



*European Economic and Social Committee*

**ECO/111**  
**Securities – Transparency**  
**regarding information**

Brussels, 10 December 2003

**OPINION**

of the European Economic and Social Committee

on the

**Proposal for a Directive of the European Parliament and of the Council on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC**

COM(2003) 138 final – 2003/0045 (COD)



On 8 April 2003 the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Economic Community, on the

*Proposal for a Directive of the European Parliament and of the Council on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC*  
COM(2003) 138 final – 2003/0045 (COD).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 26 November 2003. The rapporteur was **Mr Simon**.

At its 404<sup>th</sup> plenary session on 10 and 11 December 2003 (meeting of 10 December) the European Economic and Social Committee adopted the following opinion by 110 votes in favour, with one abstention:

## 1. **The Commission's objectives**

1.1 The proposed Directive on Transparency in publicly traded companies is one of the priority actions in the Financial Services Action Plan (FSAP), endorsed by Heads of State and Government at the Lisbon European Council in March 2000. The proposal is part of the programme launched by the European institutions to make publicly traded companies more transparent and to improve their financial and accounting reporting standards. As well as this proposal for a directive, the programme also includes the European Regulation obliging listed companies to apply the International Accounting Standards (IAS/IFRS) from 1 January 2005; the Directive on Market Abuse, which introduces new, more demanding requirements for the publication of inside information and addresses the issue of price manipulation; and the Prospectus Directive which provides for a European passport and also at the same time strengthens disclosure requirements in cases of public issue and offers of securities or requests for the admission of securities to trading on a regulated market.

1.2 The proposed directive under discussion here deals with periodic disclosure by issuers and the periodic provision of information on changes to major holdings in companies. Its declared aim is to improve investor protection and boost market efficiency. To that end, it also seeks to ensure greater openness to the world of international finance in terms of use of languages and the more widespread use of modern technologies to disseminate information. Lastly, the proposal, although drawn up from 2000 onwards, seeks to offer a response to US laws and regulations introduced following the scandals that shook the financial markets two years ago, including the Sarbanes-Oxley Act, in order to promote European capital markets.

1.3 As for the timetable involved, the Council is seeking adoption under the co-decision procedure in April 2004.

## 2. Key provisions of the draft directive

2.1 The first thing to note is that the proposed directive is based on the recommendations of the Lamfalussy report, which advocates a four-level approach to regulation using the co-decision procedure. Level 1, which is the subject of this draft text, should focus on essential principles and options. The Commission, assisted by a regulatory committee, the European Securities Committee, then adopts technical implementing rules (level 2). Coordinated implementation of these measures is a matter for the Committee of European Securities Regulators (level 3) and enforcement of Community law by the European Commission is also being strengthened (level 4).

2.2 Thus, the proposed directive contains only the essential provisions and, where appropriate, refers detailed questions of enforcement to the Commission's implementation measures.

2.3 *It is important to note that, although the proposed procedure allows regulators to be responsive and flexible, it does mean, as a result, that the texts have to provide for a periodic review of the effective convergence of financial market regulation in the Member States.*

2.4 The main points of the proposed directive are as follows:

2.4.1 *Scope:* The proposed directive covers issuers whose securities are already admitted to trading on a regulated market situated or operating within a Member State (and no longer only issuers of securities admitted to official listing on such markets).

2.4.2 *Deadline for the publication of the annual report:* The companies concerned must disclose their annual report at the latest three months after the end of the financial year.

2.4.3 *Publication of a half-yearly report:* The proposed directive requires issuers to disclose a detailed half-yearly report for the first six months of the year, at the latest two months after the end of the relevant period; the proposal also specifies the content of that report.

2.4.4 *Publication of quarterly information:* Issuers whose shares are admitted to trading on a regulated market must also disclose, for the first and third quarter, their consolidated net turnover figures, and the profit or loss before or after deduction of tax, together with an explanatory statement. Such issuers may, if they choose, also provide an indication of the likely future development of their activities at least for the remaining financial year. This information must be published at the latest two months after the end of the quarter concerned.

