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(Acts whose publication is obligatory)

**DIRECTIVE 2006/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 14 June 2006**

amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

- (1) On 21 May 2003, the Commission adopted an Action Plan announcing measures to modernise company law and enhance corporate governance in the Community. As a short-term priority, the Community was to confirm the collective responsibility of board members, increase transparency in transactions with related parties and off-balance-sheet arrangements and improve disclosure about corporate governance practices applied in a company.
- (2) Pursuant to that Action Plan, members of the administrative, management and supervisory bodies of a company were, as a minimum requirement, to be collectively responsible towards the company for drawing up and publishing annual accounts and annual reports. The same approach was also to apply to members of the administrative, management and supervisory bodies of undertakings drawing up consolidated accounts. Those bodies act

within the competences assigned to them by national law. This should not prevent Member States from going further and providing for direct responsibility towards shareholders or even other stakeholders. On the other hand, Member States were to refrain from opting for a system of responsibility limited to individual board members. However, this should not preclude the ability of courts or other enforcement bodies in the Member States to impose penalties on an individual board member.

- (3) Liability for drawing up and publishing annual accounts and consolidated accounts as well as annual reports and consolidated annual reports is based on national law. Appropriate liability rules, as laid down by each Member State under its national law or regulations, should be applicable to members of the administrative, management and supervisory bodies. Member States should remain free to determine the extent of the liability.
- (4) In order to promote credible financial reporting processes across the European Union, members of the company body that is responsible for the preparation of the company's financial reports should have the duty to ensure that the financial information included in a company's annual accounts and annual reports gives a true and fair view.
- (5) On 27 September 2004 the Commission adopted a Communication on preventing and combating financial and corporate malpractice outlining 'inter alia' the Commission policy initiatives regarding internal control in companies and responsibility of board members.

⁽¹⁾ OJ C 294, 25.11.2005, p. 4.

⁽²⁾ Opinion of the European Parliament of 15 December 2005 (not yet published in the Official Journal) and Council Decision of 22 May 2006.

- (6) At present Fourth Council Directive 78/660/EEC ⁽¹⁾ and Seventh Council Directive 83/349/EEC ⁽²⁾ only provide for disclosure of transactions between a company and the company's affiliated undertakings. With the objective of bringing companies whose securities are not admitted to trading on a regulated market closer to companies applying the international accounting standards for their consolidated accounts, disclosure should be extended to cover other types of related parties, such as key management members and spouses of board members, but only where such transactions are material and not carried out at arm's length. Disclosure of material transactions with related parties that are not carried out under normal market conditions can assist users of annual accounts to assess the financial position of the company as well as, when the company belongs to a group, the financial situation of the group as a whole. Intra-group related party transactions should be eliminated in the preparation of consolidated financial statements.
- (7) Definitions of a related party as set out in the international accounting standards adopted by the Commission in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards ⁽³⁾ should apply to Directives 78/660/EEC and 83/349/EEC.
- (8) Off-balance-sheet arrangements may expose a company to risks and benefits which are material for an assessment of the financial position of the company and, when the company belongs to a group, the financial position of the group as a whole.
- (9) Such off-balance-sheet arrangements could be any transactions or agreements which companies may have with entities, even unincorporated ones, that are not included in the balance sheet. Such off-balance-sheet arrangements may be associated with the creation or use of one or more Special Purpose Entities (SPEs) and offshore activities designed to address, *inter alia*, economic, legal, tax or accounting objectives. Examples of such off-balance-sheet arrangements include risk and benefit-sharing arrangements or obligations arising from a contract such as debt factoring, combined sale and repurchase agreements, consignment stock arrangements, take or pay arrangements, securitisation arranged through separate companies and unincorporated entities, pledged assets, operating leasing arrangements, outsourcing and the like. Appropriate disclosure of the material risks and benefits of such arrangements that are not included in the balance sheet should be set out in the notes to the accounts or the consolidated accounts.
- (10) Companies whose securities are admitted to trading on a regulated market and which have their registered office in the Community should be obliged to disclose an annual corporate governance statement as a specific and clearly identifiable section of the annual report. That statement should at least provide shareholders with easily accessible key information about the corporate governance practices actually applied, including a description of the main features of any existing risk management systems and internal controls in relation to the financial reporting process. The corporate governance statement should make clear whether the company applies any provisions on corporate governance other than those provided for in national law, regardless of whether those provisions are directly laid down in a corporate governance code to which the company is subject or in any corporate governance code which the company may have decided to apply. Furthermore, where relevant, companies may also provide an analysis of environmental and social aspects necessary for an understanding of the company's development, performance and position. There is no need to impose the requirement of a separate corporate governance statement on undertakings drawing up a consolidated annual report. However, the information concerning the group's risk management system and internal control system should be presented.
- (11) The various measures adopted under this Directive should not necessarily apply to the same types of companies or undertakings. Member States should be able to exempt small companies, as described in Article 11 of Directive 78/660/EEC, from the requirements concerning related parties and off-balance-sheet arrangements under this Directive. Companies which already disclose information about transactions with related parties in their accounts pursuant to international accounting standards as adopted in the European Union should not be required to disclose further information under this Directive, as the application of the international accounting standards already results in a true and fair view of such a company. The

