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from: General Secretariat
to: Working Party on Company Law
on: 17 September 2013

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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 as regards disclosure of non-financial and diversity information by certain large companies and groups
- Presidency compromise text

Delegations will find in the Annex I a Steering Note and in the Annex II a revised Presidency compromise text. Changes compared to the original European Commission proposal text are underlined.

Presidency Steering Note

**Changes from the original European Commission proposal are marked out as bold
underlined**

Summary of the technical amendments

For the purposes of integrating the non-financial reporting proposal into the new accounting directive 2013/34/EU, below is a list of suggested technical amendments to the original Commission proposal:

- adjustment of terminology to the one used in the new Accounting Directive:
 - company → undertaking,
 - annual report → management report,
 - total assets → balance sheet total,
 - using the definition of “*large undertaking*” instead of referring to it by threshold numbers;
- adjustment of recitals on audit concerning the change of auditing requirements of the management report already included in Directive 2013/34/EU;
- adjustment of provisions on diversity addressing that listed undertakings below 250 employees are outside the scope (in contrast with the general public-interest entity regime; i.e. deletion of old Article 53a of Directive 78/660/EEC as the new Article 40 of Directive 2013/34/EU comes in);
- adjustment of provisions on consolidated non-financial reporting in the consolidated management report in order to align them with the general approach of reference to individual reports used in the new Accounting Directive;
- references to the old Accounting Directives are replaced by ones to the new Accounting Directive;
- references to Articles and paragraphs within the proposal are updated.

CBCR on taxation

Recital 9a

Article 18. Additional disclosures for large undertakings and public-interest entities

On 22 May 2013 the European Council published its conclusions where, in order to fight tax evasion and tax fraud, it states that “the proposal amending the Directives on disclosure of non-financial and diversity information by large companies and groups will be examined notably with a view to ensuring country-by-country reporting by large companies and groups”.

It seems that the source for this conclusion is the opinion, that increased transparency regarding the activities of large companies and groups, and in particular regarding profits made, taxes on profit paid and subsidies received is necessary in order to protect revenues and ensure confidence of citizens in the fairness and effectiveness of tax system. A similar provision is already in force in Article 89 of Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV), where mandatory reporting and, therefore, the disclosure of number of employees, turnover, taxes paid, pre-tax profit for all sectors is already required, is considered as an important element of the corporate social responsibility of companies to stakeholders and society.

At the Company Law Working Party meeting on 12 July 2012, delegations expressed divergent views as to how the European Council's conclusions of 22 May 2012 on country-by-country requirements should be interpreted and taken into account.

The Presidency is of the view that a separate discussion is necessary on this issue at the Working Party meeting on 17 September 2013.

In order to facilitate the discussion, the Presidency proposes an amendment to Article 18 and introduction of Recital 9a of Directive 2013/34/EU. The proposed amendment envisages extending country-by-country reporting requirements to large European companies and groups, whose average number of employees during the financial year exceeds 500, in order to strengthen corporate transparency beyond the financial sectors. The proposed text was influenced by the requirements set out in the *Capital Requirements Directive* (CRD IV) for banks.

Several delegations expressed a view that such requirements should only be discussed on the basis of a proposal from the Commission following an Impact Assessment. The Presidency asked the Commission to prepare a non-paper on the proposed amendment and the possible impact of its implementation. The Commission is examining the possibility to prepare it. In case this non-paper is provided by the Commission before the Company Law WP meeting on 17 September 2013, it will be shared with all delegations.

The Presidency also received requests from Member States either to introduce higher thresholds to target the largest European companies or to limit this type of disclosure to the largest listed undertakings. Therefore, the scope of this potential additional requirement also needs to be discussed.

Article 19. Contents of the management report

The Presidency received a proposal from couple of Member States to clarify the “comply or explain” approach by making it focus, at least implicitly, on the “relevance/materiality” of the SCR policy applied. The Commission proposal requires companies to “explain” why they do not have a specific policy even when this may not be at all relevant for their business. Such an implicit requirement might result in a “tick the box” exercise with limited impact on real undertaking behaviour. For that reason, the Presidency proposes to amend this approach by adding that this requirement is applied “to the extent necessary for an understanding of the undertaking’s development, performance or position.”