2.4.5 *Notification of changes to major holdings:* The proposed directive increases the number of thresholds above or below which security holders are obliged to notify the issuer of the proportion of voting rights and capital they hold as a result of the threshold having been crossed, and the issuer is obliged to disclose that information.

2.4.6 *Dissemination of information to security holders by electronic means:* Home Member States must allow issuers the use of electronic means to convey information to shareholders, provided, in particular, that such a decision is taken in a general meeting.

2.4.7 *Simplification of reporting requirements in terms of number of languages to be used:* Where securities are admitted to trading on a regulated market both in the home Member State and in one or more host Member States, information must be disclosed in a language accepted by the competent authority in the home Member State and, depending on the choice of the issuer, either in a language accepted by the competent authority in the host Member State(s) or in a language customary in the sphere of international finance. A language customary in the sphere of international finance may also be selected by the issuer in all cases where the denomination per unit of the issued securities amounts to at least €50,000, and by security holders when notifying any breach of the thresholds.

2.4.8 *Timely access to regulated information:* Under the proposed directive, the home Member State must require issuers to use media that ensure the dissemination of regulated information throughout its national territory and abroad. A host Member State may not impose any requirements regarding the use of any particular media, other than the issuer's Internet website.

2.5 Moreover, it must be borne in mind that the proposed directive seeks not maximum, but minimum harmonisation. A home Member State may impose additional reporting requirements on issuers, but a host Member State may not. *We feel that this is one stage in the process but the goal must continue to be maximum harmonisation. Minimum harmonisation has some serious drawbacks in its biased treatment of issuers and investors.* So that the idea does not remain mere wishful thinking, the Commission should, within three years at the most, submit an action plan for achieving this objective.

### **3. Issues raised by the proposed directive**

3.1 The proposal for a directive is by and large a technical document and the European Economic and Social Committee endorses its objectives. Improving the financial and accounting transparency of publicly traded companies is a key element for confidence in financial market operations. Moreover, greater harmonisation of obligations incumbent on companies in this regard is vital for the integration of European financial markets, which is a goal of the Financial Services Action Plan. However, the proposed directive does raise a number of issues, some on matters of principle, other of a technical nature.

3.1.1 *Publication of quarterly information (Article 6):* This is a key issue of principle for the functioning of the financial markets. The Commission feels that some degree of quarterly financial and accounting disclosure is essential so that investors are able to make appropriate choices and have equal access to information. Moreover, the required information would be limited since it would not include an income statement and a balance sheet but simply data on turnover and profit or

loss before or after deduction of tax, thereby significantly containing the costs involved. What is more, the Commission does not feel that the disclosure of quarterly profit and loss information would *a priori* increase volatility on the financial markets.

3.1.1.1 This issue is, however, the subject of genuine debate. Companies, and especially the UNICE, are strongly opposed to the mandatory publication of quarterly information. Some institutional investors have stated that they had not requested information of this kind. On the whole, investors would prefer to see improvements in the quality rather than an increase in the quantity of the tremendous flow of information they already have to deal with.

3.1.1.2 The mandatory publication of quarterly information would also have a genuine cost impact on issuers, not least SMEs. Above all, the widespread practice of quarterly profit and loss reporting is liable to encourage investors to adopt a more short-term approach. This might increase market volatility and would also hamper the application of any long-term strategy by companies required to justify their results every three months. Such reporting would all too frequently divert managers from their operational responsibilities in order to deal with communication matters, and would, as a result, act as a disincentive for SMEs to have recourse to the market. That would run counter to one of the goals of the Lamfalussy plan.

3.1.1.3 In the light of all these objections, it would be prudent to adopt a gradual approach, with an obligation only to publish information on trends in turnover and activities for the first and third quarters. The Commission would review the situation after three years.

3.1.2 *Monitoring information by the regulatory authorities (Article 20)*: There are no plans at this stage to harmonise the role of home Member States' regulatory authorities with regard to the reporting requirements under the proposed directive. The regulatory authorities merely have to ensure that the required information is disclosed within the appropriate timeframes. The extent of regulatory authorities' input varies from Member State to Member State; some regulatory authorities monitor the consistency or even the accuracy of the information that has to be disclosed. As a result, there may be a considerable degree of unequal treatment of issuers and investors between Member States.

