EUROPEAN COMMISSION

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND 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

(Text with EEA relevance)
{SEC(2011) 1279}
{SEC(2011) 1280}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. General context

Article 33 of the Transparency Directive (Directive 2004/109/EC) requested the European Commission to report on the operation of this Directive[1]. The report published by the Commission in accordance with this Article shows that the transparency requirements of the Directive are considered to be useful for the proper and efficient functioning of the market by a majority of stakeholders.

However, despite these achievements, the review of the operation of the Transparency Directive showed that there are areas where the regime it created could be improved. It is thus desirable to provide for the simplification of certain issuers' obligations with a view to make regulated markets more attractive for small and medium-sized issuers raising capital in Europe. Additionally, the legal clarity and effectiveness of the existing transparency regime needs to be increased, notably with respect to the disclosure of corporate ownership.

This proposal for an amendment of the Transparency Directive is consistent with the objective of maintaining and, where necessary, enhancing the level of investor protection envisaged in the Directive and ensuring that the information disclosed is sufficient and useful for investment purposes at acceptable cost.

1.2. Existing Community provisions in this area

The objective of the Transparency Directive is to ensure a high level of investor confidence through equivalent transparency for securities issuers and investors throughout the European Union. In order to achieve this objective, the Transparency Directive requires issuers of securities traded on regulated markets to publish periodic financial information about the issuer's performance over the financial year and on-going information on major holdings of voting rights. It also introduces minimum standards for access to and storage of regulated information. The Transparency Directive was complemented by Commission Directive 2007/14/EC[2] which contains implementing measures and by Commission recommendation on storage of regulated information[3]. The Transparency Directive has been subsequently amended by Directives 2008/22/EC[4] and 2010/78/EU[5] as regards the implementing powers

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1 COM(2010)243 final of 27 May 2010. This report is accompanied by a more detailed Commission staff working document (SEC(2010)61).

2 Commission Directive of 8 March 2007 laying down detailed rules for the implementation of certain provisions of 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; OJ L 69, 9.3.2007, p. 27

3 Commission Recommendation of 11 October 2007 on the electronic network of officially appointed mechanisms for the central storage of regulated information referred to in Directive 2004/109/EC of the European Parliament and of the Council, OJ L267, 12.10.2007, p.16

4 Directive 2008/228EC of the European Parliament and the Council of 11 March 2008 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as regards the implementing powers conferred on the Commission , OJ 6, p.50.

5 Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC,

conferred on the Commission and the draft technical standards developed by the European Securities and Markets Authority, and by Directive 2010/73/EU[6] to align certain provisions of the Transparency Directive with the modified Prospectus Directive[7].

The Transparency Directive obligations are closely connected with requirements set out in other EU texts, either in the corporate governance/company law field or in the financial markets/securities field. In particular, the Prospectus Directive includes disclosure requirements that are very close to the core area of the Transparency Directive obligations. The Prospectus Directive requires companies offering shares to the public in the EU to issue a prospectus that complies with the detailed rules under the directive. It also allows companies to issue a prospectus in one EU country that would cover subsequent offers of securities to the public or admission to trading throughout Europe, with minimal translation obligations.

In addition, the Transparency Directive is the instrument for implementing disclosure obligations under other directives, such as the Market Abuse Directive[8], which prohibits abusive behaviour on regulated markets (e.g. insider dealing and market manipulation) and requires issuers to disclose inside information.

1.3. Consistency with other policies

Improvement of the regulatory environment for small and medium-sized issuers and their access to capital are high political priorities for the Commission. In this respect, in the Single Market Act Communication of April 2011[9], the Commission stated that the Transparency Directive should be revised *"in order to make the obligations applicable to listed SMEs more proportionate, whilst guaranteeing the same level of investor protection*". This proposal aims at amending the Transparency Directive in order to meet this objective.

In addition, the review of the Transparency Directive aims at ensuring transparency of major economic acquisitions in companies, investor confidence and increased focus on long-term results, and thus contributes to the general objective of the Commission to strengthen the financial stability. Moreover improving access to regulated information at the Union level aims at increasing functional integration of European securities markets and at insuring a better cross border visibility of small and medium-sized listed companies.

As regards the general issue of implementation, the Transparency Directive is also revised in order to follow the conclusions of the Commission Communication on reinforcing sanctioning

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2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 120.

6 Directive 2010/73/EU of the European Parliament and the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 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, OJ L 327, p.1.

7 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345, 31.12.2003, p. 64.

8 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003, on insider dealing and market manipulation. OJ L, 12 April 2003, p 16.

9 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, "Single Market Act -Twelve levers to boost growth and strengthen confidence - Working together to create new growth": COM(2011) 206 final.

regimes in the financial services sector[10]. In this Communication, the Commission has envisaged EU legislative action to set minimum common standards on certain key issues of sanctioning regimes, to be adapted to the specifics of the different sectors. In order to ensure that sanctions of breaches of the transparency requirements are sufficiently effective, proportionate and dissuasive, the proposal aims to reinforce and approximate Member States' legal framework concerning administrative sanctions and measures by providing for sufficiently dissuasive administrative sanctions which apply to breaches of the key requirements of the Transparency Directive, and an appropriate personal scope of administrative sanctions and publication of sanctions. Criminal sanctions are not covered by this proposal.

