Proposal of the EU Commission of a Directive of the European Parliament an of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC (Revision of the Transparency Directive (TD rev))

Comment of Deutsches Aktieninstitut

13 February, 2012

Transparency requirements for listed companies and investors strongly determine the efficiency and integrity of capital markets. The EU Transparency Directive is therefore of great importance for listed companies.

Deutsches Aktieninstitut1 would like to take the opportunity to comment on the proposal of the EU Commission for the revision of the Transparency Directive from 25 October 2011.

In general, listed companies are touched by the Transparency Directive in two respects. On the one hand they have to comply with transparency requirements that need to be balanced carefully. While the issuers' access to capital markets depends on the provision of timely and sufficient information, any transparency requirement goes hand in hand with compliance costs. On the other hand they and other capital markets participants are interested that major swings in the ownership structure become public as early as possible, so that behaviour can be adjusted accordingly.

Against this background Deutsches Aktieninstitut's assessment of the EU Commission's proposal is mixed: We generally support the inclusion of "instruments of similar economic effect to the holding of shares" into the Transparency Directive in order to uncover hidden ownership. However, we do not support the plan to transform the major holdings notification regime into maximum harmonisation regime as this would make regulatory adjustment less flexible, slower and may even force certain EU member states to reduce the level of transparency requirements.

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[1] Deutsches Aktieninstitut is the association of German exchange-listed stock corporations and other companies and institutions which are engaged in the capital markets development.

Deutsches Aktieninstitut e.V.
Niedenau 13-19 60325 Frankfurt am Main
Telefon +49 (0) 69 / 9 29 15-0 Telefax -11
E-Mail dai@dai.de

Rue du Luxembourg 23 B-1000 Bruxelles
Phone +32 (0)2 50301-64 Fax -65
E-Mail europa@dai.de

Internet http://www.dai.de

We support the EU Commission's proposal to liberalise the issuers' obligation with regard to the publication of interim management reports and to drop some insignificant information duties. However, we are concerned about the introduction of the new mandatory report on payments to governments as well as the option of the EU Commission and ESMA to define electronic data formats for the publication of financial reports. The latter might result in the mandatory use of XBRL which would be very costly for listed companies without having a positive effect on the investors' information.

Also, Deutsche Aktieninstitut is concerned about the proposal to define minimum sanctions for the violation of the Transparency Directive on the EU level. The definition of sanctions should be kept within the sole responsibility of Member States so that the national legal traditions can best be reflected in the sanctioning regime.

Maximum harmonisation with regard to major holdings notifications (Art. 3 para. 1)

In Art. 3 para. 1 second subparagraph the EU Commission proposes to transfer the regime of major holding notifications into a maximum harmonisation regime. As a consequence, member states would not be allowed anymore to define stricter standards with the exemption of the definition of the lower national thresholds.

Though a full harmonisation of notification requirements would reduce transaction costs for investors, Deutsches Aktieninstitut does not support the EU COM's proposal. Deutsches Aktieninstitut is concerned that on the EU level less strict standards could be defined than currently are in place in some member states with regard to a) thresholds, b) instruments included, c) aggregation rules and d) acting in concert.

For example, the provisions of the German securities law have been amended in 2009 and 2011 in order to cover a wide variety of instruments with similar economic effect to holding shares or to the entitlement to acquire shares as well as to widen the definition of acting in concert. It is at least debatable whether Art. 10 para. 1 (a) TD could be interpreted more narrowly than at present under German law.

Furthermore, recent experience has shown that member states are sometimes more flexible and can react faster to regulatory loopholes newly detected and to market innovation. Testing different solutions for the same problem is the essence of regulatory competition which should lead to the best regulatory response. Under a maximum harmonisation regime this will not be possible anymore. Furthermore, some member states (such as Germany) may be forced to turn back their own regulatory responses depending on the TD rev finally adopted. We therefore strongly prefer the TD rev to stay a minimum harmonisation directive.

It could be discussed, however, to harmonize rather technical aspects of the calculation of major holding notifications and to ease investors' compliance. In particular, national rules implementing the Transparency Directive result in different ways when a notification duty is triggered (trade versus settlement)

and how a threshold triggering a notification obligation has to be calculated because the denominator (shares/voting rights) of the calculation varies.

Elimination of the duty to prepare interim management statements (Art. 3. para. 1 subparagraph 1 as well as deletion of Art. 6 TD)

In Art. 3 para. 1 subpara 1 the EU Commission proposes to eliminate the duty to publish interim management statements.

