

European Regulatory Snapshot: The Amended Transparency Directive

October 24, 2013

Introduction

On October 17, 2013, the Council of the EU adopted the proposal for a directive to amend the Transparency Directive (2004/109/EC) (the "Amended Transparency Directive")¹. The adoption of the Amended Transparency Directive is the culmination of a review process that commenced in May 2010 with the publication of a consultation paper by the European Commission on the modernisation of the Transparency Directive. Save for certain minor technical and drafting changes, the text adopted by the Council is in the same form as that approved by the European Parliament on June 12, 2013. The changes will be relevant to companies listed on EU regulated markets and to those who directly or indirectly hold voting rights in such issuers.

Executive summary

The key points to highlight in relation to the Amended Transparency Directive are:

- interim management statements have been abolished, although home Member States may require the publication of additional periodic financial information by listed financial institutions;
- the publication deadline for half-yearly reports has been extended from two to three months after the end of the relevant reporting period;
- the notification regime for major holdings of voting rights has been extended to include direct and indirect holdings of financial instruments having the same economic effect as the holding of shares, whether or not they confer a right of physical settlement;
- EU listed companies with activities in the extractive (such as oil, gas and mining) or logging of primary forest industries will be obliged to disclose on an annual basis all payments of €100,000 or more made to governments;
- Member States are required to implement a minimum standard sanctions regime for a breach of the Amended Transparency Directive; and
- the Amended Transparency Directive must be transposed into Member State law within two years of publication in the Official Journal. Member States' implementing laws are therefore likely to be in force from around January 2016.

Background

The aim of the Transparency Directive was to promote efficient, transparent and integrated securities markets in the EU and maintain investor confidence by requiring issuers of securities admitted to trading on a regulated market to publish periodic financial information and on-going regulated

¹ Directive 2013/.../EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC. The text of the Directive can be found [here](#).

information (including financial reports, information relating to major holdings of voting rights and information required to be disclosed under the Market Abuse Directive (2003/6/EC)). In the UK, the Transparency Directive was implemented with effect from January 20, 2007 by changes to Part VI of the Financial Services and Markets Act 2000 made by Part 43 of the Companies Act 2006, and by the FSA's transparency rules. The transparency rules were combined with the disclosure rules to form the Disclosure and Transparency Rules (the "DTR"), which now form part of the FCA Handbook.

The amendments to the Transparency Directive aim to (i) make regulated markets more attractive for raising capital for small and medium-sized issuers by simplifying certain obligations; (ii) improve legal clarity and effectiveness, particularly with respect to the disclosure of corporate ownership; and (iii) ensure that the sanctions for breach of the transparency requirements are sufficiently dissuasive.

Key amendments

The Amended Transparency Directive will be published in the Official Journal and enter into force on the twentieth day following its publication. Member States will then be required to transpose the amendments into national law within two years and, as such, the long-stop date for implementation of the Amended Transparency Directive will likely be around the end of 2015. On this timeline, the changes will likely apply to issuers from around January 2016. The key amendments to the Transparency Directive are set out below.

Abolition of mandatory interim management statements

The current obligation for certain issuers to publish interim management statements has been abolished. However, some issuers may take the view that to meet investors' expectations, they should continue to publish such statements or quarterly financial reports on a voluntary basis.

In addition, the home Member State may require the publication of additional periodic financial information by financial institutions. For other issuers, additional requirements may only be imposed provided that they do not constitute a disproportionate financial burden, in particular for small and medium-sized issuers, and that the additional information required is proportionate to what it contributes to investment decisions. It must also be assessed whether such additional requirements may lead to an excessive focus on the issuer's short-term results and performance.

The regulated market where the securities are listed may also require issuers to publish additional financial information over and above what is required under the Amended Transparency Directive.

Publication of annual and half-yearly financial reports

The deadline for publication of half-yearly financial reports has been extended from two to three months after the end of the relevant reporting period. Furthermore, both annual and half-yearly financial reports must remain publicly available for at least ten years (instead of five years).

From January 2020, issuers will be required to prepare all annual financial reports in a single electronic reporting format, subject to ESMA having undertaken a cost-benefit analysis. ESMA will develop draft regulatory technical standards to be adopted by the European Commission.

