

## **EuropeanIssuers' Position on the Proposal for a Directive of the European Parliament and 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**

**14 SEPTEMBER 2013**

### **INTRODUCTION**

The European Commission adopted on 16 April 2013 a proposal for a directive enhancing transparency of certain large companies on social and environmental matters.

The proposal sets a requirement to disclose relevant non-financial and diversity information, ensuring a level playing field across the EU. The objective is to increase EU companies' transparency and performance on environmental and social matters and therefore to contribute effectively to long-term economic growth and employment.

### **SUMMARY**

EuropeanIssuers, representing the interests of European quoted companies, supports the concept of corporate social responsibility and believes that sustainability is one of the key factors to rebuild trust and to foster long-term investments and thus economic growth which are in the core interests of listed companies.

However, we would like to stress the importance of ensuring a level playing field for European companies in the international markets. We fear that some aspects of the proposal on non-financial and diversity reporting would not contribute to the overall objective of growth, but create an additional unnecessary burden for companies, especially smaller ones, and put them at a competitive disadvantage in comparison with companies incorporated outside the EU.

At the same time we would like to welcome that the Commission does not promote in legislation any national, EU based or international frameworks but rather suggests that companies may rely on them.

### **1. DISCLOSURE OF INFORMATION RELATING TO ENVIRONMENTAL, SOCIAL AND EMPLOYEE MATTERS, RESPECT FOR HUMAN RIGHTS, ANTI-CORRUPTION AND BRIBERY MATTERS**

Art. 1 of the Directive proposes to amend Art. 46, asking companies – whose average number of employees during the financial year exceeds 500 and, on their balance sheet dates, exceed either a balance sheet total of EUR 20 million or a net turnover of EUR 40 million – to include in their annual report a non-financial statement containing information relating to at least environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including: (i) a description of the policy pursued by the company in relation to these matters; (ii) the results of these policies; (iii) the risks related to these matters and how the company manages those risks. Where a company does not pursue policies in relation to one or more of these matters, it shall provide an explanation for not doing so.

The same requests are contained in Art. 2 of the proposal, amending Art. 36 of the Directive 83/349/CEE<sup>1</sup> with reference to consolidated accounts.

EuropeanIssuers believes that publishing a description of the policy on these matters and of the results of this policy could help companies to enhance their risk management culture. Consequently, the application of such a policy could be a good standard of corporate governance and the disclosure could be useful information for shareholders. However, we think that the proposal could be improved in some respects.

### 1.1. The instrument of disclosure

The proposal requires publication of the above mentioned information in the annual report. Quoted companies think that, having regard to the nature and characteristics of the non-financial information, the proposal should explicitly allow companies to decide on publication of the requested information in a separate report.

Therefore, we suggest amendment of the proposal providing for Member States to allow companies to publish the information required by Article 46 par.1 b) in a separate report published either together with the annual report or by means of a reference in the annual report stating when and where such document will be publicly available on the company's website, consistent with article 5(1) of the Shareholder Rights Directive (2007/36/EC)<sup>2</sup>. This is already the case in several Member States.

Therefore, we suggest modification of article 46 par. 4 as follows:

*Where a company prepares a comprehensive report corresponding to the same financial year relying on national, EU-based or international frameworks and which covers the information provided for in paragraph 1(b), it shall be exempt from the obligation to prepare the non-financial statement set out in paragraph 1(b), provided that such report is part of the annual report. **Member States may permit the information required by article 46 par. 1 b) to be set out in a separate report published either together with the annual report or by means of a reference in the annual report stating when and where such document will be publicly available on the company's website, consistent with article 5(1) of the Shareholder Rights Directive (2007/36/EC).***

The same formulation should be adopted with regard to article 36.

## 2. DISCLOSURE OF THE COMPANY'S DIVERSITY POLICY

Art. 1 of the Directive proposes to amend Art. 46a of the Fourth Directive requiring a *"description of the company's diversity policy for its administrative, management and supervisory bodies with regard to aspects such as age, gender, geographical diversity, educational and professional background, the objectives of this diversity policy, how it has been implemented and the results in the reporting period. If the*

---

<sup>1</sup> For parent undertakings of undertakings to be consolidated that together exceed an average number of 500 employees during the financial year, and, on their balance sheet dates, exceed either a balance sheet total of EUR 20 million or a net turnover of EUR 40 million, the consolidated annual report shall include also include a non-financial statement containing information relating to at least environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including the following: (i) a description of the policy pursued by the company in relation to these matters; (ii) the results of these policies; (iii) the risks related to these matters and how the company manages those risks. Where the undertakings included in the consolidation taken as a whole do not pursue policies in relation to one or more of these matters, the company shall provide an explanation for not doing so.