2. RESULTS OF THE CONSULTATIONS WITH THE INTERESTED PARTIES AND THE IMPACT ASSESSMENT

2.1. Consultations with the interested parties

The proposal has been prepared in accordance with the Commission's approach to principles of better regulation. The initiative and the impact assessment are the result of an extensive dialogue and consultation with all major stakeholders, including securities regulators, market participants (issuers, intermediaries and investors), and consumers. It is built upon the observations and analysis contained in the above mentioned Commission report on the operation of the Transparency Directive and the more detailed Commission staff working document which accompanied it. It draws on the findings of an external study[11] conducted in 2009 for the Commission on the application of selected obligations of this Directive, which includes evidence gathered from market participants through a survey. The Commission report also draws on reports published by the Committee of European Securities Regulators (CESR) (now ESMA)[12] and by the European Securities Markets Expert Group (ESME)[13] in this area. CESR (ESMA) and ESME reports have been particularly valuable to identify areas of the Transparency Directive with unclear provisions and/or which could be improved.

Comments received from stakeholders participating in the public consultation were also taken into account. As part of the consultation process, the Commission services organised on 11 June 2010 a public conference with the participation of several stakeholders. Discussion focused on the attractiveness of regulated markets to small and medium sized issuers and the

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10 Communication of 9 December 2010 "Reinforcing sanctioning regimes in the financial sector" COM(2010)716 final.

11 Mazars (2009), Transparency Directive Assessment Report, external study conducted for the European Commission.

12 CESR was an independent advisory group to the European Commission composed by the national supervisors of the EU securities markets. See the European Commission's Decision of 23 January 2009 establishing the Committee of European Securities Regulators 2009/77/CE. OJ L25, 23.10.2009, p. 18). The role of CESR was to improve co-ordination among securities regulators, act as an advisory group to assist the EU Commission and to ensure more consistent and timely day-to-day implementation of community legislation in the Member States. It has been replaced by European Securities and Markets Authority: ESMA as from 1 January 2011: see Regulation No 1095/2010 of the European Parliament and of the Council of 24 November 2010: OJ L 331/84 of 15 December 2010.

13 ESME was an advisory body to the Commission, composed of securities markets practitioners and experts. It was established by the Commission in April 2006 and operated on the basis of the Commission Decision 2006/288/EC of 30 March 2006 setting up a European Securities Markets Expert Group to provide legal and economic advice on the application of the EU securities Directives (OJ L 106, 19.4.2006, p. 14–17).

possible enhancement of the transparency obligations regarding corporate ownership disclosures.

2.2. Impact assessment

In line with its "Better Regulation" policy, the Commission conducted an impact assessment of policy alternatives. Below are presented the best policy options which were retained for the following topics:

- allow for more flexibility regarding the frequency and timing of publication of periodical financial information, in particular for small and medium-sized issuers:

Abolish the obligation to present quarterly financial reports for all listed companies – Introducing differentiated disclosure regimes for companies listed on a regulated market according to their size was considered undesirable as such a regime would introduce double standards for the same market segment and would therefore be confusing for investors. The preferred policy option reduces compliance costs for all companies listed on regulated markets but should in particular benefit the smaller ones, reducing considerably the administrative burden linked to the publication and preparation of quarterly information. This option enables the small and medium-sized issuers to redirect their resources to publish the kind of information that suits best their investors. This option should reduce short term pressure on issuers and incentivise investors to adopt a longer term vision. It should not have negative impact on investor protection. Investor protection is already sufficiently guaranteed through the mandatory disclosure of half yearly and yearly financial results, as well as through the disclosures required by the Market Abuse and Prospectus Directives. Therefore, investors should be duly informed about important events and facts that could potentially influence the price of the underlying securities independently of the disclosure of quarterly information currently required by the Transparency Directive.

- simplify the narrative parts of financial reports for small and medium-sized issuers:

Require ESMA to prepare non binding guidance (templates) on narrative content of the financial reports for all listed companies – This option allows for cost savings and improves comparability of information for investors. It also increases the cross-border visibility of the small and medium-sized issuers.

- eliminate the gaps in requirements for notification concerning major holdings of voting rights:

Extend the disclosure regime to all instruments of similar economic effect to holding of shares and entitlements to acquire shares – This option captures cash settled derivatives[14] as well as any future similar financial instruments and closes a gap in the existing disclosure regime. It has a strong positive impact on investor protection and market confidence as it discourages secret stock building in listed companies.

- eliminate divergences in notification requirements for major holdings:

Harmonise the regime for the disclosure of major holdings of voting rights by requiring the aggregation of holdings of shares with those of financial instruments giving access to shares (including the cash settled derivatives) – This option creates a uniform approach, reduces

[14] Cash-settled equity derivatives refer to equity linked transactions settled by the payment of cash only without any physical delivery of the underlying equity.

legal uncertainty, enhances transparency, simplifies cross-border investments and reduces its costs.

In addition, technical adjustments and clarifications were considered in order to create a better implementation framework for the Directive.

The full impact assessment report is available at: […]

2.3. Legal basis

The EU has the right to act in this area according to Articles 50 and 114 of the TFEU.