⁽¹⁾ OJ L 222, 14.8.1978, p. 11. Directive as last amended by Directive 2006/43/EC of the European Parliament and of the Council (OJ L 157, 9.6.2006, p. 87).

⁽²⁾ OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2006/43/EC.

⁽³⁾ OJ L 243, 11.9.2002, p. 1.

provisions of this Directive concerning the corporate governance statement should apply to all companies, including banks, insurance and reinsurance undertakings and companies which have issued securities other than shares admitted to trading on a regulated market insofar as they are not exempted by Member States. The provisions of this Directive concerning duties and liabilities of board members as well as penalties should apply to all companies to which Council Directives 78/660/EEC, 86/635/EEC ⁽¹⁾ and 91/674/EEC ⁽²⁾ apply and to all undertakings which draw up consolidated accounts in accordance with Directive 83/349/EEC.

- (12) At present Directive 78/660/EEC makes provision for examination every five years of, *inter alia*, the maximum thresholds for balance sheet and net turnover which Member States may apply in determining which companies may be exempted from certain disclosure requirements. In addition to those five-yearly examinations, an additional one-off increase in those balance sheet and net turnover thresholds may also be appropriate. There is no obligation on Member States to make use of those increased thresholds.
- (13) Since the objectives of this Directive, namely facilitating cross-border investments and improving EU-wide comparability and public confidence in financial statements and reports through enhanced and consistent specific disclosures, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and the effects of this Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (14) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of the Fundamental Rights of the European Union.
- (15) In accordance with paragraph 34 of the Interinstitutional agreement on better law-making ⁽³⁾, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (16) Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 78/660/EEC

Directive 78/660/EEC is hereby amended as follows:

1. in Article 11, the first paragraph shall be amended as follows:
 - (a) in the first indent the words 'balance sheet total: EUR 3 650 000' shall be replaced by the words 'balance sheet total: EUR 4 400 000';
 - (b) in the second indent the words 'net turnover: EUR 7 300 000' shall be replaced by the words 'net turnover: EUR 8 800 000';
2. in Article 11, third paragraph, the words 'the Directive setting those amounts in consequence of the review provided for in Article 53(2)' shall be replaced by 'any Directive setting those amounts';
3. in Article 27, the first paragraph shall be amended as follows:
 - (a) in the first indent the words 'balance sheet total: EUR 14 600 000' shall be replaced by the words 'balance sheet total: EUR 17 500 000';
 - (b) in the second indent the words 'net turnover: EUR 29 200 000' shall be replaced by the words 'net turnover: EUR 35 000 000';
4. in Article 27, third paragraph, the words 'the Directive setting those amounts in consequence of the review provided for in Article 53(2)' shall be replaced by 'any Directive setting those amounts';
5. in Article 42a, the following paragraph shall be added:

'(5a) By way of derogation from the provisions of paragraphs 3 and 4, Member States may, in accordance with international accounting standards as adopted by Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council ^(*), as amended until 5 September 2006, permit or require valuation of financial instruments, together with the associated disclosure requirements

⁽¹⁾ OJ L 372, 31.12.1986, p. 1. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

⁽²⁾ OJ L 374, 31.12.1991, p. 7. Directive as amended by Directive 2003/51/EC.