According to the some comments received, the Commission proposal does not appear to have a “safe harbour provision” in its text. These allow directors to make longer term statements that, provided they are not deliberately misleading or knowingly reckless, will not hold them liable for, should they prove to be wrong in the future. With the objective to encourage companies to look at the long term as this reflects on the strategy of the business, the Presidency suggests in the end of Article 19 including the following provision:

‘6. The information about impending developments or matters in the course of negotiation may not be disclosed provided that the disclosure of such information would, in the opinion of the members of the administrative, management, and supervisory bodies, be seriously prejudicial to the interests of the undertaking.’

Pursuant to the proposal, the statement on non-financial information should be included in the management report. According to the information received, a lot of companies already make special SCR reports. To a certain point, the proposal takes this into account (Article 19 paragraph 4). For reasons of flexibility and limitation of administrative burdens, it should be possible for companies to choose to supply the non-financial information in a separate report or on the website of the undertaking, with a reference in the annual report to the non-financial information. A similar option already exists with regard to the corporate governance statement (Article 20 of the Directive 2013/34/EU).

Without prejudice to the flexible approach to reporting, it seems that there is a difference between allowing the use of different internationally recognized frameworks for reporting versus national frameworks that might be very different in scope and nature. It is unclear what are the consequences of allowing undertakings to use national frameworks if they are not clearly defined and not consistent with international frameworks, or the requirements proposed, the potential downside being lack of legitimacy and a potentially diffuse and uneven level-playing field for companies in Europe and globally. Thus, both in terms of strengthening the sustainability and competitiveness of European undertakings, it seems relevant to consider the potential pros and cons in this regard, and to consider having some requirements for using national frameworks.

For the sake of the arguments mentioned above, the Presidency proposes to amend the Article 19(4) in order to increase the flexibility of disclosure, defining national framework in the Recital 7:

‘4. Where an undertaking prepares a comprehensive report corresponding to the same financial year relying on national, EU-based or international frameworks and covering the information provided for in paragraph 1a, the undertaking shall be exempted from the obligation to prepare the non-financial statement set out in paragraph 1a, provided that such comprehensive report:

(a) is published together with the management report in the manner set out in Article 30; or

(b) is publicly available on the undertaking's website, to which reference is made in the management report.'

One member state wondered whether it is necessary to put the non-financial information in a specific non-financial statement and if it would not be sufficient to supply the non-financial information in the management or a separate report without such title. The Presidency does not propose any amendments related to this request as that could hinder the application of the above mentioned disclosure provisions.

Article 29. The consolidated management report

Similar amendments as in Article 19.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Directive 2013/34/EU as regards disclosure of non-financial and diversity
information by certain large undertakings and groups

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 50(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled ‘Single Market Act Twelve levers to boost growth and strengthen confidence “Working together to create new growth”’³, adopted on 13 April 2011, the Commission identifies the need to improve the transparency of the social and environmental information provided by undertakings in all sectors, in order to ensure a level playing field.

¹ OJ C , , p. .

² OJ C , , p. .

³ COM(2011)206 final of 13 April 2011.

- (2) The necessity to improve undertakings' disclosure of social and environmental information, by presenting a legislative proposal in this field, was reiterated in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled "A renewed EU strategy 2011-14 for Corporate Social Responsibility"⁴ adopted on 25 October 2011.
- (3) The European Parliament has, in its resolutions of 6 February 2013 on, respectively, "Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth"⁵ and "Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery"⁶, acknowledged the importance of businesses divulging information on sustainability such as social and environmental factors, with a view to identifying sustainability risks and increasing investor and consumer trust, and called the Commission to bring forward a proposal on non-financial disclosure by undertakings.
- (4) The coordination of national provisions concerning the disclosure of non-financial information in respect of large undertakings with limited liability is of importance for the interests of undertakings, shareholders and other stakeholders alike. Coordination is necessary in those fields because most of these undertakings operate in more than one Member State.
- (5) It is also necessary to establish a certain minimum legal requirement as regards the extent of the information that should be made available to the public by undertakings across the Union. Management reports should give a fair and comprehensive view of an undertaking's policies, results, and risks.

