



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 20 November 2012

**Interinstitutional File:
2011/0308 (COD)**

16193/12

LIMITE

**DRS 127
COMPET 690
ECOFIN 937
CODEC 2658**

NOTE

From: General Secretariat
To: Permanent Representatives Committee

No. prev. doc.: 15446/12 DRS 120 COMPET 646 ECOFIN 878 CODEC 2484

No. Cion prop.: 16250/11 DRS 111 COMPET 475 ECOFIN 733 CODEC 1862
+ ADD 1 + ADD 2 + ADD 3 + ADD 4

Subject: Proposal for a Directive of the European Parliament and of the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (First reading) (Legislative deliberation)
- Preparation for the informal trilogue

I. INTRODUCTION

The second informal trilogue on the draft Accounting Directive took place on 14 November 2012 and focused on its Chapter 9 (Report on payments to governments). At this second trilogue, the European Parliament did not show any real flexibility on Chapter 9, which was a certain step backwards from the preparatory technical meeting of 12 November 2012.

However, on 15 November 2012 the Presidency had a very constructive technical meeting with the European Parliament and the Commission, which brought clarifications on several important issues.

On 19 November 2012, the Presidency debriefed the Permanent Representatives Committee on the outcome of the second informal trilogue.

II. ISSUES FOR DISCUSSION

Given the European Parliament's rigid attitude as regards all the issues in Chapter 9, the Presidency suggests that further concessions of the Council should only be considered if the European Parliament is willing to make real concessions on its side. In this context, the Presidency's intention is to keep insisting on widening the scope of negotiations with the European Parliament and include the accounting part of the Directive, as an agreement will only be possible once we can evaluate the final compromise offer on the whole Directive.

The following issues are presented for discussion with a view to providing clarification:

1. Payment definition (new Article 36 (4a))

At the technical meeting of 15 November 2012, it became obvious that point (e) and the introductory words in relation to the materiality threshold needed to be clarified.

The Permanent Representatives Committee is asked to reflect on whether the following clarified payment definition could be acceptable:

"For the purpose of this Chapter, "payments" means payments made in relation to the activities referred to in paragraphs 1 and 2, in respect of the following types of payment

(a) production entitlements;

(b) taxes levied on the income, production or profits of companies, excluding taxes levied on consumption such as value added taxes, personal income taxes or sales taxes;

(c) royalties;

(d) dividends;

(e) signature, discovery and production bonuses;

(f) licence fees, rental fees, entry fees and other considerations for licences and/or concessions; and

(g) payments for infrastructure improvements,

whether effected in money or in kind."

2. Materiality threshold

At the second informal trilogue, the European Parliament maintained its position as regards the materiality threshold, and strongly argued in favour of setting a threshold which corresponds to the threshold in the rules adopted by the US Securities and Exchange Commission (SEC).

At the technical meeting, it became clear, however, that there was a rather basic misunderstanding by the European Parliament as regards the difference in the wording of Article 38(4) between the Council's General approach and the European Parliament's position.

In the Council's General approach, the materiality threshold relates to *"the total amount of payments to a government"*. This leads to reports in which all the payments to a government are counted in the total and are disclosed if they exceed 500,000 EUR per financial year.

In the Parliament's position, the materiality threshold relates to *"a single payment or a series of related payments"*. Therefore, a payment or a series of related payments needs not to be disclosed if it does not exceed 80,000 EUR. It is easy to understand that *"a single payment or a series of related payments"* is normally a lower amount than the *"total amount of payments to a government"* which can justify a lower materiality threshold.

The Council compromise proposal of 14 November follows the wording of the European Parliament as regards the materiality threshold. This approach is consistent with the *"not de minimis"* provision in the US SEC rules.

For clarification purposes with regard to the payments to be disclosed, we would like to point out that on the basis of the provisions in the Council compromise proposal, the intended approach to be followed is as follows:

Step 1:

In line with Article 38(4), payments – made either as single payments or a series of related payments – that exceed the set threshold (250,000 EUR in the Council compromise proposal) must be identified.

Only the single payments or the series of related payments that exceed the set threshold are taken into account in Step 2 below for disclosure purposes.

Step 2:

The payments identified through Step 1 above must be disclosed in line with the provisions of Article 38(1) to (3).

It should be pointed out that the European Parliament, through Amendments 98 and 100, is also asking for the disclosure of each individual payment. This means that, in addition to the total amount and the total amount per type, the amount of each individual payment which is included in the total (those which exceed, as single or series of related payments, the materiality threshold) needs to be disclosed.

The US SEC rules do not require such detailed information on payments.

At the trilogue, the Presidency emphasised that this amendment was not acceptable for the Council because it would create a huge administrative burden without producing truly meaningful or useful information for citizens in the host countries wishing to hold their government accountable for payments from the extractive and primary forest logging industries.

In addition, the following explanatory recital, drafted on the basis of the SEC rules, as regards the materiality threshold could be considered:

"Any payment, whether made as a single payment or a series of related payments, need not be disclosed if it does not exceed 250,000 EUR within a financial year. This means that in the case of any arrangement providing for periodic payments or instalments (e.g. rental fees), the undertaking must consider the aggregate amount of the related periodic payments or instalments of the related payments in determining whether the materiality threshold has been met for that series of payments."

The Permanent Representatives Committee is asked to reflect on whether the above mentioned recital could be acceptable.

3. Responsibility of company boards

As regards the responsibility of company boards for the content of the report, the European Parliament considers that their amendment is a good solution, pointing out that another more burdensome option would be to get the report audited.

At the Coreper meeting on 14 November 2012, Germany submitted a suggestion on how to reformulate the European Parliament's amendment.

The Permanent Representatives' Committee is asked to consider the inclusion of the German suggestion which reads:

"Member States shall ensure that the members of the management bodies of an undertaking, acting within the competences assigned to them by national law, have responsibility for ensuring that to the best of their knowledge and ability the report is being prepared with due care and attention."

III. CONCLUSION

The Permanent Representatives Committee is invited to discuss the above issues as regards Chapter 9 of the draft Accounting Directive and decide whether the mandate provided to the Presidency for the second informal trilogue should remain unchanged for the third informal trilogue with the exception of the issues mentioned above.

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