<sup>2</sup> Please, note that a similar provision is already in place in Article 46a par.2 of the Directive 78/660/CEE.

*company has no such policy, the statement shall contain a clear and reasoned explanation as to why this is the case”.*

We believe that a good mix in board composition could contribute to the effectiveness of the board and we agree with the general premise of transparency on the application of the diversity policy.

Nevertheless, we would like to underline that companies in the EU already give detailed information on the board composition since the transposition of the Directive 2006/46/EC. At the same time, some national corporate governance codes already encourage diversification of the board composition and invite companies to give information on their annual corporate governance statements.

### **2.1. The instrument of disclosure**

The proposal suggests inserting this information in the management report. However, we think that national corporate governance codes are the best instrument to foster companies’ best practices in defining the most suitable directors’ qualifications and make them available to the shareholders, who are called to appoint the directors.

Therefore, we think that a more appropriate solution would be to propose this disclosure through an EU recommendation that leaves Member States free to transpose it through national legislation or, possibly, corporate governance code.

Reassuring, firstly we suggest **to delete article 46a (g) and insert its content in an EU recommendation**. Secondly, we suggest **a modification in the content of disclosure**.

### **2.2. The content of disclosure**

The proposal asks for a description of the company’s diversity policy and, at same time, suggests some possible parameters.

We think that a selection of any possible parameter and, in general, the composition of the board should be left in the sole responsibility of the company and that the application of one or more of these characteristics could limit the freedom of the company on the selection of the board members.

Therefore, we believe that the decision to adopt or not a policy on these parameters should be left to each company and that the requested information should be published only if a company voluntarily adopts the policy.

Moreover, the proposal asks a company to give “a clear and reasoned explanation” in case of not adopting such policy. We believe that no explanation should be required on aspects that are not covered by the policy. Firstly, because this approach risks flooding the market with void statements; secondly, because it is not clear with reference to which of the parameters the explanation should be given. Surely, an explanation should not be required with reference to all the parameters indicated; otherwise the requested explanations would be burdensome for companies and uninformative for investors.

We also fear that the proposal could have a negative impact on the composition of the board in case of smaller listed companies. The proposal could have an indirect effect in terms of an increase in costs for the small listed companies and discourage them from accessing capital markets. A decision whether to adopt

or not a policy on these matters should be left to each company and the requested information should be published only if a company has voluntarily adopted such a policy.

Consequently, the information on diversity should solely concern: (i) the adoption of a policy on diversity; (ii) how it has been implemented and (iii) the result of this policy. No explanation should be required to be published in case of non-adoption of a policy.

Therefore, we would suggest modification of article 46a as follows:

***“in case of the adoption of a policy relating to aspects such as age, gender, geographical diversity, educational and professional background, (companies should publish) a description of the company's diversity policy for its administrative, management and supervisory bodies, the objectives of this diversity policy, how it has been implemented and the results in the reporting period. ~~If the company has no such policy, the statement shall contain a clear and reasoned explanation as to why this is the case”.~~***

### 3. COUNTRY BY COUNTRY REPORTING

The European Council adopted conclusions in May 2013 stating that: “the proposal for a Directive on disclosure of non-financial information will be examined notably with a view to ensuring country-by-country reporting by large companies and groups”. Commissioner Barnier announced in June 2013 that more transparency should be required by large companies on a country by country basis, similar to the information required by banks in CRD IV<sup>3</sup>. It is currently envisaged to take the opportunity of the draft directive on non-financial information to require additional disclosure items such as turnover, number of employees, profit or loss before tax, tax on profit or loss as well as public subsidies received. This information might have to be disclosed publicly on an annual basis.