3.1.3 *Consistency of the definition of the home Member State with the existing definition in the proposed Prospectus Directive (Article 2)<sup>1</sup>*: Establishing the home Member State is important both for issuers and investors, since it determines the rules applicable to the issuer.

3.1.3.1 The definition adopted in this proposed Directive on Transparency is not wholly consistent with the definition adopted in Article 2 of the Prospectus Directive. The threshold for allowing debt securities issuers to select their home Member State is set at a denomination of €5,000 in the current proposal, but at €1,000 in the Prospectus Directive. For the rules to make sense,

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<sup>1</sup> Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC – 2001/0117 (COD), adopted on 15 July 2003

however, the threshold in the Transparency Directive should be aligned with the threshold in the Prospectus Directive.

3.1.4 Inclusion of derivatives in the notification obligation (Art. 2): *Including derivative securities (warrants, convertible or exchangeable bonds) in the system for reporting the proportion of voting rights and capital leads to difficulties in calculating the proportion. In the case of warrants, a disclosure obligation is not possible if the rights have not yet been exercised. In the case of convertible bonds, this leads to difficulties if the related rights have not yet been exercised and hence the underlying shares do not yet exist. In this case it will be (a) impossible to determine a proportion for the relevant instruments and (b) unclear to what extent such shares which will only be issued in the future are to be taken into consideration in determining the total capital and the total voting rights and hence the proportion of voting rights and capital held by other parties subject to the notification obligation. Therefore the inclusion of derivatives, whatever their nature, in the notification obligation for major shareholdings is not compatible with the system and should be deleted.*

3.1.5 *Deadline for the publication of the annual financial report (Article 4):* Under Article 4, the issuer must disclose its annual financial report to the public at the latest three months after the end of the financial year. This deadline may prove problematic given the requirement to publish the full audit report alongside the annual report. This means publishing the accounts as they have to be presented to the general shareholder meeting. Many companies are unable to do that within three months.

3.1.6 Deadline for the publication of the half-yearly report and the mandatory nature, or otherwise, of the audit of that report (Article 5): Under Article 5, a half-yearly report must be drawn up in line with international standards (IAS 34) within two months of the end of the relevant six-month period. However, this deadline is incompatible with an audit of the half-yearly accounts for issuers who publish audited accounts. For the record, the IASB recommends such a deadline only for non-audited accounts. Moreover, Article 5(5) specifies that an audit of the report might be made mandatory under the committee procedure. Home Member States may also require an audit. Such a potentially onerous obligation should not be subject to the committee procedure.

3.1.6.1 Furthermore, as regards the content of the half-yearly report, a more precise definition would be required of the term "management report" which does not mean the same thing in all Member States. In practice, it would be advisable to require an update of the financial data contained in the last management report in order to avoid making the obligations for companies excessively cumbersome.

3.1.7 *Notification of the acquisition or disposal of major holdings (Article 9):* In practice, notification of this kind may prove problematic for certain types of players, most notably institutional investors. One issue, for instance, is the level, within a particular group, at which the holdings of the

various asset management subsidiaries should be consolidated – which, moreover, raises questions about the "Chinese walls" that these players are supposed to put in place.

3.1.8 *Additional information to the public (Article 12):* Under this article, the issuer is obliged to inform the public without delay of any changes in the rights of security holders and any new loan issues. In the interest of legal certainty for issuers, it would be a good idea to define what exactly is meant by "without delay", given that such questions are subject to a general assembly decision. Whatever the timeframe, it may only start following the decision of the competent body.

3.1.9 *Timely access to regulated information (Article 17):* This is a key article highlighting the importance of timely and efficient access to information at both national and international level. However, under Article 17(2), the host Member State may require issuers "to alert any interested person, without delay and free of charge, to any new disclosure or any change to regulated information which has already been published". Such a requirement is too loose and, hence, goes too far. For instance, even if it were done by Internet, the obligation to alert any person on request could make it necessary for companies to keep inordinately large, and costly, data files. That would also open the door to acts of malice that might jam up the system.