⁴ COM(2011)681 final of 25 October 2011.

⁵ Report on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth (2012/2098(INI)); Committee on Legal Affairs. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0017+0+DOC+PDF+V0//EN&language=EN>

⁶ Report on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery (2012/2097(INI)); Committee on Employment and Social Affairs. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0023+0+DOC+PDF+V0//EN&language=EN>

- (6) In order to enhance consistency and comparability of non-financial information disclosed throughout the Union, undertakings should be required to include in their management report a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Such statement should include a description of the policies, results, and the risks related to those matters.
- (7) In providing this information, undertakings may rely on requirements in national frameworks, provided that they are based on internationally accepted principles, EU-based frameworks such as the Eco-Management and Audit Scheme (EMAS), and 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 Organisation for Standardisation (ISO) 26000, the International Labour Organization (ILO) Tripartite Declaration of principles concerning multinational enterprises and social policy, [...] Global Reporting Initiative or other recognised international frameworks.
- (8) Paragraph 47 of the final declaration of the United Nations RIO+20 conference, “The Future We Want”⁷, recognises the importance of corporate sustainability reporting and encourages undertakings, where appropriate, to consider integrating sustainability information into their reporting cycle. It also encourages industry, interested governments and relevant stakeholders with the support of the United Nations system, as appropriate, to develop models for best practice and facilitate action for the integration of financial and non-financial information, taking into account experiences from already existing frameworks.
- (9) Investors’ access to non-financial information is a step towards reaching the milestone of having in place by 2020 market and policy incentives rewarding business investments in efficiency under the Roadmap to a Resource Efficient Europe⁸.

⁷ United Nations, “The Future We Want”, Outcome Document of the United Nations Conference on Sustainable Development RIO+20, A/CONF.216/L.1

⁸ COM(2011) 571 final of 20 September 2011

- (9a) In its conclusions of 22 May 2013, the European Council has called for rapid progress in the area of tax evasion and tax fraud and decided, amongst others, that country-by-country reporting by large companies and groups should be ensured. Increased transparency regarding the activities of large companies and groups, and in particular regarding profits made, taxes on profit paid and subsidies received, is necessary in order to protect revenues and ensure confidence of citizens in the fairness and effectiveness of tax system and trust of EU citizens in companies. In order to ensure a level playing field, these provisions should also apply to large groups where the parent undertaking is not governed by the laws of a Member State, but has affiliated undertakings which are governed by the law of a Member State. Mandatory reporting in this area can therefore be seen as an important element of the corporate social responsibility of undertakings and groups.
- (10) The European Council of 24 and 25 March 2011 called for the overall regulatory burden, in particular for small and medium-sized enterprises (“SMEs”), to be reduced at both European and national levels and suggested measures to increase productivity while the Europe 2020 Strategy for smart, sustainable and inclusive growth aims to improve the business environment for SMEs and to promote their internationalisation. Thus, according to the “think small first” principle, the disclosure requirements under Directive 2013/34/EU should only apply to certain large undertakings and groups.
- (11) The scope of these non-financial disclosure requirements should be defined by reference to the average number of employees, balance sheet total and net turnover. SMEs should be exempted from additional requirements, and the obligation to disclose a non-financial statement in the management report should only apply to those large undertakings and groups, whose average number of employees exceeds 500.
- (12) Some of the undertakings and groups falling under the scope of Directive 2013/34/EU already prepare non-financial reports on a voluntary basis. Those undertakings should not be subject to the obligation to provide a non-financial statement in the management report, provided that the report corresponds to the same financial year, covers at least the same content required by this Directive, [...] is published as separate report together with the management report or on the undertaking’s webpage.