While being in favor of transparency towards the public authorities and of introduction of measures to combat corruption and tax evasion at international level, EuropeanIssuers fears that European companies could be harmed by an obligation to publicly disclose detailed sensitive information, which could clearly place them at a competitive disadvantage to third-country companies for the following reasons:

- the publication of commercially or economically sensitive information 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 being in favor of maximum transparency vis-à-vis the tax authorities, we fear that overly detailed information could lead to incorrect interpretations concerning the breakdown of tax payments and expose companies to multiple taxation, if the general context of operations is not taken into account.

EuropeanIssuers would also like to encourage EU legislators to look at the regulatory developments overseas as some useful lessons can be drawn from experiences of other countries and also to ensure as much as possible international competitive level playing field. In this respect we would also like to draw the attention to the US Court ruling of 2 July 2013<sup>4</sup> against the US Securities and Exchange Commission (SEC)

---

<sup>3</sup> All firms subject to CRD IV will need to publish information on activities, turnover and employees by 30 June 2014, whilst global systemically important institutions will in addition need to report information on profits and tax payments by the same date, albeit on a confidential basis. Subject to approval by the European Commission, all firms subject to CRD IV will need to publish information on tax payments from 1 January 2015.

<sup>4</sup> [http://www.europeanissuers.eu/\\_lib/newsflash/USSECcaseCbC.pdf](http://www.europeanissuers.eu/_lib/newsflash/USSECcaseCbC.pdf)

over country-by-country reporting rules. The ruling required that the SEC reconsiders the transparency rules for the extractives industry interpreting Section 1504 of the Dodd-Frank bank reform act of 2010 adopted after the global financial crisis and states that the decision by the Securities and Exchange Commission was “arbitrary and capricious” in requiring companies to publicly disclose payments when that information could hurt their competitive stance, violate contracts and prove very costly. Information is to be given to the SEC, which will judge whether to make it public.

We therefore believe **that tax issues should continue to be dealt within the framework of the EU, the OECD or other international organizations** (methods for determining “transfer prices”, content and application of information exchange agreements, etc.).

European issuers would emphasize in this regard the essential role played by the OECD Global Forum on Transparency and Exchange of Information in monitoring the implementation of exchange clauses between states. Since March 2010, it has produced 88 reports assessing some 80% of the Global Forum members<sup>5</sup>.

#### 4. TRANSITION PERIODS

We believe that small and mid-cap companies will need longer transition periods, bearing in mind that the whole subject of non-financial reporting is still being adjusted to the needs of companies and investors. In addition, such companies typically have only slim financial reporting units and so will need time to adjust to any regulatory changes, in order to build up reporting lines, train personnel and recruit additional staff if necessary.

We therefore propose the following transition periods:

- Companies with 10.000 or more employees should be required to adopt reporting rules as proposed;
- Companies with an average number of employees between 5.000 and 10.000, a balance sheet total of €250m and respectively an annual turnover of €500m, should be granted 3 additional years to comply;
- Companies with an average number of employees between 3.000 and 5.000, a balance sheet total of €100m and an annual turnover of €200m, should be granted 6 years to comply.
- Companies with an average number of employees between 500 and 3.000, a balance sheet total of €50m and an annual turnover of €100m, should be granted 9 years to comply.

#### 5. INTEGRATED REPORTING

While transparency and comparability of information provided to investors and other stakeholders is very important, in the current situation, increased integration of financial and non-financial information should be avoided in EU legislation. Such integration should be left to best practice to avoid confusion. Please refer to our position to question 24 of the EC Green Paper on Long Term Financing<sup>6</sup> for more information.

\*\*\*

---

<sup>5</sup> See OECD Global Forum Tax Transparency Report 2012: Report on Progress

<sup>6</sup> See [http://www.europeanissuers.eu/\\_mdb/position/259\\_EI\\_FINAL\\_Green-Paper-Long-Term-Financing-20130701.pdf](http://www.europeanissuers.eu/_mdb/position/259_EI_FINAL_Green-Paper-Long-Term-Financing-20130701.pdf)

*EuropeanIssuers* was set up to represent the interests of quoted companies across Europe. Our members include both national associations and companies from all sectors in 14 European countries.

We aim to ensure that EU policy creates an environment in which companies can raise capital through the public markets and can deliver growth over the longer-term. We seek capital markets that serve the interests of their end users, including issuers.

More information can be found at [www.europeanissuers.eu](http://www.europeanissuers.eu).