On 23 September 2009, the Commission adopted proposals for Regulations establishing EBA, EIOPA, and ESMA. In this respect the Commission wishes to recall the Statements in relation to Articles 290 and 291 TFEU it made at the adoption of the Regulations establishing the European Supervisory Authorities according to which: "As regards the process for the adoption of regulatory standards, the Commission emphasises the unique character of the financial services sector, following from the Lamfalussy structure and explicitly recognised in Declaration 39 to the TFEU. However, the Commission has serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures are in line with Articles 290 and 291 TFEU."

2.4. Subsidiarity and proportionality

The problems identified concerning small and medium-sized issuers derive from European Union's and national legislation and can only be addressed through changes in the legislation at the level of the European Union. In addition, only a binding legal instrument adopted at the EU level would ensure that all Member States apply the same regulatory framework based on the same principles, thereby ending the current fragmentation of the regulatory response concerning the regime for notification of major holdings.

Sanctions which are divergent and too weak risk being insufficient to effectively prevent breaches of the Transparency Directive and to ensure effective supervision and the development of a level playing field. Action at EU level can avoid divergences and weaknesses in the legal framework of sanctioning and investigative powers available to national authorities and thus contribute to the elimination of regulatory arbitrage opportunities.

2.5. Choice of instruments

A modification of the current Transparency Directive seems to be the most viable solution. A directive may allow for maximum harmonisation in some areas but still leaves Member States flexibility to allow for their specific situation to be taken into account in other areas.

2.6. More detailed explanation of the specific provisions of the proposal

- *Choice of the home Member State for third country issuers*

The Transparency Directive is currently unclear with regard to which country is the home Member State for issuers who have to choose their home Member State according to article 2, paragraph 1, sub (i) (ii), but who have not done so. It is important that the Transparency Directive does not provide for any possibility to implement the rules in such a way that a listed company can operate without being under the supervision of any Member State.

Therefore, following the comments received from the respondents to the public consultation, a default home Member State is established for third country issuers who have not chosen their home Member State in accordance with Article 2(1) (i) during a period of three months.

- *The requirement to publish interim management statements and/ or quarterly reports is abolished*

In order to reduce the administrative burden linked to listing on regulated markets and encourage long-term investment, the requirement to publish interim management statements is abolished for all listed companies. The publication of such information is not considered necessary for investor protection and should therefore be left to the market in order to eliminate unnecessary administrative burden. Issuers can continue to publish such information if there is a strong demand from investors. For the sake of efficiency and in order to provide for a harmonised regime for disclosure, Member States should not continue to impose such an obligation in their national legislation. Currently, many Member States impose stricter disclosure requirements than the minimum foreseen in the Directive. In order to ensure that all listed companies in the EU benefit from equal treatment and that the administrative burden is effectively reduced, Member States should be prevented from gold plating and should not require more than what is necessary for investor protection.

- *Broad definition of financial instruments subject to notification requirement*

In order to take account of financial innovation and ensure that issuers and investors have full knowledge of the structure of corporate ownership, the definition of financial instrument should be broadened to cover all instruments of similar economic effect to holdings of shares and entitlements to acquire shares, whether giving right to a physical settlement or not. Currently, the Transparency Directive does not require notification of certain types of financial instruments that do not give the right to acquire voting rights, but which can be used to build secret stakes in listed companies without being disclosed to the market.

- *Greater harmonisation for notification of major holdings - Aggregation of holdings of shares with holdings of financial instruments*

The Transparency Directive does not require aggregation of holdings of voting rights with holdings of financial instruments to calculate the thresholds for notification of major holdings. Member States have adopted different approaches in this field. This results in a fragmented market and additional costs for cross-border investors. A uniform approach concerning the calculation of thresholds for notification of major holdings is essential in order to improve legal certainty, enhance transparency, simplify cross-border investments and reduce the underlying costs. Therefore, holdings of shares need to be aggregated with the holdings of financial instruments for the calculation of notification thresholds. Netting of long and short positions should not be allowed. The notification should include the breakdown by type of financial instruments held to provide the market with detailed information on the nature of the holdings.

However, in order to take into account the differences in ownership concentration, Member States should continue to be allowed to set lower national thresholds for notification of major holdings than those foreseen in the Transparency Directive where this is necessary to ensure appropriate transparency of holdings. In fact, in some Member States companies are owned by a small number of shareholders, each shareholder holding a significant percentage of shares. Whereas in other Member States the ownership is dispersed, and a shareholder with a

relatively small percentage of shares can already exercise a major influence in a company. In this latter case, the notification of holdings at a lower threshold than the minimum foreseen in the Transparency Directive may be required to ensure adequate transparency of major holdings.

- *Storage of regulated information*

Access to financial information on listed companies on a pan-European basis is currently burdensome: interested parties need to go through 27 different national databases in order to search for information. The level of interconnection between the 27 national storage mechanisms is insufficient. Therefore, in order to facilitate cross border access to regulated information, the current network of officially appointed storage mechanisms should be enhanced. It is proposed that the European Commission receives further delegated powers in this respect, in particular regarding the access to regulated information at the Union level. ESMA should assist the European Commission by developing draft regulatory technical standards concerning, for example, the operation of a central access point for the search of regulated information at the Union level. These measures should also be used to prepare the possible future creation of a single European storage mechanism ensuring storage of regulated information at the Union level.