This liberalisation opens a certain degree of freedom to listed companies to provide information in a frequence that exactly meets the preferences of their investors.

However, there will presumably be no change for issuers with an international shareholder base. Investors expect to get informed on the financial situation of a company regularly, which basically means on a quarterly basis. Companies behave accordingly – regardless of their size. Furthermore, many stock exchanges have defined the duty to publish quarterly reports in the regulations of premium segments.

Therefore, Deutsches Aktieninstitut expects that the elimination of the duty to publish interim management statements will not affect the information behaviour significantly. For the same reason we appreciate, that listed companies are still allowed to publish quarterly reports according to the EU COM's considerations (see explanatory memorandum, p. 7)

Report on payments to governments (Art. 6)

Deutsches Aktieninstitut opposes Art. 6 TD rev. The justification of this duty with regard to the information of the capital market, that is the overarching goal of the TD, is not clear. Investors do expect financial reports on a consolidated basis, that allow a fair view on the economic situation of the listed company. The proposed Art. 6 TD rev does not contribute to this aim.

Inclusion of „instruments of similar economic effect" in the regime of major holding notifications (Art. 13 para. 1 (b), Art. 13a and Art. 9)

The EU Commission proposes to improve shareholder transparency by including "instruments of similar economic effect to the holding of shares" into the TD regardless of the fact whether these instruments are physically settled or not. Deutsches Aktieninstitut generally regards this principle based regulatory proposal as big step forward towards improved transparency on significant changes in ownership structures of listed companies. This inclusion will uncover techniques of "hidden ownership" that have frequently been used for "secret stakebuilding" throughout Europe much earlier than under the current TD provisions. Improved transparency with regard to instruments that can be used to build up a hidden ownership will help to enhance the reliability of major holding notifications, to close information asymmetries among market participants and thus would improve the integrity and efficiency of the capital market as well as the dialogue between issuers and their shareholders.

It is also positive that instruments have to be calculated on nominal rather than a delta-adjusted basis and that no netting of long and short positions

will be possible (Art. 13 para 1a subpara. 1). The same holds true with regard to the aggregation rules that demand that shares, physically settled derivates and cash settled instruments have to be aggregated and that the notification shall include the breakdown of the number of voting rights attached to shares and voting rights relating to financial instruments according to Art. 13a TD rev. Art. 13 para. 1b already names instruments that will definitely be included in the new notification requirement. Additionally, ESMA shall establish an „indicative list" of included instruments.

Overall, the EU Commission's proposal is basically in line with existing German regulation. However, there are some important deviations in detail that bear the risk the TD may open regulatory loopholes that have just been closed by the German regulator. This risk also stems from the fact that the EU Commission proposing to transfer the notification requirements into a maximum harmonisation regime.

- **Really any technique of secret stake building covered?** The TD refers to "financial instruments" which opens room for discussion whether or not techniques of secret stakebuilding are covered that are not regarded as financial instruments by some commentators (e.g. reclaims from share lending or repurchase agreements). In Germany the legislator therefore chose the term "other instruments" rather than "financial instrument" in order to narrow the room for creative compliance. At least, reclaims from share lending or repurchase agreements need to be included in the list of instruments definitely covered in Art. 13 para. 1b.
- **Regulation open for innovations?** It has to be ensured that ESMA's competence to establish and update a non indicative list of instruments covered is not limited to instruments already mentioned in Art. 13 para. 1b. so that ESMA will be able to react to market innovation appropriately. Furthermore, it has to be ensured that neither ESMA nor the EU Commission will be able to limit the scope of the regulation by administrative or other measures. It is the nature of a principle based regulation that it has a wide scope in order to limit circumvention strategies.
- **Meaning of „on maturity" in Art. 13 para. 1 (a)?** It has to be ensured that the term „on maturity" (Art. 13 para. 1 (a)) cannot be interpreted in a way, that allows creative legal constructions to circumvent the regulation. Instruments should principally also be included, if they have no fixed contract period or if the right to acquire shares can be used during the whole contract period except at the final termination time.

Besides these „material" issues Deutsches Aktieninstitut would also like to point at some technical aspects of the TD rev. Firstly, it needs to be clarified, when voting rights have to be notified again under Art. 13a para. 2. Deutsches Aktieninstitut reads the requirement in the way that positions have only be notified again if the (disaggregated) threshold for shares has been crossed. Secondly, Deutsches Aktieninstitut would prefer if the notification requirements in Art. 13 and Art. 13a were integrated in Art. 9. This would make the notification regime more consistent.

