirements on notification of changes in the company's statutes and the publication of new loan issues;**
   d) **We believe that the data format(s) to be used by Officially Appointed Mechanisms should be compatible with data formats already used by issuers;**
   e) **We believe that the publication deadline for the half-yearly report should be extended;**
3) Sanctions (Art. 28, 28a, 28b, 28c)
   We would like to have sanctions defined on the national level rather than European.

Comments in detail

1. Notification requirements of investors

a) Inclusion of „instruments of similar economic effect“ in the regime of major holding notifications (Art. 13 para. 1 (b), Art. 13a and Art. 9)

We support the European Commission's proposals to improve shareholder transparency by including "instruments of similar economic effect to the holding of shares" in the Transparency Directive whether these instruments are physically settled or not. Listed companies and their investors have frequently made the experience that cash settled derivative instruments and other techniques have been used to build up huge secret stakes in listed companies in order to prepare for a takeover bid, for example. This regulatory loophole is to be closed or at least narrowed in the future, which will clearly improve the integrity and efficiency of the capital markets.

We also welcome that the calculation of the number of voting rights by reference of the full notional amount of underlying instruments rather than on the basis of the delta-adjusted method and that netting of long and short positions will be prohibited.

Also, we support that the regulation is principle based and therefore open for future market innovation and that ESMA shall establish an „indicative list" of included instruments which would help market participants to comply with the new regime. However, it could be made clearer what exactly will the European Commission's and/or ESMA's role is in determining the administrative practice across Europe. From our point of view, it should be clarified that they will not be equipped with the right to narrow material aspects of the Transparency Directive by administrative or other measures.

b) Additional suggestions

- (Review of the criteria of independence in Art. 12 para. 4 and Art. 12 para. 5

The European Commission has not amended Article 12 para. 4 and 12 para. 5 of the Transparency Directive which define exemptions from the obligation to aggregate major holding notifications on the level of a "parent undertaking" of a "management company" or an "investment firm". Basically, a parent undertaking will be exempted from this obligation if the management company/investment firm exercises its voting rights independently from the parent undertaking.

However, from the issuers' point of view this provision is not only complex but also reduces inappropriately the overall level of transparency. Due to Art. 12 para. 4 and Art. 12 para. 5 both investors and listed companies get an incomplete picture of the true ownership structure and the distribution of voting rights which would lead to "creative compliance" and counters the goal of capturing "hidden ownership" in the system of major holdings notifications.

Furthermore, Art. 12 para. 4 and Art. 12 para.5 may not reflect the current practice of voting within complex investment firms. While it may be true from a purely legal point of view that the single fund manager also decides on the voting, most investment firms have at least some kind of a voting policy that predetermines the casting of votes of any investment funds in the investment company's structure. In many cases, the casting of votes and the investment decision is even organisationally separated, so that listed companies that prepare their general meetings have a specific contact person responsible for voting issues (typically a compliance or governance officer).
EuropeanIssuers therefore suggests narrowing the criteria of independence in Articles 12 para. 4 and 12 para. 5 in order to better align them to current voting practices.

- Clarification of Art. 17 para. 2a

The review of the Transparency Directive could also be used to clarify Art. 17 para 2a. which obliges listed companies to inform the capital markets on the total number of shares and voting rights and the rights of holders to participate in meetings. It should concretely be clarified that voting rights have to be calculated as in Art. 9 para. 1 subpara. 1, for this purpose. This means that the voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended (e.g. because they are bought back).

- Publication of voting policies

EuropeanIssuers favours rule that encourages institutional investors to publish their general voting policies as it has been suggested in the 2010 consultation document by the Commission.

This is because:

First, the disclosure of the voting policy would ease issuers the preparation of the general meeting as agenda item that might conflict with voting guidelines could be discussed much earlier with investors.

Second, the ongoing investor dialogue would be strengthened as issuers could discuss structural issues of corporate governance with their investors that are frequently laid down in the voting guidelines.

Third, end investors could better select "their" institutional investors that act as their agents and trustees which would improve the governance of the indirect investment process

2. Transparency duties of listed companies

a) Elimination of the duty to prepare interim management statements (Art. 3. para. 1 subparagraph 1 as well as deletion of Art. 6 TD)

In Art. 3 para. 1 (1) the European Commission proposes to eliminate the requirement to publish interim management statements (which in fact means the publication of quarterly information) and leaves listed companies the discretion to publish quarterly information if they so desire.

We welcome such a proposal, as many companies are opposed to mandatory quarterly reports, which may in certain cases contribute to a short-term vision of the companies' performance and does not seem important to investors' protection.

Also many listed companies appreciate that they are still allowed to publish quarterly management statements according to the Commission's considerations in the explanatory memorandum s which should be inserted in the recitals (See explanatory memorandum, p. 7). Companies are keen to retain flexibility in order to be able to respond to their investors' expectations or if they feel that quarterly information would be useful for other reasons. For instance:

- specifically, in certain industries, some international investors may wish to compare, on a quarterly basis, the results of a company with those of competitors which publish or are required to publish quarterly information or with those whose business model is based on short-term fluctuations (e.g. oil industry, trading activities),
- some stock exchanges require in their listing rules quarterly disclosure for premium segments.

b) Report on payments to governments (Art. 6)

EuropeanIssuers does not support the introduction of Art 6. The justification of this duty is not clear. Investors do expect financial reports on a consolidated basis to get a fair view on the economic situation of the listed company. The proposed disclosure of payments to governments does not contribute to this aim. It would however entail compliance costs for listed companies, which perfectly runs counter the aim of easing access to capital markets.