- *Reporting of payments to governments*

The Commission has publicly expressed support for the Extractive Industry Transparency Initiative (EITI), and envisaged willingness to present legislation mandating disclosure requirements for extractive industry companies.[15] A similar pledge was made in the concluding Declaration of the G8 Summit in Deauville of May 2011[16], where the G8 governments committed "to setting in place transparency laws and regulations or to promoting voluntary standards that require or encourage oil, gas, and mining companies to disclose the payments they make to governments." Furthermore, the European Parliament has presented a Resolution[17] reiterating its support for country-by-country reporting requirements, in particular for the extractive industries.

EU legislation does not currently require issuers to disclose, on a country basis, payments to governments made in countries where they operate. Therefore such payments made to governments in a specific country are normally not disclosed, even though such payments by the extractive industry (oil, gas and mining) or loggers[18] of primary forests[19] can represent a significant proportion of a country's revenues, especially in third countries that are rich in natural resources. In order to make governments accountable for the use of these resources and promote good governance, it is proposed to require the disclosure of payments to governments at the individual or consolidated level of a company. The Transparency Directive requires issuers to disclose payments to governments by referring to the relevant

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15 http://www.liberation.fr/monde/01012339133-lutter-contre-l-opacite-des-industries-extractives

16 http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/deauville-g8-declaration_en.pdf

17 Resolution INI/2010/2102.

18 Whether clear-cutting, selective logging or thinning, on land classified as containing primary forest areas or other disturbance of such forest or forest land caused by mining, mineral, water, oil or gas exploration or extraction or other detrimental activities.

19 Defined in Directive 2009/28/EC as "naturally regenerated forest of native species, where there is no clearly visible indication of human activities and the ecological processes are not significantly disturbed."

provisions of Directive 2011/../EU Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings which provides for the detailed requirements in this respect.

This proposal is comparable to the US Dodd-Frank Act[20], which was adopted in July 2010, and requires extractive industry companies (oil, gas and mining companies) registered with the Securities and Exchange Commission (SEC) to publicly report payments to governments[21] on a country- and project-specific basis. The SEC's implementing rules are scheduled to be adopted by the end of 2011.

- *Sanctions and investigation*

In order to provide for a better implementing framework of the provisions of the Directive, the sanctioning powers of competent authorities are enhanced. In particular, the publication of sanctions is important to improve transparency and to maintain confidence in the financial markets. Sanctions should normally be published, except in certain well-defined circumstances. In addition, the competent authorities in the Member States should have the power to suspend the exercise of voting rights of the issuer who had breached the notification rules on major holdings, as this is the most efficient sanction to prevent a breach of these rules. In order to ensure consistent application of sanctions, uniform criteria should be set for determining the actual sanction applicable to a person or a company.

- *Other technical adjustments*

Other technical adjustments and clarifications are proposed following the results of the public consultation.

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20 http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

21 Taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits.

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DIRECTIVE OF THE EUROPEAN PARLIAMENT AND 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

(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 and Article 114 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 Central Bank[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) According to Article 33 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC[3], the Commission was to report on the operation of that Directive to the European Parliament and to the Council, including on the appropriateness of ending the exemption for existing debt securities after the 10-year period as provided for by Article 30(4) of that Directive and its potential impact on the European financial markets.

(2) On 27 May 2010 the Commission adopted a report on the operation of Directive 2004/109/EC[4] which identified areas where the regime created by that Directive could be improved. In particular, the report demonstrates the need to provide for the simplification of certain issuers' obligations with a view to making regulated markets more attractive to small and medium-sized issuers raising capital in the Union. Furthermore, the effectiveness of the existing transparency regime needs to be improved, notably with respect to the disclosure of corporate ownership.

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1 OJ C , , p. .
2 OJ C , , p. .
3 OJ L 390, 31.12.2004, p. 38.
4 COM (2010), 243 final.

(3) In addition, in its Communication to the European Parliament, the Council, the 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'[5], the Commission identifies the need to review Directive 2004/109/EC in order to make the obligations applicable to listed small and medium-sized enterprises more proportionate, whilst guaranteeing the same level of investor protection.

(4) According to the Commission report and to the Commission Communication, the administrative burden associated with obligations linked to admission to trading on regulated markets should be reduced for small and medium-sized issuers in order to improve their access to capital. The obligations to publish interim management statements or quarterly financial reports represent an important burden for issuers whose securities are admitted to trading on regulated markets, without being necessary for investor protection. They also encourage short-term performance and discourage long-term investment. In order to encourage sustainable value creation and long-term oriented investment strategy it is essential to reduce short-term pressure on issuers and to give investors incentive to adopt a longer term vision. The requirement to publish interim management statements should therefore be abolished.

(5) In order to ensure that the administrative burden is effectively reduced across the Union, Member States should not be allowed to continue to impose the requirement to publish interim management statements in their national legislation.

(6) To further reduce the administrative burden for small and medium-sized issuers and to ensure the comparability of information, the European Supervisory Authority (European Securities and Markets Authority, hereinafter 'ESMA'), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[6], should issue guidelines, including standard forms or templates, to specify which information should be included in the management report.

(7) In order to provide for enhanced transparency of payments made to governments, issuers whose securities are admitted to trading on a regulated market and which have activities in the extractive or logging of primary forest industries should disclose in a separate report on an annual basis payments made to governments in the countries in which they operate. The report should include types of payments comparable to those disclosed under the Extractive Industries Transparency Initiative (EITI) and provide civil society with information to hold governments of resource-rich countries to account for their receipts from the exploitation of natural resources. The initiative is also complementary to the EU FLEGT Action Plan (Forest Law Enforcement, Governance and Trade)[7] and the Timber Regulation[8] which require traders of timber products to exercise due diligence in order to prevent illegal wood

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5 COM(2011) 13.4.2010, 206 final.