Elimination of Art. 19 para. 1(2) and Art. 16 para. 3

Deutsches Aktieninstitut supports both the elimination of art Art. 19 para. 1 subpara. 2 (notification of changes in the company's statutes) and Art. 16 para. 3 TD (publication of new loan issues) as this would reduce compliance costs.

Access to regulated information at the Union level (Art. 21 para. 4, Art. 22 para. 1 (d))

With respect to the access to regulated information at the Union level ESMA and the EU Commission will be empowered to define minimum standards.

Art. 22 para 1(d) may turn out as problematic, which renders the EU Commission together with ESMA the right to define "the common format for storing regulated information by national officially appointed mechanisms". It has to be ensured that these technical standards will not lead to additional compliance costs on the side of listed companies. In particular, the data formats have to be compatible with data formats usually used be issuers, so that there will be no significant costs of transferring/converting existing data to that EU format.

Deutsche Aktieninstitut is seriously concerned that Art. 22 Abs. 1 (d) will prepare the basis for a EU wide mandatory use of XBRL (eXtensible Business Reporting Language) for the publication and storage of financial information. This idea has been put forward by the EU Commission since a longer period of time.

Deutsches Aktieninstitut has frequently opposed a mandatory use of XBRL, for example in the response the EU Commission's consultation on the revision of the TD in August 2010. Our arguments are reproduced below:[2]

"As the Commission is bringing up the issue of a mandatory use of XBRL within the Commission's working document ... we would like to take the opportunity to bring to the mind of the Commission our huge concerns:

- Negligible benefits: To our knowledge neither analysts nor shareholders have complained about the status quo with respect to the use of XBRL. If there were a widespread demand for XBRL in the market and if (and only if) XBRL proved to be as beneficial for market participants as advocates of a mandatory use seems to assume, we would expect market forces to lead to a widespread voluntary implementation. One should therefore be extremely cautious to prematurely implement a standard which raises doubts on its acceptance in the market and its overall economic benefits.
- Costs: In addition to the absence of market demand it can be expected that the introduction of electronic reporting format will cause massive implementation- and compliance-costs for issuers and a massive draw on high level personal resources. Furthermore, as financial reporting standards change over time, there will be continuous changes in standard reporting formats, as well. Therefore, it is clear that short- and long-term

[2] See Deutsches Aktieninstitut, response to the EU Commission's public consultation on the Revision of the Transparency Directive, 23 August 2010, S. 8f.

additional costs will be imposed on issuers without evidence of benefits which makes the cost-benefit analysis clearly negative.

- Problems with XBRL and excessive standardisation: One of the reasons why we do not expect financial analysts and investors to rely on XBRL data is because there is a fundamental problem with XBRL taxonomies. 'Official' or 'standardized' taxonomies already available to the market do not cover many firms' specific reporting needs. So companies have to create company-specific extensions to deal with this problem. An increase in firm-specific XBRL tags directly interferes with the need of investors and analysts to get comparable financial data about companies. As a result, XBRL will either result in too less flexibility (if companies were not allowed to provide extensions or – even worse – were not allowed to employ a given scope of national or international reporting standards) or in too little comparable data and high compliance costs (if companies were allowed to provide extensions). It is not achievable to make all the required information available through pure data processing. Excessive standardisation of data must be avoided as it may render financial communication overly inflexible: concerns have been raised by companies with regard to the presentation formats resulting from standardisation of data or to the difficulty of disclosing additional information."

For these reasons we are generally of the opinion that there is no need for public intervention and XBRL should not become mandatory through regulatory action in Europe. This is not to say that XBRL or any other standard format may have no benefits at all in the future. It should simply be left to market forces whether listed companies introduce and use XBRL for financial reporting reasons on a voluntary basis.

Sanctions (Art. 28, 28a, 28b, 28c)

Similar to the revision proposals to the Market Abuse Directive/Regulation and the MIFID/MIFIR the EU Commission is substantially interfering with member states' competence to define sanctions in case of violations of capital market regulations.

Deutsches Aktieninstitut is critical to that shifting of legislative competences to EU level due to subsidiarity considerations (see in detail Deutsches Aktieninstitut's comments on the revision of the Market Abuse Directive from 16 January 2012).

Besides this basic concern the catalogue of sanctions in Art. 28, 28a und 28b appears to be unbalanced and inconsistent.

Firstly, the sanctions proposed do not make a difference with respect to the duties of the TD. Issuers' duties as well as investors duties' are covered without difference. However not any sanction makes sense with regard to any duty laid down in the TD.

