To	**Claire Bury and Mariano Fernandez-Salas**
From	**ecoDa (European Confederation of Directors' Associations) / IoD (Institute of Directors)**
Date	**5 September, 2008**
Subject	**European Commission consultation on stricter national measures (gold-plating) in relation to the Directive on Transparency Requirements For Listed Companies**

The Internal Market and Services DG of the European Commission have contacted ecoDa in order to consult on the issue of gold-plating of the Transparency Directive (2004)[1]. They are seeking to determine if Member States have imposed stricter national rules than required by the Directive when transposing it into national law. This memo offers an assessment of how the Directive has been translated into UK law, and provides answers to five specific questions posed by the Commission in their consultation request.

<u>Note that the response is UK-specific.</u>

Background to the Transparency Directive

The aim of the Transparency Directive (TD) is to complement the earlier Prospectus Directive[2] (which related to new issues) by defining the ongoing information disclosure obligations of listed companies. It consists of three main elements.

The first is that all issuers must publish annual, semi-annual and interim reports. These reports must meet certain accounting standards (such as IFRS or their equivalent for consolidated accounts) and contain management reports that

[1] 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.
[2] Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities.

describe important events that have occurred in the previous period or are likely to occur in the forthcoming period.

A second element is that both issuers and investors must disclose changes to major shareholdings. The aim is to allow the public to be aware of large changes in ownership structure, which may be a prelude to a takeover or an attempt by an external shareholder to exercise strategic influence over a company's board.

Finally, the TD attempts to promote the development of an integrated pan-European capital market through the host member state rule. This prevents the regulated market of a member state from imposing additional disclosure requirements on a non-domestic issuer from elsewhere in the EU. Specifically, the host member state may not impose disclosure requirements that are more stringent than those laid out in the TD or other EU legislation. This is analogous to the passport provision of the Prospectus Directive, which allows issuers to utilise a prospectus approved in their home member state for a securities issuance in any other member state.

The TD was implemented in the UK on 20 January 2007 through the introduction by the Financial Services Authority (FSA) of new transparency rules. These rules were combined with the FSA's existing disclosure rules to form the "Disclosure Rules and Transparency Rules". The legal basis for this change was section 1266 of the Companies Act 2006, which amended the Financial Services and Markets Act 2000.

In contrast to the Prospectus Directive, the Transparency Directive is a "minimum harmonization" directive. This means that a Member State can impose more stringent or "super-equivalent" requirements on domestic issuers. In the UK, the FSA has decided to retain, as much as possible, the existing UK disclosure regime. As a result, the environment for disclosure in the UK is likely to be more onerous than in those member states that have chosen to implement only the minimum requirements of the Directive.

In accordance with the requirements of the TD, annual reports must now be published within 4 months of the end of the relevant financial year (reduced from the previous UK requirement of 6 months) and half-yearly reports within 2 months of the end of the relevant financial period (reduced from the previous requirement of 90 days). In addition, annual and half-yearly reports must now be accompanied by a responsibility statement made by "the persons responsible within the Issuer" (which in practice means the board of directors), that the accounts give a true and fair view of the issuer's financial position. Preliminary statements of annual results are no longer obligatory, but issuers will be permitted to release such statements if they wish to do so.

Interim management statements must also be produced (no earlier than week 11 and no later than week 20 in each 6-month period). These statements should provide an explanation of material events and transactions which have occurred during the relevant period and their impact on the issuer's financial position. However, they will not be required if the issuer already publishes quarterly reports (for example, because it is listed in the US). The FSA have stated that issuers may be able to meet the requirements by using trading statements and other similar reports released during the relevant period, and that numerical financial data may not always be required.

Answers to questions posed by the EC consultation

Question (1): Do you have any views on what should be understood as gold plating?

The general issue of translating EU legislation into UK law was examined in a report by Lord Davidson QC, which was published in November 2006.
(http://www.hm-treasury.gov.uk/media/E/F/davidson_review281106.pdf)

According to this report, gold-plating occurs when implementation goes beyond the minimum necessary to comply with the requirements of European legislation by:

- extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the directive;
- not taking full advantage of any derogations which keep requirements to a minimum;
- providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed;
- Implementing the directive early, before the date given in the directive.

The report evaluated a popular perception that the UK tends to gold-plate EU legislation to a greater extent than other EU countries. However, the findings of the review were that:

- there is a lack of evidence to support the assertion that the UK implements and enforces more rigorously than other Member States.
- many allegations of over-implementation of European legislation either derive from disagreements with the EU measure itself, or wrongly assume that the UK legislation originated from the EU;
- it can sometimes be beneficial for the UK economy to set or maintain regulatory standards which exceed the minimum requirements of European legislation;
- the OECD and World Bank consistently report that the UK has one of the most favourable regulatory environments for doing business in the EU, which is not suggestive of gold-plating.

Nonetheless, the review made a number of sensible recommendations to ensure that UK businesses and other stakeholders did not face unnecessary competitive disadvantages from gold-plating in the future. These included the following:

- UK government departments should explicitly highlight and justify the retention of any pre-existing higher national standards relative to a new directive;
- Post-implementation reviews by the Commission should be more systematic and quantified. A post-implementation review in the UK should involve comparisons with at least two other major Member States;
- UK Government departments and regulators should work with EU partners during negotiation and implementation to exchange views and share best practices;

- All UK departments should ensure that lawyers and policy officials with responsibility for the implementation of European legislation have training and incentives to focus on better regulation;
- There should be a better transfer of knowledge between teams negotiating and teams implementing European legislation;
- There should be a gap of at least six months between the transposition deadline and the date when European legislation comes into force;
- The European Commission should publicise its action plans and road maps more effectively so that it reaches a wider range of stakeholders;

Question (2): which is your view on the distinction between "more stringent" and "additional" requirements in the Transparency Directive framework?