6 OJ L 331, 15.12.2010, p. 84.

7 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:347:0001:0006:EN:PDF

8 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010. Companies that import wood products under EU voluntary agreements will be exempt from this requirement.

from entering into the EU market. The detailed requirements are defined in Chapter 9 of Directive 2011/../EU of the European Parliament and of the Council[9].

(8) Financial innovation has lead to the creation of new types of financial instruments that give investors economic exposure to companies, the disclosure of which has not been provided in Directive 2004/109/EC. Those instruments can be used to acquire secret stocks in companies, which could result in market abuse and give a false picture of economic ownership of publicly listed companies. In order to ensure that issuers and investors have full knowledge of the structure of corporate ownership, the definition of financial instruments in that Directive should cover all instruments with similar economic effect to holding shares and entitlements to acquire shares.

(9) In addition, in order to ensure adequate transparency of major holdings, where a holder of financial instruments exercises its entitlement to acquire shares and the total holdings of physical shares exceed the notification threshold without affecting the overall percentage of the previously notified holdings, a new notification should be required to disclose the change in the nature of the holdings.

(10) A harmonised regime for notification of major holdings of voting rights, especially regarding aggregation of holdings of shares with holdings of financial instruments, should improve legal certainty, enhance transparency and reduce administrative burden for cross-border investors. Member States should therefore not be allowed to adopt stricter or divergent rules in that area than those provided in Directive 2004/109/EC. However, taking into account the existing differences in ownership concentration in the Union, Member States should continue to be allowed to set lower thresholds for notification of holdings of voting rights.

(11) Technical standards should ensure consistent harmonisation of the regime for notification of major holdings and adequate transparency levels. It would be efficient and appropriate to entrust ESMA with the elaboration of draft regulatory technical standards which do not involve policy choices, for submission to the Commission. The Commission should adopt the draft regulatory technical standards developed by ESMA to specify the conditions for the application of existing exemptions from the notification requirements for major holdings of voting rights. Using its expertise, ESMA should in particular determine the cases of exemptions while taking account of their possible misuse to circumvent notification requirements.

(12) In order to take account of technical developments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission to modify the method to calculate the number of voting rights relating to financial instruments, to specify the types of financial instruments subject to notification requirements and to specify the contents of notification of major holdings of financial instruments. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drafting up of delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.

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[9] OJ L, , p..

(13) To facilitate cross-border investment, investors should be able to easily access regulated information for all listed companies in the Union. However, the current network of national officially appointed storage mechanisms for regulated information does not ensure an easy search for such information across the Union. In order to ensure cross-border access to information and to take account of technical developments in financial markets and in communication technologies, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission to specify minimum standards for dissemination of regulated information, access to regulated information at Union level and central storage mechanism of regulated information. The Commission, with assistance of ESMA, should also be empowered to take measures to improve the functioning of the network of national officially appointed storage mechanisms and develop technical criteria for access to regulated information at the Union level, in particular concerning the operation of a central access point for the search of regulated information at the Union level.

(14) In order to improve compliance with the requirements of Directive 2004/109/EC and following the Communication from the Commission of 9 December 2010 entitled 'Reinforcing sanctioning regimes in the financial sector'[10], the sanctioning powers of competent authorities should be enhanced and should satisfy certain essential requirements. In particular, competent authorities should be able to suspend the exercise of voting rights for holders of shares and financial instruments who do not comply with the notification requirements and to impose pecuniary sanctions which are sufficiently high to be dissuasive. To ensure sanctions have a dissuasive effect on the public at large, sanctions should normally be published, except in certain well-defined circumstances.

(15) In order to clarify the treatment of non-listed securities represented by depository receipts admitted to trading on a regulated market and in order to avoid transparency gaps, the definition of 'issuer' should be further specified to include issuers of non-listed securities represented by depository receipts admitted to trading on a regulated market. It is also appropriate to amend the definition of 'issuer' taking into account that in some Member States issuers can be natural persons with securities admitted to trading on regulated markets.

(16) All issuers whose securities are admitted to trading on a regulated market within the Union should fall under supervision by a competent authority of a Member State to ensure that they comply with their obligations. Issuers who, according to Directive 2004/109/EC, have to choose their home Member State but who have not done so could avoid being supervised by any competent authority in the Union. Therefore, Directive 2004/109/EC should be amended to include an assumption of a choice of a home Member State for issuers that have not communicated the choice of their home Member State to the competent authorities within a three-month period.

(17) According to Directive 2004/109/EC, the choice of a home Member State is valid for three years. However, when a third country issuer is no longer listed on the regulated market in its home Member State and only remains listed in one host Member State, there is no relationship of such issuer with its originally chosen home Member State.

[10] COM(2010) 716 final.

Such issuer should be allowed to choose its host Member State as its new home Member State before the expiration of the three-year period.

(18) Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of 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[11] contains in particular rules concerning the notification of the choice of the home Member State by the issuer. To avoid that competent authorities of the Member State where the issuer has its registered office are not informed about the choice of home Member State by the issuer, all issuers should be required to communicate the choice of their home Member State to the competent authority of the Member State where they have their registered office, if different from their home Member State. Directive 2007/14/EC should therefore be amended accordingly.