3.1.10 *Sanctions (Article 24):* Under Article 24, Member States are required to impose administrative sanctions in the case of non-compliance with the provisions of this directive, without prejudice to their right to impose penal sanctions. On the face of it, however, this raises a fundamental difficulty in respect of the European Convention on Human Rights, since, given the similar nature of administrative and penal sanctions, applying them both together violates the *ne bis in idem* principle.

## PROPOSALS

<b>Chapter I – Article 2 (1)(e)(iv)</b>	
Inclusion of derivative securities in the notification obligation	
1(e)(iv) derivative securities entitling a natural person or legal entity to acquire, on its initiative, or to dispose of, on the sole initiative of a third party, shares to which voting rights with the issuer are attached;	1(e)(iv) <b>Deleted</b>
<b>Chapter I - Article 2.1</b>	
Harmonisation of the definitions of <i>home Member State</i> between the Prospectus Directive and the current proposed directive	
1. i) "home Member State" means  i) in the case of an issuer of debt securities the denomination of which does not exceed €5,000 or an issuer of shares:	i) in the case of an issuer of debt securities the denomination of which does not exceed <b>€1,000</b> or an issuer of shares:

<ul style="list-style-type: none"> <li>- where the issuer is incorporated in the Community, the Member State in which it has its registered office;</li> <li>- where the issuer is incorporated in a third country, the Member State in which it is required to file the annual information with the competent authority in accordance with Article 10 of the Prospectus Directive;</li> </ul> <p>ii) for any issuer not covered by i), the Member State chosen by the issuer from among those Member States which have admitted its securities to trading on a regulated market on their territory, provided that those securities continue to be admitted to trading on that regulated market for three financial years, that being the period of validity of the issuer's choice;</p>	<ul style="list-style-type: none"> <li>- where the issuer is incorporated in the Community, the Member State in which it has its registered office;</li> <li>- where the issuer is incorporated in a third country, the Member State in which it is required to file the annual information with the competent authority in accordance with Article 10 of the Prospectus Directive;</li> </ul> <p>ii) <b>Unchanged</b></p>
<i>Chapter II – Article 4</i>	
Extending the publication deadline for the annual financial report to four months	
<p>1. The issuer shall disclose its annual financial report to the public at the latest three months after the end of each financial year and shall ensure that it remains publicly available.</p>	<p>1. The issuer shall disclose its annual financial report to the public at the latest <b>four</b> months after the end of each financial year and shall ensure that it remains publicly available.</p>
<i>Chapter II – Article 5</i>	
Extending the publication deadline for the half-yearly annual report and clarifying the information to be updated in the management report	
<p>1. The issuer shall disclose to the public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest two months thereafter. The issuer shall ensure that the half-yearly report remains available to the public.</p> <p>2. The half-yearly financial report shall comprise:</p> <p>a) the condensed set of financial statements;</p>	<p>1. The issuer shall disclose to the public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest <b>three</b> months thereafter. The issuer shall ensure that the half-yearly report remains available to the public.</p> <p>a) <b>Unchanged</b></p>



<p>b) an update of the last management report as provided for in Article 4 (5);</p> <p>c) statements made by the persons responsible within the issuer, whose names and functions shall be clearly indicated, to the effect that the information contained in the half-yearly financial report is, to the best of their knowledge, in accordance with the facts and that the report makes no omission likely to affect its import.</p>	<p>b) an update of the <b>financial data contained in</b> the last management report as provided for in Article 4(5);</p> <p>c) <b>Unchanged</b></p>
<p><i>Chapter II – Article 6</i></p>	
<p>Limiting the mandatory quarterly publication to net turnover</p>	
<p>1. An issuer whose shares are admitted to trading on a regulated market shall disclose to the public quarterly financial information covering the first and third quarter, respectively, of the financial year, as soon as possible after the end of the relevant three-month period, but at the latest two months thereafter. The same issuer shall ensure that the quarterly financial information remains available to the public.</p> <p>2. Quarterly financial information shall contain at least:</p> <p>a) consolidated figures, presented in table form, indicating, for the relevant three-month period, the net turnover, and the profit or loss before or after deduction of tax; and</p> <p>b) an explanatory statement relating to the issuer’s activities and profits and losses during the relevant three-month period; and</p> <p>c) if the issuer so chooses, an indication of the likely future development of the issuer and its subsidiaries at least for the remaining financial year, including any significant uncertainties and risks which may affect that development.</p> <p>3. Where the quarterly financial information, or any quarterly financial report, has been</p>	<p>1. An issuer whose shares are admitted to trading on a regulated market shall disclose to the public at least its net turnover for the first and third quarters of the financial year <b>as soon as possible after the end of the relevant three-month period, but at the latest two months thereafter.</b></p> <p>a) <b>Deleted</b></p> <p>b) <b>An explanatory, statement relating to activities;</b></p> <p>c) <b>If the issuer so chooses, an indication of the likely future development of the issuer and its subsidiaries at least for the remaining financial year.</b></p> <p>3. <b>Deleted</b></p>