Secondly, the sanctions tend to go very far (and far beyond what is usually codified in EU member states the more that it is unclear if and to what extent competent authorities will be allowed to or will in fact take into consideration the circumstances laid down in Art. 28c. For example, legal persons might face an administrative pecuniary sanction up to 10 percent of the total

turnover. Furthermore, Art. 28b introduces public statement on the nature of the breach of the TD and the person responsible which is unknown at least in the German securities law. This is not only questionable from the background of data protection regulations. Additionally, even marginal offences under the TD may be followed by a public statement to be published on the competent authority's website. If at all, a public statement should only be considered in the case of serious offences, a publication should be limited in time and – in any case – a public statement should only be possible when the offence is recognised as res judicata.

Overall, Deutsches Aktieninstitut would like to have sanctions defined on the national level only which allows to take into account the different legal traditions in the different EU member states.

Additional remarks

(a) Review of the criteria of independence in Art. 12 para. 4 and Art. 12 para. 5

Unfortunately, the EU Commission has not amended Article 12 para. 4 and 12 para. 5 of the TD, which define exemptions from the obligation to aggregate major holding notifications on the level of a "parent undertaking" of a "management company" or an "investment firm". Basically, a parent undertaking will be exempted form this obligation if the management company/investment firm exercises its voting rights independently from the parent undertaking.

From the issuers' point of view this provision is not only complex but also reduces inappropriately the overall level of transparency. Due to Art. 12 para. 4 and Art. 12 para. 5 both investors and listed companies get an incomplete picture of the true ownership structure and the distribution of voting rights which principally opens room for "creative compliance" and counters the goal of capturing "hidden ownership" in the system of major holdings notifications.

Furthermore, Art. 12 para. 4 and Art. 12 para. 5 do not reflect the current practice of voting by complex investment firms. While it may be true from a purely legal point of view that the single fund manager also decides on the voting, most investment firms have at least some kind of a voting policy that predetermines the casting of votes of any investment funds in the investment company's structure. In many cases, the casting of votes and the investment decision is even organisationally separated, so that listed companies that prepare their general meetings have a specific contact person responsible for voting issues (typically a compliance or governance officer).

Deutsches Aktieninstitut therefore suggests to narrow the criteria of independence in Articles 12 para. 4 and 12 para. 5 in order to better align them with current voting practices.

(b) Clarification in Art. 17 para. 2(a)

The review of the TD could also be used to clarify Art. 17 para 2(a) which obliges listed companies to inform the capital markets on the total number of shares and voting rights and the rights of holders to participate in meetings.

Specifically, in Art. 17 para 2(a) (and Art. 15) it should be better clarified that voting rights have to calculated as in Art. 9 para. 1 subpara. 2. This would mean that the voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended.

Furthermore, Art. 17 para 2(a) can be read as the total number of shares should be calculated on the day of the invitation to the general meeting and should also be published at same day as the invitation itself. Since the number votes may change due to share buy back programmes and stock option plans between the day an invitation is send to the means of publication and the day of the invitation. It is not always possible to comply with this obligation for organisational reasons. It should therefore be clarified, that the notification could be made shortly after the invitation.

(c) Shareholder identification – for registered shares in particular

Deutsches Aktieninstitut has always promoted the idea of a system of shareholder identification, in particular for issues with registered shares. At least, the EU should ensure that national identification mechanisms that are usually codified in the national company law can be enforced effectively across borders. A duty for the investor or the account providing intermediary to identify the investor on the issuer's request would allow for a direct communication between the issuer and the investor and thus improve the equal treatment of investors in the EU. Currently only home country investors are broadly registered in the issuer's share registers and are therefore able to get directly informed by the issuer (e.g. invitation to the general meeting) and to directly interact with the issuer (e.g. voting on the general meeting). In contrast, foreign shareholders are usually registered as a "nominee shareholders" and have to be informed by the issuer along a chain of intermediaries. As a consequence, they often get information with a delay or even stay uninformed which also complicates the feedback from the investors, in particular the notification of participation in a general meeting and the casting of votes.

(d) Publication of voting policies

Deutsches Aktieninstitut misses a rule that obliges institutional investors to publish their general voting policies as it has been brought up in the consultation document by the EU Commission.

First, the disclosure of the voting policy would make the preparation of the general meeting easier for issuers as agenda-items that might conflict with voting guidelines could be discussed much earlier with investors. Second, the ongoing investor dialogue would be strengthened as issuers could discuss structural issues of corporate governance with their investors that are frequently laid down in the voting guidelines. Third, end investors could better select "their" institutional investors that act as their agents and trustees which would improve the governance of the indirect investment process.