(19) The requirement of Directive 2004/109/EC regarding disclosure of new loans has lead to many implementation problems in practice and its application is considered to be complex. Furthermore, that requirement overlaps partially with the requirements laid down in Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC[12] and Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)[13] and it does not provide much additional information to the market. In order to reduce unnecessary administrative burden for issuers, that requirement should therefore be abolished.

(20) The requirement to communicate any amendment of issuer's instruments of incorporation or statutes to the competent authorities of the home Member State overlaps with the similar requirement of Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies[14] and can result in confusion regarding the role of the competent authority. In order to reduce unnecessary administrative burden for issuers, that requirement should therefore be abolished.

(21) Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[15] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data[16], are fully applicable to the processing of personal data for the purposes of this Directive.

(22) Directives 2004/109/EC and 2007/14/EC should therefore be amended accordingly,

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11 OJ L 69, 9.3.2007, p. 27.
12 OJ L 345, 31.12.2003, p. 64.
13 OJ L 96, 12.4. 2003, p. 16.
14 OJ L 184, 14.7.2007, p. 17.
15 OJ L 281, 23.11.1995, p. 31.
16 OJ L 8, 12.1.2001, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2004/109/EC

Directive 2004/109/EC is amended as follows:

(1) Article 2(1) is amended as follows:

(a) point (d) is replaced by the following:

'(d) 'issuer' means a natural person or a legal entity governed by private or public law, including a State, whose securities are admitted to trading on a regulated market.

In case of depository receipts admitted to trading on a regulated market, the issuer means the issuer of the securities represented, whether those securities are admitted to trading on a regulated market or not;';

(b) point (i) is amended as follows:

(i) in point (ii), the following paragraph is added:

'In absence of choice by the issuer within a period of three months, point (i) above shall automatically apply to that issuer;';

(ii) the following point (iii) is added:

'(iii) by way of derogation from points (i) and (ii), an issuer incorporated in a third country whose securities are no longer admitted to trading on a regulated market in its home Member State but instead are admitted to trading in one or more other Member States may choose its home Member State amongst the Member States where its securities are admitted to trading on a regulated market;';

(c) the following point (q) is added:

'(q) 'formal agreement' means an agreement which is binding under the applicable law.'.

(2) Article 3(1) is replaced by the following:

'1. The home Member State may make an issuer subject to requirements more stringent than those laid down in this Directive, except requiring issuers to publish periodic information other than annual financial reports referred to in Article 4 and half-yearly financial reports referred to in Article 5.

The home Member State may not make a holder of shares, or a natural person or legal entity referred to in Articles 10 or 13, subject to requirements more stringent

than those laid down in this Directive, except setting lower notification thresholds than those laid down in Article 9(1).'.

(3) In Article 4, the following paragraph 7 is added:

'7. The European Securities and Markets Authority (hereinafter 'ESMA'), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council(*), shall issue guidelines, including standard forms or templates, to specify the information to be included in the management report.

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(*) OJ L 331, 15.12.2010, p. 84.'

(4) In Article 5, the following paragraph 7 is added:

'7. ESMA shall issue guidelines, including standard forms or templates, to specify the information to be included in the interim management report.'.

(5) Article 6 is replaced by the following:

'Article 6

Report on payments to governments

Member States shall require issuers active in the extractive or logging of primary forest industries, as defined in […] to prepare, in accordance with Chapter 9 of Directive 2011/../EU of the European Parliament and of the Council (*), a report on payments made to governments on an annual basis. The report shall be made public at the latest six months after the end of each financial year and shall remain publicly available for at least five years. Payments to governments shall be reported at consolidated level.

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(*) OJ L […]'.

(6) Article 8 is amended as follows:

(a) Paragraph 1 is replaced by the following:

'1. Articles 4, 5 and 6 shall not apply to an issuer that is a State, a regional or local authority of a State, a public international body of which at least one Member State is a member, the ECB, and Member States' national central banks whether or not they issue shares or other securities.';

(b) The following paragraph 1a is inserted:

'1a. Articles 4 and 5 shall not apply to an issuer exclusively of debt securities admitted to trading on a regulated market, the denomination per unit of which is at least EUR 100 000 or, in the case of debt securities denominated in a currency other than euro, the value of such denomination per unit is, at the date of the issue, equivalent to at least EUR 100 000.';

(c) Paragraph 4 is replaced by the following:

'4. By way of derogation from paragraph 1a of this Article, Articles 4 and 5 shall not apply to issuers of exclusively debt securities the denomination per unit of which is at least EUR 50 000 or, in the case of debt securities denominated in a currency other than euro, the value of such denomination per unit is, at the date of the issue, equivalent to at least EUR 50 000, which have already been admitted to trading on a regulated market in the Union before 31 December 2010, for as long as such debt securities are outstanding.'.

(7) Article 9 is amended as follows:

(a) In paragraph 4, the following subparagraphs are added:

'ESMA shall develop draft regulatory technical standards to specify the cases in which the exemption referred to in the first subparagraph applies to shares acquired for a short period of time through underwriting.