- (13) Many of the undertakings which fall under the scope of Directive 2013/34/EU are members of groups of undertakings. Consolidated management reports should be drawn up so that the information concerning such groups of undertakings may be conveyed to members and third parties. National law governing consolidated management reports should therefore be coordinated in order to achieve the objectives of comparability and consistency of the information which undertakings should publish within the Union.
- (14) As required by Article 34 of Directive 2013/34/EU, the audit report of the statutory auditors shall also contain an opinion concerning the consistency [...] of the management report, including non-financial information contained. in the annual report, with the financial statements for the same financial year.
- (15) Diversity of competences and views of the members of administrative, management and supervisory bodies of undertakings facilitates a good understanding of the business organisation and affairs. It enables members of these bodies to exercise a constructive challenge of the management decisions and to be more open to innovative ideas, addressing the similarity of views of members, the “group-think” phenomenon. It contributes thus to effective oversight of the management and a successful governance of the undertaking. It would therefore be important to enhance transparency regarding the diversity policy undertakings have in place. This would inform the market of corporate governance practices and thus put indirect pressure on undertakings to have more diversified boards.
- (16) The obligation to disclose their diversity policies for their administrative, management and supervisory bodies with regard to aspects such as age, gender, geographical diversity, educational and professional background should only apply to large listed undertakings. Therefore small and medium-sized undertakings [...] should not be covered to by this obligation. Disclosure of the diversity policy should be part of the corporate governance statement, as laid down by Article 20 of Directive 2013/34/EU. Undertakings not having such a diversity policy should not be obliged to put one in place, but they should clearly explain why this is the case.

- (17) Since the objective of this Directive, namely to increase the relevance, consistency and comparability of information disclosed by undertakings across the Union, cannot be sufficiently achieved by the Member States, and can therefore by reason of its effect be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve the pursued objective.
- (18) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the freedom to conduct a business, respect for private life and the protection of personal data. This Directive has to be implemented in accordance with these rights and principles.
- (19) Directive 2013/34/EU should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Amendments to Directive 2013/34/EU

Directive 2013/34/EU is amended as follows:

1. Article 18 is amended as follows:

(a) The new paragraph 2a after paragraph 2 is added:

‘2a. In the notes to the financial statements, large undertaking, whose average number of employees during the financial year exceeds 500, shall disclose, specifying by Member State and by third country in which it has an establishment, the following information on a consolidated basis for the financial year :

a) name(s), nature of activities and geographical location;

b) turnover;

c) number of employees on a full time equivalent basis;

d) profit or loss before tax;

e) tax on profit or loss;

f) public subsidies received.

(b) In paragraph 3 after the words “provide that point (b) of paragraph 1” replace the word “is” with the words “and paragraph 2a are”.

2. Article 19 is amended as follows:

(a) Paragraph 1 is replaced by the following:

‘1. The management report shall include a fair review of the development and performance of the undertaking’s business and of its position, together with a description of the principal risks and uncertainties that it faces.

The review shall be a balanced and comprehensive analysis of the development and performance of the undertaking’s business and of its position, consistent with the size and complexity of the business.

(b) The following paragraphs 1a to 1c are added:

1a. For large undertakings, whose average number of employees during the financial year exceeds 500 [...], and to the extent necessary for an understanding of the undertaking's development, performance or position, the review shall 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:

- (a) a description of the policy pursued by the undertaking in relation to these matters;
- (b) the results of these policies;
- (c) the risks related to these matters and how the undertaking manages those risks.

Where the undertaking does not pursue policies in relation to one or more of these matters, the review shall provide an explanation for not doing so.

In providing the information required by the first subparagraph, the undertaking may rely on national, EU-based or international frameworks, and if so, the undertaking shall specify which frameworks it has relied upon.

1b. To the extent necessary for an understanding of the undertaking's development, performance or position, the analysis referred to in paragraph 1 shall include both financial and non-financial key performance indicators relevant to the particular business.

1c. In providing the analysis referred to in paragraph 1, the management report shall, where appropriate, include references to and additional explanations of amounts reported in the annual financial statements.'

(c) Paragraph 4 is replaced by the following:

‘4. Where an undertaking prepares a comprehensive report corresponding to the same financial year relying on national law, EU-based or international frameworks and covering the information provided for in paragraph 1a, the undertaking shall be exempted from the obligation to prepare the non-financial statement set out in paragraph 1a, provided that such comprehensive report:

(a) is published together with the management report in the manner set out in Article 30; or

(b) is publicly available on the undertaking’s website, to which reference is made in the management report.’