“More stringent” is taken to imply legislative or regulatory measures that relate to areas lying within the scope of the Directive, but imposing greater constraints on the behaviour of issuers and investors than stipulated by the Directive. “Additional” is taken to refer to measures extending the scope of the Directive, or covering matters not explicitly addressed by the Directive.

Question (3): Do you have evidence of national gold plating measures affecting ISSUERS? If so and not described above, which ones? Would you described them as "more stringent" or "additional" requirements?

The FSA’s consultation paper 06/4 (March 2006) proposed the deletion of a number of super-equivalent disclosure requirements. However, following the consultation, the FSA decided to retain many of these measures at the request of market participants. As a result, the Listing Rules provisions (particularly in relation to disclosure requirements in issuers’ annual reports) are more extensive than those required by the Directive.

However, this gold-plating only applies to issuers admitted to the Official List of the FSA and traded on the main market of the London Stock Exchange. It does not apply to issuers on “prescribed markets”. The term “prescribed markets” includes markets such as the Alternative Investment Market of the London Stock Exchange (AIM) and the PLUS Quoted market (PLUS). The gold-plated rules for periodic financial reporting also only apply to issuers whose home Member State is the UK. They do not apply to foreign issuers, e.g. with a dual listing in the UK.

Some examples of where gold-plating appears to have occurred with respect to issuers include the following. They are mainly “additional” rather than “more stringent” requirements:

- Issuers of convertible securities are excluded from ongoing information requirements and the obligation to publish semi-annual reports.

- Listed issuers of exclusively wholesale debt are required to issue annual reports (but not semi-annual reports).

- Issuers falling outside the scope of IAS34 should state in half-yearly reports any accounting policy changes that will be applicable in the subsequent annual report.

- Existing rules on the timeliness and content of dividend statements are retained.

- Responsibility for compliance with the TP’s requirements for periodic reporting lies with the issuer, not the board of directors.

Question (4): Do you have evidence of national gold plating measures affecting INVESTORS? If so and not described above, which ones? Would you described them as "more stringent" or "additional" requirements?

The TD states that where a shareholder acquires or disposes of shares relating to an issuer on an EU-regulated market, the shareholder must notify the issuer of the proportion of voting rights it holds when the proportion reaches, exceeds or falls below the following thresholds: 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.

However, the FSA has chosen to retain the lower notification thresholds set out in the UK Companies Act 1985, i.e. 3%, with notifications also triggered at every 1% thereafter, for issuers incorporated in the UK. This can be described as a “more stringent” requirement than that stipulated by the Directive.

A second area of difference between UK rules and the TD is likely to emerge with respect to contracts for difference (CFDs). CFDs are not covered by the minimum disclosure requirements of the Transparency Directive. The shareholder notification regime in the UK also does not currently apply to the holding of economic interests in shares through derivatives such as contracts for difference.

However, this lack of disclosure has resulted in issuers and investors raising concerns that there is a lack of transparency regarding economic interests in shares. The potential implications of this are:

- inefficient pricing in the equity market as a result of information asymmetries;
- the risk of stealth takeovers by predatory investors using CFDs to bypass the major shareholder notification requirements;
- Weaker market confidence due to the lack of transparency about the identity of investors with undisclosed economic interests.

Furthermore, with effect from November 2005, the UK Takeover Panel extended the disclosure provisions of the UK Takeover Code to require the disclosure of purely economic exposures to shares under cash-settled derivatives (such as CFDs) when an issuer was in an offer period. Consequently, there is currently an inconsistency between takeover and normal disclosure regulations.

The implementation of the Transparency Directive in the UK gave the FSA the power to potentially extend the major shareholder notification regime to the disclosure of economic interests. With that in mind, the FSA launched a consultation in November 2007 on the issue of whether the disclosure regime in the UK should be extended to CFDs. Following this consultation, the FSA announced (in July 2008), that new rules are to be developed that aggregate share and CFD holdings for disclosure purposes. This aggregate amount will be subject to the overall 3% disclosure threshold. Final rules relating to this matter are expected to be issued by the FSA in February 2009.

Other areas of potential TD gold-plating in respect of investors include the following:

- Retention of existing (shorter) UK deadlines in respect of notification of major shareholdings.

- Specification of a specific dissemination regime for the notification of major shareholdings (i.e. through Regulated Information Service Providers).

Question (5): Do you have evidence of the Transparency Directive measures having been extended to the alternative markets? If so, which measures? In which alternative markets?

Yes. The FSA has expanded the scope of the notification of shareholdings regime to apply to prescribed markets (e.g. AIM or PLUS) as well as to EU-regulated markets. However, the new rules do not apply to issuers incorporated outside the UK.

Conclusion

The Transparency Directive has caused fewer problems for the financial regulatory structure of the UK than the Prospectus and Market Abuse Directives. This is due to the fact that the minimum harmonization nature of the Directive has allowed it to be implemented in a manner that is largely consistent with the existing UK regulatory regime.

As described above, there are several aspects of the UK's Disclosure and Transparency Rules that can be regarded as "gold-plating", i.e. additional or more stringent measures in comparison with the Transparency Directive. However, these measures are mainly reflective of existing UK listing rules, which have historically placed a high degree of emphasis on corporate transparency and disclosure (e.g. relative to other European equity markets). Furthermore, UK rules have been retained or implemented with the overwhelming support of UK market participants. Consequently, they do not appear to represent a form of gold-plating that poses a threat to the competitiveness of UK companies or investors.