In addition, under the proposed requirements in the 4th and 7th Company Law Directives, which the amendments refer to, companies active in the extractive industry or the logging of primary forests would have to publish payments made to governments, country-by-country and project-by-project. Such overly detailed disclosure would be detrimental to European companies and place them in an unfavourable position compared to third-country companies, which are not subject to similar requirements. In particular the publication of commercially or economically sensitive information – such as information on a project-by-project basis – could lead to the loss of markets (strategic information on contracts, management, results, level of profitability, etc.) and the calling into question of contracts or agreements (such as those signed with the tax authorities of host countries).

While we strongly prefer not to have any European obligation in this field (see above), in any event it is therefore essential:

- not to enable identification of information relating to specific projects;
- to take into account any host country legislation/provision that prohibits the publication of information relating to the host country (risk of conflicting obligations);
- to limit the scope of any requirement that would be envisaged to the industries and companies proposed by the European Commission.

c) Elimination of Art. 19 para. 1(2) and Art. 16 para. 3

EuropeanIssuers supports the elimination of art Art. 19 para. 1(2) (notification of changes in the company's statutes) and Art. 16 para. 3 of the Directive (publication of new loan issues) as a contribution to the reduction of compliance costs.

d) Access to regulated information at the Union level (Art. 21 para. 4, Art. 22 para. 1 (d))

With respect to the access to regulated information at the Union level, both ESMA and Commission will be empowered to define minimum standards.

Art. 22 para 1(e) may prove problematic, as it gives these bodies the right to define "the common format for storing regulated information by national officially appointed mechanisms" (OAMs). It has to be ensured that the use of such technical standards by these mechanisms would not lead to listed companies being forced to use the same standards. Therefore the data format(s) to be defined for and used by OAMs should be compatible with data formats already used by issuers, so that issuers do not bear costs as a result of OAMs transferring/converting existing data to that EU format.

In particular EuropeanIssuers has raised concerns in the past with regard to mandatory use of XBRL (eXtensible Business Reporting Language) for the publication and storage of financial information which would lead to massive additional costs for listed companies without having benefits to investors. We therefore suggest to clarify at level 1 that Art. 22 para. 1(e) will not lead to a mandatory use of XBRL by companies. Any such use, for financial reporting or other purposes, should simply be left to companies alone, based inter alia on their assessment of market expectations.

e) Half yearly reports

The Transparency Directive deadline for publication of half-yearly reports raises implementation issues in many cases, for companies: the deadline for preparing and publishing financial statements is too short, especially when they are subject to a limited review or an audit. Furthermore, as all half-yearly reports are published around the same date, it is often difficult to obtain a satisfactory coverage by financial analysts and investors, even for large companies. For companies, including large ones, that have their financial statements audited or reviewed by their statutory auditors, the publication deadline for the half-yearly report should be extended to three months, instead of two months under the current Directive.

3. Sanctions (Art. 28, 28a, 28b, 28c)

As it is the case for the Market Abuse Directive/Regulation and the MIFID/MIFIR, the proposals seem to substantially interfere with Member States' competences to define sanctions in case of violations of capital market regulations.

EuropeanIssuers is sceptical of that shifting of legislative competences to EU level due to subsidiarity considerations. The proposals will heavily interfere with existing national sanctioning regimes without giving supporting empirical evidence or theoretical arguments for

such a step. We therefore doubt that such interference is justified by the given constitutional elements of the European Union or by the (potential) benefits such harmonisation might bring to the EU market. For example, the possibility of regulatory arbitrage appears to be limited with regard to the requirements of the Transparency Directive. What would exactly the negative externalities if a Member State A would impose lower administrative sanctions for the violation of a certain duty than Member State B? Couldn't it be expected that the Members States themselves would set appropriate sanctioning levels that take into account their legal traditions to prevent their national capital markets from being damaged?

Besides this fundamental concern the catalogue of sanctions in Art. 28, 28a und 28b appears to be unbalanced and inconsistent. Firstly, the sanctions proposed do not make a difference with respect to the different duties of the Transparency Directive. Issuers' duties as well as investors duties' are covered. However not any sanction makes sense with regard to any duty laid down in the Transparency Directive. Secondly, the sanction tend to go very far (and far beyond what is usually codified in MS) the more that it is unclear if and to what extent competent authorities will be allowed to or will in fact take into consideration the circumstances laid down in Art. 28c. For example, a legal person might face an administrative pecuniary sanction up to 10 percent of the total turnover. Furthermore, Art. 28b introduces public statement on the nature of the breach of the Directive and the person responsible which is unknown at least in some Member States' laws. This is questionable against data protection regulations. Additionally, even marginal offences under the Transparency Directive may be followed by a public statement to be published on the competent authority's website. If at all, a public statement should only be considered in the case of serious offences, a publication should be limited in time and – in any case – a public statement should only be possible when the offence is recognised as res judicata.

Overall EuropeanIssuers would like to have sanctions defined on the national level only which allows to take into account the different legal traditions in the different Member States.

EuropeanIssuers *was set up to represent the interests of publicly traded companies in Europe, which are subject to complex rules on issues such as shareholder rights, corporate governance and reporting and market regulations. Our members include both national associations and companies from all sectors in 14 European countries, where there are some 9.200 such companies with a combined market value of some € 5.000 billion.*

EuropeanIssuers' ultimate goal is to achieve well functioning European financial markets which serve the interests of their users, together with good corporate governance and responsible share ownership. More information can be found at www.europeanissuers.eu.