Securities: issuers trading on a regulated market, transparency requirements

2011/0307(COD) - 25/10/2011 - Legislative proposal

PURPOSE: to amend Directive 2004/109/EC (Transparency Directive) in order to provide for the simplification of certain issuers' obligations with a view to making regulated markets more attractive for small and medium-sized issuers raising capital in Europe.

PROPOSED ACT: Directive of the European Parliament and of the Council.

BACKGROUND: the Commissions report on the operation of the Transparency Directive 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, the review of the operation of the Transparency Directive also showed that there are areas where the regime it created could be improved. In particular, Improvement of the regulatory environment for small and medium-sized issuers and their access to capital are high political priorities for the Commission, as noted in the Single Market Act Communication of April 2011. It is thus desirable to provide for the simplification of certain issuers' obligations with a view to making 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. Lastly, the Commission Communication on reinforcing sanctioning regimes in the financial services sector envisages 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.

IMPACT ASSESSMENT: the Commission conducted an impact assessment of policy alternatives. It sets out the best policy options which were retained in the proposal:

(i) 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;
- 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, which 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;

(ii) 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;

(iii) 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 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;

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

LEGAL BASIS: Article 50 and Article 114.

CONTENT: the proposal contains the following provisions:

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 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, 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 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. 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, resulting in a fragmented market and additional costs for cross-border investors. 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 provided in the Transparency Directive where this is necessary to ensure appropriate transparency of 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. 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 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.

Furthermore, the European Parliament has adopted a Resolution 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. 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 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, which was adopted in July 2010, and requires extractive industry companies (oil, gas and mining companies) registered with the Securities and Exchange Commission to publicly report payments to government son a country- and project-specific basis.

Sanctions and investigation: 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.

BUDGETARY IMPLICATIONS: the proposal has no implications for the EU budget.