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2013.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the second subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.';

(b) Paragraph 6 is replaced by the following:

'6. This Article shall not apply to voting rights held in the trading book, as defined in Article 11 of Directive 2006/49/EC of the European Parliament and of the Council(*), of a credit institution or investment firm provided that:

(a) the voting rights held in the trading book do not exceed 5 %, and

(b) the voting rights attached to shares held in the trading book are not exercised nor otherwise used to intervene in the management of the issuer.

The 5 % threshold referred to in point (a) of the first subparagraph of this paragraph shall be calculated taking into account the aggregated number of holdings under Articles 9, 10 and 13.

ESMA shall develop draft regulatory technical standards to specify the method of calculation of the 5 % threshold referred to in point (a) of that subparagraph in case of a group of companies, taking into account Article 12(4) and (5).

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2013.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the third subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

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(*) OJ L 177, 30.6.2006, p. 201.'.

(8) Article 13 is amended as follows:

(a) Paragraph 1 is replaced by the following:

'1. The notification requirements laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly:

(a) financial instruments that, on maturity, give the holder, under a formal agreement, either the unconditional right to acquire or the discretion as to his right to acquire, shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market;

(b) financial instruments with economic effects similar to those referred to in point (a), whether they give right to a physical settlement or not.

The notification required shall include the breakdown by type of financial instruments held according to point (a) of the first subparagraph and financial instruments held according to point (b) of that subparagraph.';

(b) The following paragraphs 1a and 1b are inserted:

'1a. The number of voting rights shall be calculated by reference to the full notional amount of shares underlying the financial instrument. For this purpose, the holder shall aggregate and notify all financial instruments relating to the same underlying issuer. Only long positions shall be taken into account for the calculation of voting rights. Long positions shall not be netted with short positions relating to the same underlying issuer.

ESMA shall develop draft regulatory technical standards to specify the method to calculate the number of voting rights referred to in the first subparagraph in case of financial instruments referenced to a basket of shares or an index.

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2013.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the second subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

1b. For the purposes of paragraph 1 of this Article, transferable securities; and options, futures, swaps, forward rate agreements, contracts for differences and any other derivative contracts which may be settled physically or in cash, shall be considered to be financial instruments, provided they satisfy the conditions set out in points (a) and (b) of paragraph 1.

ESMA shall establish and periodically update an indicative list of financial instruments that are subject to notification requirements according to paragraph 1, taking into account technical developments on financial markets.';

(c) Paragraph 2 is replaced by the following:

'2. The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 27(2a), (2b) and (2c), and subject to the conditions of Articles 27a and 27b, measures to:

(a) modify the method to calculate the number of voting rights relating to the financial instruments referred to in paragraph 1a;

(b) specify the types of instruments to be considered as financial instruments within the meaning of paragraph 1b;

(c) specify the contents of the notification to be made, the notification period and to whom the notification is to be made, as referred to in paragraph 1.';

(d) The following paragraph 4 is added:

'4. The exemptions laid down in Article 9(5) and (6) and in Article 12(3), (4) and (5) shall apply *mutatis mutandis* to the notification requirements under this Article.

ESMA shall develop draft regulatory technical standards to specify the cases in which the exemptions referred to in the first subparagraph apply to financial instruments held by a natural person or a legal entity fulfilling orders received from clients or responding to a client's requests to trade otherwise than on a proprietary basis, or hedging positions arising out of such dealings.

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2013.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the second subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.'.

(9) The following Article 13a is inserted:

'Article 13a

Aggregation

1. The notification requirements laid down in Articles 9, 10 and 13 shall also apply to a natural person or a legal entity when the number of voting rights held directly or indirectly by such person or entity under Articles 9 and 10 aggregated with the number of voting rights relating to financial instruments held directly or indirectly under Article 13 reaches, exceeds or falls below the thresholds set out in Article 9(1).

The notification required under the first subparagraph of this paragraph shall include the breakdown of the number of voting rights attached to shares held according to Articles 9 and 10 and voting rights relating to financial instruments within the meaning of Article 13.

2. Voting rights relating to financial instruments that have already been notified according to Article 13 shall be notified again when the natural person or the legal entity has acquired the underlying shares and such acquisition results in the total number of voting rights attached to shares issued by the same issuer reaching or exceeding the thresholds of Article 9(1).'.

(10) Article 16(3) is deleted.

(11) In Article 19(1), the second subparagraph is deleted.

(12) Article 21(4) is replaced by the following:

'4. The Commission shall be empowered to adopt, by means of delegated acts in accordance with Article 27(2a), (2b) and (2c), and subject to the conditions of Articles 27a and 27b, measures to specify the following minimum standards and rules:

(a) minimum standards for the dissemination of regulated information, as referred to in paragraph 1;

(b) minimum standards for the central storage mechanism as referred to in paragraph 2;

(c) rules concerning the interoperability of the information and communication technologies used by the national officially appointed mechanisms and the access to regulated information at the Union level, as referred to in paragraph 2.

The Commission may also specify and update a list of media for the dissemination of information to the public.'.

(13) Article 22 is replaced by the following:

'Article 22

Access to regulated information at the Union level

1. ESMA shall develop draft regulatory technical standards setting technical requirements regarding access to regulated information at the Union level in order to specify the following:

(a) the technical requirements regarding the interoperability of the information and communication technologies used by the national officially appointed mechanisms;

(b) the technical requirements for the operation of a central access point for the search of regulated information at the Union level;

(c) the technical requirements regarding the use of a unique identifier for each issuer by the national officially appointed mechanisms;

(d) the common format for storing regulated information by national officially appointed mechanisms;

(e) the common classification of regulated information by national officially appointed mechanisms and the common list of types of regulated information.

