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Subject : Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC concerning the annual accounts of certain types of companies and consolidated accounts

- Consolidated text

COMMON GUIDELINES

Consultation deadline: 06.06.2005 (For reasons of urgency, the consultation deadline is shorter than 7 working days)

Delegations will find below a consolidated text of the Presidency compromise proposal as agreed upon at the meeting of the Permanent Representatives Committee (Part 2) on 1 June 2005.

Consolidated presidency compromise proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC concerning the annual accounts of certain types of companies and consolidated accounts

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44 (1) thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty³,

Whereas:

- (1) On 21 May 2003, the Commission adopted an Action Plan announcing measures to modernise company law and enhance corporate governance in the Community. As a short term priority, for the Community was to confirm the collective responsibility of board members, increase transparency in transactions with related parties and off-balance sheet arrangements and improve disclosure about corporate governance practices applied in a company.
- (2) Pursuant to that Action Plan, members of the administrative, management and supervisory bodies of a company were as a minimum to be collectively responsible towards the company for drawing up and publishing annual accounts and annual reports. The same approach was also to apply to members of the administrative, management and supervisory bodies of undertakings drawing up consolidated accounts. These bodies act within the competences assigned to them by national law. On the one hand, this would not prevent

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

Member States from going further and provide for direct responsibility towards shareholders or even other stakeholders. On the other hand, Member States were to refrain from opting for a system of responsibility limited to individual board members. However, this should not prevent courts or other enforcement bodies in the Member States from being able to impose sanctions on an individual board member.

- (3) On 27 September 2004 the Commission adopted a Communication on preventing and combating financial and corporate malpractice outlining inter alia the Commission policy initiatives regarding internal control in companies and responsibility of board members.
- (4) At present Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies⁴ and Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts⁵ only provide disclosure of transactions between a company and the company's affiliated undertakings. With the objective of bringing companies whose securities are not admitted to trading on regulated markets closer to companies applying the international accounting standards for their consolidated accounts, disclosure should be extended to cover other types of related parties, such as key management members and spouses of board members, but only where such transactions are material and not carried out at arm's length. Disclosure of material transactions with related parties that are not carried out under normal market conditions can assist users of annual accounts to assess the financial position of the company as well as, when the company belongs to a group, the financial situation of the group as a whole. Intra group related party transactions should be eliminated in the preparation of consolidated financial statements.
- (5) Definitions of a related party as set out in the International Accounting Standards adopted by the Commission in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council⁶, should apply to Directives 78/660/EEC and 83/349/EEC.

⁴ OJ L 222, 14.08.1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

⁵ OJ L 193, 18.07.1983, p.1. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p.16).

⁶ OJ L 243, 11.09.2002, p1

- (6) Off balance sheet arrangements may expose a company to risks and benefits, which are material for an assessment of the financial position of the company and when the company belongs to a group, the financial position of the group as a whole.
- (7) Such off balance sheet arrangements could be any transactions or agreements companies may have with entities, even unincorporated ones, that are not included in the balance sheet. Such off balance sheet arrangements may be associated with the creation or use of one or more Special Purpose Entities (SPE's) and offshore activities designed to address *inter alia* economic, legal, tax or accounting objectives. Examples of such off balance sheet arrangements include risk and benefit sharing arrangements or obligations arising from a contract such as debt factoring, combined sale and repurchase agreements, consignment stock arrangements, take or pay arrangements, securitisation arranged through separate companies and unincorporated entities, pledged assets, operating leasing arrangements, outsourcing, and similar. Appropriate disclosure of the material risks and benefits of such arrangements that are not included in the balance sheet should be set in the notes to the accounts or the consolidated accounts.
- (8) Companies having their securities admitted to trading on a regulated market and which have their registered office in the Community should be obliged to disclose an annual corporate governance statement as a specific and clearly identifiable section of the annual report. This statement should at least provide shareholders with easily accessible key information about the actually applied corporate governance practices, including a description of the main features of any existing risk management systems and internal controls in relation to the financial reporting process. The corporate governance statement should make clear whether the company applies any provisions on corporate governance other than those provided for in national law, regardless of whether these provisions are directly laid down in a corporate governance code to which a company is subject or in any corporate governance code, which the company may have decided to apply. Furthermore, where relevant, companies may also provide an analysis of environment and social aspects necessary for an understanding of the company's development, performance and position. There is no need to impose a separate corporate governance statement on undertakings drawing up a consolidated annual report, however, the information concerning the risk management system and the internal control system the group has should be presented.

