Deutsches Aktieninstitut

# No Going beyond the Requirements of the CSR-Directive

The non-binding guidelines should be published as soon as possible

Comments on issue fiches for the non-binding guidelines on non-financial reporting, 24 February 2017

# Introduction

The Deutsche Aktieninstitut[1] welcomes the opportunity to comment the issue finches for the non-binding guidelines on non-financial reporting. The Commission is supposed to present the guidelines in order to facilitate the disclosure of non-financial information for undertakings. Therefore it is important that the guidelines will be finalized as soon as possible so companies, especially those that will report non-financial information for the first time, can get the necessary guidance.

In this context it is important that the Commission does not exceed its assignment by going beyond the requirements set by the Directive. Referring to already existing national or international reporting frameworks helps companies already reporting non-financial information to limit their reporting burdens. The freedom of choice regarding the reporting frameworks may not be limited by the requirements of the guidelines.

[1] Deutsches Aktieninstitut (EU transparency register: 38064081304-25) represents the entire German economy interested in the capital markets. The about 200 members of Deutsches Aktieninstitut are listed companies, banks, stock exchanges, investors and other important market participants. This position paper is based on discussions in the issuers working group which is the central forum of opinion building for listed companies in Germany on capital market issues.

# 1 General Remarks

In many cases the wording of the guidelines is prescriptive and goes beyond the directive. The guidelines should not “expect” or recommend disclosures which are not required by the directive.

As an example Deutsches Aktieninstitut would like to highlight fiche #12 “Key Performance Indicators”:

According to the directive, the non-financial statement shall contain information about non-financial key performance indicators (only) to the extent that is “necessary for an understanding of the undertaking’s development, performance, position and impact of its activities” and they are “relevant to the particular business”. That means, KPIs must meet that materiality threshold to be required for the non-financial statement by the directive. It is our understanding that according to GAAP the analysis of the course of business and the position of the group shall include financial key performance indicators, which are used for the internal management of the group. Therefore, we believe that “expectations” to report on KPIs, which may be “*broadly recognized metrics and widely used in their sector or for specific thematic issues*” but are not used for the internal management by the companies, go beyond the requirement of that directive. We also believe that guidance such as “*Companies are expected to explain data collection, methodology, frameworks relied upon*” or “*Companies are expected to present KPIs in the context of targets, past performance, and comparison with peers*” is not regulated by the directive.

Beside that point, we would like to note, that for non-financial KPIs no generally binding provisions exist and therefore a comparison across companies is not possible and may result in a confusing picture of the non-financial-performance for the stakeholder. We refer to ongoing discussion in terms of Alternative Performance Measures or Non-GAAP-Measures.

According to the directive, “*the commission shall prepare non-binding guidelines on methodology for reporting non-financial information*”. We do not believe it is required and helpful to expand this directive and include guidance on disclosures which companies may provide on a voluntary basis. Including voluntary recommendations in a document provided by a regulator may be misunderstood as additional requirements. We believe companies should have sufficient knowledge and expertise in disclosing voluntary information. Companies will also find already sufficient information and guidance in national, Union-based or international frameworks regarding corporate social responsibility and therefore, they do not need additional support for voluntary reporting from a regulator.

Regarding the thematic aspects in # 13 the use of “companies are expected to rely” seems to leave no leeway for companies to what kind of framework they can use. This is even more surprising because in most of the other fiches the EU-Commission is generally speaking of “companies may..”. In fiche # 7 the Commission also stresses the fact that in line with the Directive companies may rely on different frameworks. Looking at the wording of the different thematic aspects companies could get the impression that they have to use special frameworks for these aspects.

The guidelines refer for human rights to *the Guiding Principles on Business and Human Rights implementing the UN `Protect, Respect and Remedy Framwork, the OECD Guidelines for multinational companies, ILO Tripartite Decleration of Principles concerning Multinational Enterprises and Social Policy*. And for anti-corruption matters the guidelines refer only to *the OECD Guidelines for multinational companies*.

In fiche # 13 it should be clarified that all the references to frameworks used in the guidelines are only recommendations. This is important because most multinational companies refer to the G4 of the Global Reporting Initiative when reporting on non-financial aspects and they should be able to doing so even in the future.