2. In developing the draft regulatory technical standards, ESMA shall ensure that the technical requirements specified in Article 22(1), are compatible with the technical requirements for the electronic network of national company registers set up by the Directive 2011/../EU of the European Parliament and of the Council(*).

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2014.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.'

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(*) OJ L […]'.

(14) The following title is inserted after Article 27b:

'CHAPTER VIa

SANCTIONS'

(15) Article 28 is replaced by the following:

'Article 28

Sanctions

1. Member States shall provide that their respective competent authorities may take appropriate administrative sanctions and measures where the national provisions adopted in the implementation of this Directive have not been complied with, and shall ensure that they are applied. Those sanctions and measures shall be effective, proportionate and dissuasive.

2. Member States shall ensure that where obligations apply to legal persons, in case of a breach, sanctions can be applied to the members of administrative, management or supervisory bodies of the legal person, and to any other person who under national law is responsible for the breach.

3. Competent authorities shall be given all investigative powers that are necessary for the exercise of their functions. In the exercise of their sanctioning and investigative powers, competent authorities shall cooperate closely to ensure that

sanctions or measures produce the desired results and coordinate their action when dealing with cross border cases.'.

(16) The following Articles 28a, 28b and 28c are inserted:

'Article 28a

Specific provisions

1. This Article shall apply in all the following circumstances:

(a) failure by the issuer to make public information required under Articles 4, 5, 6 and 16 within the required time limit;

(b) failure by the natural or the legal person to notify the acquisition or disposal of a major holding according to Articles 9, 10, 13 and 13a within the required time limit.

2. Without prejudice to the supervisory powers of competent authorities in accordance with Article 24, Member States shall ensure that in the cases referred to in paragraph 1 of this Article, the administrative sanctions and measures that can be applied include at least the following:

(a) a public statement which indicates the natural or the legal person and the nature of the breach;

(b) an order requiring the natural or the legal person to cease the conduct and to desist from a repetition of that conduct;

(c) the power to suspend the exercise of voting rights attached to shares admitted to trading on a regulated market if the competent authority finds that the provisions of this Directive, concerning notification of major holdings have been infringed by the holder of shares or other financial instruments, or a person or entity referred to in Articles 10 or 13;

(d) in case of a legal person, administrative pecuniary sanctions of up to 10 % of the total annual turnover of that legal person in the preceding business year;

(e) in case of a natural person, administrative pecuniary sanctions of up to EUR 5 000 000;

(f) administrative pecuniary sanctions of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined.

For the purposes of point (d) of the first subparagraph, where the legal person is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year.

For the purposes of point (e) of the first subparagraph, in the Member States where the Euro is not the official currency, the corresponding value to EUR 5 000 000 in the national currency shall be calculated taking into account the official exchange rate on [*the date of entry into force of this Directive – insert date*].

Article 28b

Publication of sanctions

Member States shall ensure that the competent authorities publish any sanction or measure imposed for breach of the national provisions adopted in the implementation of this Directive without undue delay, including information on the type and nature of the breach and the identity of persons responsible for it, unless such publication would seriously jeopardise the stability of financial markets. Where publication would cause a disproportionate damage to the parties involved, competent authorities shall publish the sanctions on an anonymous basis.

Article 28c

Effective application of sanctions and exercise of sanctioning powers by competent authorities

1. Member States shall ensure that when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, the competent authorities shall take into account all relevant circumstances, including:

(a) the gravity and the duration of the breach;

(b) the degree of responsibility of the responsible natural or legal person;

(c) the financial strength of the responsible natural or legal person, as indicated by the total turnover of the responsible legal person or the annual income of the responsible natural person;

(d) the importance of profits gained or losses avoided by the responsible natural or legal person, insofar as they can be determined;

(e) the losses for third parties caused by the breach, insofar as they can be determined;

(f) the level of cooperation of the responsible natural or legal person with the competent authority;

(g) previous breaches by the responsible natural or legal person.

2. ESMA shall issue guidelines addressed to competent authorities in accordance with Article 16 of Regulation (EU) No 1095/2010 on types of administrative measures and sanctions and level of administrative pecuniary sanctions.'.

(17) Article 29 is replaced by the following:

'Article 29

Right of appeal

Member States shall ensure that decisions and measures taken in pursuance of laws, regulations and administrative provisions adopted in accordance with this Directive are subject to the right of appeal.'.

(18) Article 31(2) is replaced by the following:

'2. Where Member States adopt measures pursuant to Articles 3(1), 8(2), 8(3) or Article 30, they shall immediately communicate those measures to the Commission and to the other Member States.'.

Article 2

Amendments to Directive 2007/14/EC

Directive 2007/14/EC is amended as follows:

(1) In Article 2, the following paragraph is added:

'In addition, an issuer incorporated in the Union, shall communicate its choice of home Member State to the competent authorities of the Member State where such issuer is incorporated, if different from the home Member State.'.

(2) In Article 11, paragraphs 1 and 2 are deleted.

(3) Article 16 is deleted.

Article 3

Transposition

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

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 4

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*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*