- (8a) The various measures adopted under this Directive should not necessarily apply to the same types of companies or undertakings. Member States should be able to exempt small companies, as defined in Article 11 of Directive 78/660/EEC, from the requirements concerning related parties and off balance sheet arrangements under this Directive. Companies which already disclose information about transactions with related parties in their accounts according to international accounting standards as adopted in the European Union should not be required to disclose further information according to this Directive as the application of the international accounting standards already results in a true and fair view of such a company. The provisions in this Directive concerning the corporate governance statement should apply to all companies, including banks, insurance undertakings and issuers of bonds having their securities admitted to trading on a regulated market and which have their registered office in the Community. The provisions in this Directive concerning duties and liabilities of board members as well as sanctions should apply to all companies to which Directives 78/660/EEC, 86/635/EEC and 91/674/EEC apply and to all undertakings, which draw up consolidated accounts in accordance with Directive 83/349/EEC.
- (9) The objectives of the action to be taken are, in particular, to facilitate cross border investments and to improve EU-wide comparability and public confidence in financial statements and reports through enhanced and consistent specific disclosures. This cannot be sufficiently achieved by the Member States since national legislation differs. By amending the Accounting Directives and deepened harmonisation the objectives can be better achieved at Community level. Hence the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (10) Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC should therefore be amended accordingly.

- (11) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of the Fundamental Rights of the European Union,
- (12) Member States are encouraged, in accordance with paragraph 34 of the Interinstitutional Agreement on better law-making, to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 78/660/EEC is amended as follows:

1. In Article 43 (1), the following points (7a) and (7b) are inserted:

"(7a) the nature and business purpose of company's arrangements not included in the balance sheet and the financial impact on the company of those arrangements, provided the information setting out the risks or benefits is material and in so far as this information is of assistance in assessing the financial position of the company.

Member States may permit the companies referred to in Article 27 of Directive 78/660/EEC to limit the information to what is strictly necessary to assess the financial position of the company.

(7b) the transactions which have been entered into with related parties by the company, including the amount of such transactions, the nature of the related party relationship as well as other information about the transactions necessary for an understanding of the financial position of the company, if such transactions are material and have not been concluded under normal market conditions. Information about individual transactions may be aggregated according to their nature except when separate information is necessary for an understanding of the effects of related party transactions on the financial position of the company.

Member States may limit disclosure by companies referred to in Article 27 to at least transactions entered into directly or indirectly between the company and its major shareholders, and the company and the members of the administrative, management and supervisory bodies.

Member States may exempt transactions entered into between two or more members of a group provided that subsidiaries, which are party to the transaction, are wholly owned by such a member.

Related party has the same meaning as in international accounting standards adopted in accordance with Regulation (EC) N° 1606/2002 of the European Parliament and of the Council."

2. The following Article 46a is inserted:

“Article 46a

A company whose securities are admitted to trading on a regulated market, within the meaning of Article 4(1)(14) of Directive 2004/39/EC of the European Parliament and of the Council⁷ shall include a corporate governance statement in its annual report. That statement shall be included as a specific section of the annual report and shall contain at least the following information:

- (1) a reference to :
- a) the corporate governance code, which the company is subject to, and/or
 - b) the corporate governance code, which the company may have voluntarily decided to apply, and/or
 - c) all relevant information about the corporate governance practices applied beyond the requirements under national law.

⁷ OJ L 145, 30.4.2004, p. 1

Where points (a) and (b) above apply, the company shall also indicate where the relevant texts are publicly available, while, where point (c) applies, the company shall make its corporate governance practices publicly available;

- (2) to the extent a company, in accordance with national law, departs from a corporate governance code referred to under points (1)(a) or (b), the company shall explain from which parts of the corporate governance code it departs and the reasons for doing so. In cases where the company decided not to apply any provisions of a corporate governance code referred to under point (1)(a) or (b), it shall explain its reasons for doing so;
- (3) a description of the main features of the company's internal control and risk management systems in relation to the financial reporting process;
- (4) the information required by Article 10, paragraph 1, points (c), (d), (f), (h), and (i) of Directive 2004/25/EC of the European Parliament and of the Council ⁸;
- (5) unless the information is already fully provided in national laws or regulation, the operation of the shareholder meeting and its key powers, and a description of shareholder's rights and how they can be exercised ;
- (6) the composition and operation of the administrative, management and supervisory bodies and their committees.

Member States may permit that the information required by this Article can be set out in a separate report published together with the annual report in the manner set out in Article 47 or by means of a reference in the annual report where such document is publicly available on the company's website. In case of a separate report, the corporate governance statement may contain a reference to the annual report where the information required in point (4) is made available. Article 51 paragraph 1, second subparagraph of this Directive shall apply to the provisions of the first subparagraph, points 3 and 4. For the remaining information, the statutory auditor shall check that the corporate governance statement has been produced.

⁸ OJ L 142, 30.4.2004, p. 12

Member States may exempt companies which 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 of the European Parliament and of the Council, from the application of the provisions of the first subparagraph, points 1, 2, 5 and 6, unless such companies have issued shares which are traded in a multilateral trading facility, within the meaning of Article 4(1)(15) of Directive 2004/39/EC."

3. The following Section 10A is inserted:

“SECTION 10A

Duty and liability for the annual accounts and the annual report

Article 50b

Member States shall ensure that the members of the administrative, management or supervisory bodies of the company have collectively the duty to ensure that the annual accounts, the annual report, and, when provided separately, the corporate governance statement pursuant to Article 46a of this Directive are drawn up and published in accordance with the requirements of this Directive and, where applicable, in accordance with the international accounting standards as adopted in accordance with Regulation (EC) N° 1606/2002 of the European Parliament and of the Council. Such bodies shall act within the competences assigned to them by national law.