## 2 Disclose material information

Deutsches Aktieninstitut agrees with the statements in the headings of fiche #3 “The Directive foresees that companies report on all information that is necessary for an understanding of the company's development, performance, position and impact. The non-financial statement is also expected to be concise.” and fiche #6 “The non-financial statement is expected to be consistent with other elements of the management report and coherent over time.” However, implementing these principles should lead to a different result regarding materiality:

In fiche #1, FISMA refers to the general materiality definition*:* ”In the context of the Accounting Directive (2013/34/EU) material information is defined as *"the status of information where its omission or misstatement could reasonably be expected to influence decisions that users make on the basis of the financial statements of the* *undertaking. The materiality of individual items shall be assessed in the context of other similar items".*

It is our understanding that this general principle should also be true in connection with the requirements of the CSR-Directive. Otherwise the introduction of the new element "impact of its activity" would lead to unreasonable and unlimited information overload. According to the directive, there is no lower level of materiality required. The new element to be taken into account when assessing the materiality is not a criterion which has to be assessed separately but has to be assessed together with the criteria "to the extent necessary for the understanding of the company's development, performance, position". The interpretation for a combined assessment is justified by the fact that the new element is connected with an "and". That means, an assessment about a disclosure requirement regarding non-financial information could not lead to reporting on a lower level when considering an additional criterion is required.

We also believe that, to be consistent with other elements of the management report, a consistent definition of materiality for financial and non-financial information throughout the complete mandatory management report is required.

# 3 Strategic and forward looking

The heading of the fiches #4 states: "The statement is expected to provide insight into the company's strategy and its implementation. Where relevant, it is expected to give due regards to the short term, medium term and long term implications of the facts and circumstances reported."

The statement is not appropriate. The statement includes a number of terms which are not used in the directive. Instead of terms used in the directive such as "business model", "policies", "due diligence", and "outcome", the statement uses terms such as "strategy", "implementation", "short/medium/long term", or "implications". The Deutsche Aktieninstitut believes that the use of new and different terms in the statement is confusing and misleading. This will lead to uncertainties regarding the interpretation. Therefore generally consistent definitions should be used.

We also believe that examples such as the one at the end of the fiche are not helpful: "A company may disclose the potential impact of climate change scenarios on its expected results, strategy and activities." It is not our understanding that according to the directive companies are required to report on scenarios. However, including such examples in guidelines could raise the expectation of regulators and could be interpreted accordingly as general requirements in the form of a checklist, although this is not desired.

Fiche #4 sets forth that “where relevant, the non-financial statement should provide information on the short-term, medium-term and long-term implications of the policies, facts and circumstances reported.” The purpose of financial reporting, including the management report, is to provide disclosures that are material for an understanding of the company’s earnings, financial condition and cash flows in the period under review and – in many jurisdictions – a forecast of the financial performance of the following year. For good reasons, in particular the lack of reliability, there is currently no requirement to make medium and long-term forecasts for financial information. We do not believe that such forecasts could be made with higher reliability for non-financial information, and even if they were to be made, no link could be established to the financial information due to the differing time horizons. Accordingly, we believe that due to the lack of reliability providing forecasts of medium-term and long-term implications would generally result in generic and boilerplate disclosure and does not provide useful information.

# 4 Stakeholder oriented

The Deutsche Aktieninstitut does not believe that it is helpful to present an list of possible relevant stakeholders. Trying to address all potential stakeholders with the same disclosure significantly impairs the application of the materiality principle due to different interests of the stakeholder groups. We believe that is more important to make clear that a stakeholder-oriented-approach should consider always general principles like “material”, “concise”, “decision usefulness” or “relevant to understand the undertaking’s development, performance, position and the impact of its”. It should be clearly stated that these principles could only be met by not considering the interest of each and every stakeholder.

## 5 Consistent and coherent

In fiche #6 it is stated that key linkages should be highlighted and explained. We don´t see the need that effective linkages that enhance the overall usefulness and relevance of the information have to be explained or highlighted.

## 6 Principal risks

In fiche #11 it is said that ".. A description is also expected as regards their likelihood, circumstances and possible effects." The companies are expected to identify and explain principal risks in a way as specific as possible, "including appropriate assessment of likelihood…" The Directive does not request an appropriate assessment of likelihood of each and every risked concerned. If the risks are deemed material they have to be disclosed.

## 7 Thematic aspects

It is not appropriate to include specific sections on conflict minerals as mentioned in fiche #13. These issues are not covered by the directive. If the Commission adds conflict minerals to the reporting list there will be other demands on extending the list. Why not adding animal welfare or other specific aspects. This should be avoided in any case in order to limit the reporting duties of the companies to the minimum asked for in the Directive.

# 8 Board diversity disclosure

As far as the diversity disclosure is concerned there is no need for guidelines by the Commission. Board diversity is generally regulated by the laws and national Corporate Governance-Codices. The Commission should not interfere with these standards by setting its own. Especially the objectives mentioned in the guidelines are not helpful. The Commission states that it is best practice to set ambitious targets for instance gender balance. However it does not explain how it has established this kind of best practice. Also the requirement to apply the diversity policy in the succession planning, selection, nomination and evaluation goes beyond the requirements of the Directive.

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