(d) The following paragraph 5 is added:

‘5. An undertaking, which is a subsidiary undertaking, shall be exempted from the obligations set out in paragraph 1a, if the undertaking and its subsidiary undertakings are included in the consolidated financial statements and consolidated management report of another undertaking and that consolidated management report is drawn up in accordance with Article 29.’

(e) The following paragraph 6 is added:

‘6. The information about impending developments or matters in the course of negotiation may not be disclosed provided that the disclosure of such information would, in the opinion of the members of the administrative, management, and supervisory bodies, be seriously prejudicial to the interests of the undertaking.’

3. Article 20 is amended as follows:

- (a) In paragraph 1, the following point (g) is added:
'(g) a description of the undertaking'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 undertaking has no such policy, the statement shall contain a clear and reasoned explanation as to why this is the case.'

- (b) Paragraph 3 is replaced by the following:

'3. The statutory auditor or audit firm shall express an opinion in accordance with the second subparagraph of Article 34(1) regarding information prepared under points (c) and (d) of paragraph 1 of this Article and shall check that the information referred to in points (a), (b), (e), (f) and (g) of paragraph 1 of this Article has been provided.'

- (c) The following paragraph 5 is added:

'5. Notwithstanding Article 40, point (g) of paragraph 1 shall not apply to small and medium-sized undertakings.'

[...]

4. Article 29 is amended as follows:

- (a) The following paragraph 1a is added:

'1a. For the purposes of paragraph 1 of this Article, the review of parent undertakings of a large group, whose average number of employees during the financial year exceeds 500 [...], shall also include, to the extent necessary for an understanding of the group's development, performance or position, 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:

- (a) a description of the policy pursued by the group in relation to these matters;
- (b) the results of these policies;
- (c) the risks related to these matters and how the group manages those risks.

Where the group does not pursue policies in relation to one or more of these matters, the review shall provide an explanation for not doing so.

In providing the information set out in the first subparagraph, the parent undertaking may rely on national, EU-based or international frameworks, and if so, the parent undertaking shall specify which frameworks it has relied upon.’

(b) The following paragraphs 4, 5 and 6 are added:

‘4. For the purposes of paragraph 1 of this Article, where a parent undertaking prepares a comprehensive report corresponding to the same financial year and referring to the whole group, relying on national, EU-based or international frameworks and covering the information provided for in paragraph 1a, the parent undertaking shall be exempt from the obligation to prepare the non-financial statement set out in paragraph 1a, provided that such comprehensive report:

(a) is published together with the consolidated management report in the manner set out in Article 30; or

(b) is publicly available on the undertaking’s website, to which reference is made in the consolidated management report.’

5. For the purposes of paragraph 1 of this Article, a parent undertaking which is also a subsidiary undertaking shall be exempted from the obligations set out in [...] paragraph 1a, if the exempted undertaking and its subsidiaries are included in the consolidated financial statements and consolidated management report of another undertaking and that consolidated management report is drawn up in accordance with this Article.

6. The information about impending developments or matters in the course of negotiation may not be disclosed provided that the disclosure of such information would, in the opinion of the members of the administrative, management, and supervisory bodies, be seriously prejudicial to the interests of the undertaking.’

Article 2
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [...] ⁹ at the latest. They shall forthwith communicate to the Commission the text of those provisions.

Member States may provide that the provisions referred to in the first subparagraph shall first apply to undertakings governed by the law of a Member State whose transferable securities are admitted to trading on a regulated market of any Member State within the meaning of point 14 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments for the financial year starting on 1 January 201_ ¹⁰, and to all other undertakings within the scope of Article 1 for the financial year starting on 1 January 201_ ¹¹.

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 3
Entry into force

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

⁹ Two years after entry into force

¹⁰ First year after the transposition deadline

¹¹ Second year after the transposition deadline

Article 4

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament
The President*

*For the Council
The President*