<p>audited, the audit report, and any qualifications thereto or references to any matters by way of emphasis to which the auditors draw attention without qualifying their report, shall be reproduced in full. The same shall apply in the case of an auditors' review. If the quarterly financial information has not been audited or reviewed by auditors, the issuer shall make a statement to that effect.</p> <p>4. The Commission shall, in accordance with the procedure referred to in Article 23(2), adopt implementing measures, in order to take account of technical developments on financial markets and to ensure the uniform application of paragraphs 1, 2 and 3 of this Article.</p> <p>The Commission shall, in particular:</p> <p>a) specify the period of time throughout which published quarterly financial information is to remain available to the public, as well as any other conditions to be complied with by the issuer in that connection</p> <p>b) clarify, if necessary, the terms "net turnover" and "profit or loss before or after deduction of tax" in relation to specific types of issuers, such as credit institutions;</p> <p>c) specify the information to be given in the explanatory statement, as referred to in paragraph 2(b), and in the indication of the issuer's likely future development, as referred to in paragraph 2(c);</p> <p>d) clarify the nature of the auditors' review, referred to in paragraph 3.</p>	<p>4. <b>Unchanged</b></p> <p>a) <b>Deleted</b></p> <p>b) <b>clarify, if necessary, the term "net turnover" in relation to specific types of issuers, such as credit institutions;</b></p> <p>c) <b>Unchanged</b></p> <p>d) <b>Deleted</b></p>
<p><i>Chapter IV- Article 17</i></p>	
<p>Clarifying the provisions for the dissemination of regulated information by the issuer</p>	
<p>2. A host Member State may not impose on issuers any requirements regarding the media to be used for the dissemination of regulated</p>	<p>2. <b>Unchanged</b></p>

<p>information. However, a host Member State may require issuers:</p> <p>a) to publish regulated information on their Internet sites, in which case the host Member State shall keep the public informed as regards the Internet sites of issuers; and</p> <p>b) to alert any interested person, without delay and free of charge, to any new disclosure or any change to regulated information which has already been published, such communication to be effected by electronic means or, upon request, on paper.</p>	<p>a) <b>Unchanged</b></p> <p>b) to alert <b>any visitor to these sites</b>, without delay, to any new disclosure or any change to regulated information which has already been published.</p>
<p><b>Chapter V – Article 20</b></p>	
<p>Minimum harmonisation of checks by the competent authorities</p>	
<p>1, 2, 3</p> <p>4. Each competent authority shall have all the rights necessary for the performance of its functions. It shall at least be empowered to:</p> <p>(a), (b), (c), (d), (e), (f), (g) and (h)</p> <p>5 and 6</p>	<p>1, 2 + 3 <b>Unchanged</b></p> <p>4. <b>Each competent authority shall have all the rights necessary for the performance of its functions. It shall ensure that the information provided by issuers under this directive is consistent and intelligible.</b> It shall at least be empowered to:</p> <p>(a), (b), (c), (d), (e), (f), (g) and (h): <b>unchanged</b></p> <p>5 and 6: <b>Unchanged</b></p>

Brussels, 10 December 2003.

The President  
of the  
European Economic and Social Committee

The Secretary-General  
of the  
European Economic and Social Committee

**Roger Briesch**

**Patrick Venturini**