Notification of interests in financial instruments

The existing regime for notification of major holdings of voting rights has been extended to include direct and indirect holdings of financial instruments having the same economic effect as the holding of shares, whether or not they confer a right to physical settlement. In broad terms, this will align the EU regime with the current UK rules in DTR 5. The Amended Transparency Directive contains a number of other changes relating to the notification of major holdings of voting rights. In particular, it is worth noting that long positions cannot be netted off against short positions relating to the same underlying issuer and the calculation of voting rights in relation to financial instruments that are exclusively cash settled will be on a "delta-adjusted" basis. These changes are also broadly in line with the current UK rules, although unlike the UK position, ESMA has been tasked with developing technical standards to specify the methods for determining delta in connection with the calculation of voting rights relating to exclusively cash settled financial instruments.

The home Member State will no longer be free to adopt more stringent requirements regarding the regime for notification of major holdings of voting rights, subject to certain exceptions. These include the permission to set both lower and additional notification thresholds, meaning that the UK may maintain its current disclosure thresholds (which are currently where voting rights held reach, exceed or fall below 3% and each 1% threshold thereafter)².

Disclosure of government payments by extractive and logging companies

EU listed companies with activities in the extractive (such as oil, gas and mining) or the logging of primary forest industries should disclose in a report, to be prepared on an annual basis, all payments of €100,000 or more made to governments. The report is to be made public at the latest six months after the end of each financial year and should remain publicly available for at least ten years. In addition, such payments should be reported at a consolidated level. The new disclosure obligation is further set out in Chapter 10 of the recently adopted Accounting Directive (2013/34/EU)³. By 2018, the European Commission must consider whether to expand this obligation to other industries, including banking, telecommunications and construction.

European electronic access point

By January 2018, ESMA is required to establish a web portal providing a European electronic access point to regulated information. Member States must ensure access to their central storage mechanisms via this web portal.

Sanctions for breach

Member States are required to have effective, proportionate and dissuasive sanctions applicable to breaches of the national implementing regulation. In addition, there must be certain minimum sanctions. For failure by an issuer to make required disclosures, fines are to be set as the higher of (i) up to €10 million or 5% of annual turnover, or (ii) up to twice the profits gained or losses avoided because of the breach. For failure by an individual to make required disclosures, fines are to be set as the higher of (i) up to €2 million, or (ii) up to twice the profits gained or losses avoided because of the breach. In relation to a failure to make the required notification within the required time limit in connection with the acquisition or disposal of major holdings of voting rights, Member States must also provide for the possibility of suspending the voting rights attached to the shares, at least for the most serious breaches.

Practical implications

Companies to which the Amended Transparency Directive applies can now begin considering what steps need to be taken in light of the changes outlined above. In particular, they will need to consider the expectations of their investors in relation to the publication of interim management statements; some companies may choose to continue providing more frequent market updates. In addition, transparency related systems and controls should be reviewed to ensure that they comply with the new requirements.

Those companies involved in the extractive or logging industries should begin to prepare systems and controls to ensure compliance with the new disclosure obligations. They should also establish at an early stage whether compliance would be contrary to the local law of the jurisdiction in which such payments are made or trigger a breach of existing contractual obligations of confidentiality. Finally,

² DTR 5.1.2R, FCA Handbook.

³ Directive 2013/34/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. The text of the Directive can be found [here](#).

investors who routinely invest via contracts for difference, derivatives or other similar financial instruments should note that they will have an opportunity to lobby the EU in relation to the technical standards relating to the calculation of delta.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Will Pearce	+44 20 7418 1448	will.pearce@davispolk.com
Richard Small	+44 20 7418 1379	richard.small@davispolk.com
Simon Witty	+44 20 7418 1015	simon.witty@davispolk.com
Simon Evers	+44 20 7418 1306	simon.evers@davispolk.com
Dan Hirschovits	+44 20 7418 1023	dan.hirschovits@davispolk.com
Anne Ingerslev	+44 20 7418 1029	anne.ingerslev@davispolk.com
Victoria Kershaw	+44 20 7418 1022	victoria.kershaw@davispolk.com

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