Article 50c

Member States shall ensure that their laws, regulations and administrative provisions on liability apply to the members of the administrative, management and supervisory bodies referred to in Article 50b of this Directive at least towards the company.”

4. The following Article 60a is inserted:

“Article 60a

"Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties and measures provided for must be effective, proportionate and dissuasive."

Article 2

Directive 83/349/EEC is amended as follows:

1. In Article 34 the following points (7a) and (7b) are inserted :

”(7a) the nature and business purpose of any arrangements not included in the consolidated balance sheet, and the financial impact of those arrangements provided the information setting out the risks or benefits is material and in so far as this information is of assistance in assessing the financial position of the undertakings included in the consolidation taken as a whole.”

“(7b) the transactions, save for intra group transactions, entered into by the parent undertaking, or by other undertakings included in the consolidation, with related parties, including the amounts of such transactions, the nature of the related party relationship as well as other information about the transactions necessary for an understanding of the financial position of the undertakings included in the consolidation taken as a whole, if such transactions are material and have not been concluded under normal market conditions. Information about individual transactions may be aggregated according to their nature except when separate information is necessary for an understanding of the effects of the related party transactions on the financial position of the undertakings included in the consolidation taken as a whole."

2. In Article 36 (2), the following point (f) is added:

“(f) In case where an undertaking has its securities admitted to trading on a regulated market, within the meaning of Article 4(1)(14) of Directive 2004/39/EC of the European Parliament and of the Council, a description of the main features of the group’s internal control and risk management systems in relation to the process for preparing consolidated accounts. In case the consolidated annual report and the annual report are presented as a single report, this information must be included in the section of the report containing the corporate governance statement as provided by Article 46a of Directive 78/660/EEC.

If a Member State permits the information required by the first subparagraph of Article 46a of Directive 78/660/EEC to be set out in a separate report published together with the annual report in the manner set out in Article 47 of that Directive, the information provided under the first subparagraph shall also form part of that separate report. Article 37 paragraph 1, second subparagraph of this Directive shall apply;”

3. The following Section 3A is inserted:

“SECTION 3A

Duty and liability for drawing up the consolidated annual accounts and the consolidated annual report

Article 36a

“Member States shall ensure that the members of the administrative, management or supervisory bodies of the undertaking drawing up the consolidated accounts and the consolidated annual report have collectively the duty to ensure that the consolidated annual accounts, the consolidated annual report, and, when provided separately, the corporate governance statement pursuant to Article 46a of Directive 78/660/EEC are drawn up and published in accordance with the requirements of this Directive and, where applicable, in accordance with the international accounting standards adopted in accordance with Regulation (EC) N° 1606/2002 of the European Parliament and of the Council. Such bodies shall act within the competences assigned to them by national law.”

Article 36b

Member States shall ensure that their laws, regulations and administrative provisions on liability apply to the members of the administrative, management and supervisory bodies referred to in Article 36a of this Directive at least towards the undertaking drawing up the consolidated accounts.”

4. In Article 41, the following paragraph 1a shall be inserted:

“1a. Related party has the same meaning as in international accounting standards adopted in accordance with (EC) Regulation N° 1606/2002 of the European Parliament and of the Council.”

5. The following Article 48 is inserted:

“Article 48

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.”

Article 2a

Directive 86/635/EEC is amended as follows:

The first sentence of Article 1(1) is replaced by the following sentence:

"Articles 2, 3, 4(1), (3) to (6), Articles 6, 7, 13, 14, 15(3) and (4), Articles 16 to 21, 29 to 35, 37 to 41, 42 first sentence, 42a to 42f, 45(1), 46(1) and (2), 46a, Articles 48 to 50, 50a, 50b, 50c, 51(1) and 51a, 56 to 59, 60a, 61 and 61a of Directive 78/660/EEC shall apply to the institutions mentioned in Article 2 of this Directive, except where this Directive provides otherwise."

Article 2b

Directive 91/674/EEC is amended as follows:

The first sentence of Article 1(1) is replaced by the following sentence:

"Articles 2, 3, 4(1), (3) to (6), Articles 6, 7, 13, 14, 15(3) and (4), Articles 16 to 21, 29 to 35, 37 to 41, 42, 42a to 42f, 43 (1), points 1 to 7b and 9 to 14, 45(1), 46(1) and (2), 46a, 48 to 50, 50a, 50b, 50c, 51(1), 51a, 56 to 59, 60a, 61 and 61a of Directive 78/660/EEC shall apply to the undertakings mentioned in Article 2 of this Directive, except where this Directive provides otherwise."

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...⁹ at the latest.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

⁹ Twenty four months from the entry into force of this Directive.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, ...

For the European Parliament

The President

...

For the Council

The President

...