⁽³⁾ OJ C 321, 31.12.2003, p. 1.

which are provided for in international accounting standards adopted in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (**).

(*) OJ L 261, 13.10.2003, p. 1. Regulation as last amended by Regulation (EC) No 108/2006 (OJ L 24, 27.1.2006, p. 1).

(**) OJ L 243, 11.9.2002, p. 1.

6. in Article 43(1), the following points shall be inserted:

(7a) the nature and business purpose of the company's arrangements that are not included in the balance sheet and the financial impact on the company of those arrangements, provided that the risks or benefits arising from such arrangements are material and in so far as the disclosure of such risks or benefits is necessary for assessing the financial position of the company.

Member States may permit the companies referred to in Article 27 to limit the information required to be disclosed by this point to the nature and business purpose of such arrangements;

(7b) transactions which have been entered into with related parties by the company, including the amount of such transactions, the nature of the related party relationship and other information about the transactions necessary for an understanding of the financial position of the company, if such transactions are material and have not been concluded under normal market conditions. Information about individual transactions may be aggregated according to their nature except where separate information is necessary for an understanding of the effects of related party transactions on the financial position of the company.

Member States may permit the companies referred to in Article 27 to omit the disclosures prescribed in this point unless those companies are of a type referred to in Article 1(1) of Directive 77/91/EEC, in which case Member States may limit disclosure to, as a minimum, transactions entered into directly or indirectly between:

(i) the company and its major shareholders,

and

(ii) the company and the members of the administrative, management and supervisory bodies.

Member States may exempt transactions entered into between two or more members of a group provided that subsidiaries which are party to the transaction are wholly owned by such a member.

“Related party” has the same meaning as in international accounting standards adopted in accordance with Regulation (EC) No 1606/2002.’

7. the following Article shall be inserted:

‘Article 46a

1. A company whose securities are admitted to trading on a regulated market within the meaning of Article 4(1), point (14) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (*) shall include a corporate governance statement in its annual report. That statement shall be included as a specific section of the annual report and shall contain at least the following information:

(a) a reference to:

(i) the corporate governance code to which the company is subject,

and/or

(ii) the corporate governance code which the company may have voluntarily decided to apply,

and/or

(iii) all relevant information about the corporate governance practices applied beyond the requirements under national law.

Where points (i) and (ii) apply, the company shall also indicate where the relevant texts are publicly available; where point (iii) applies, the company shall make its corporate governance practices publicly available;

(b) to the extent to which a company, in accordance with national law, departs from a corporate governance code referred to under points (a)(i) or (ii), an explanation by the company as to which parts of the corporate governance code it departs from and the reasons for doing so. Where the company has decided not to apply any provisions of a corporate governance code referred to under points (a)(i) or (ii), it shall explain its reasons for doing so;

(c) a description of the main features of the company's internal control and risk management systems in relation to the financial reporting process;

- (d) the information required by Article 10(1), points (c), (d), (f), (h) and (i) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on take-over bids (**), where the company is subject to that Directive;
- (e) unless the information is already fully provided for in national laws or regulations, the operation of the shareholder meeting and its key powers, and a description of shareholders' rights and how they can be exercised;
- (f) the composition and operation of the administrative, management and supervisory bodies and their committees.

2. Member States may permit the information required by this Article to be set out in a separate report published together with the annual report in the manner set out in Article 47 or by means of a reference in the annual report where such document is publicly available on the company's website. In the event of a separate report, the corporate governance statement may contain a reference to the annual report where the information required in paragraph 1, point (d) is made available. Article 51(1), second subparagraph shall apply to the provisions of paragraph 1, points (c) and (d) of this Article. For the remaining information, the statutory auditor shall check that the corporate governance statement has been produced.

3. Member States may exempt companies which have only issued securities other than shares admitted to trading on a regulated market, within the meaning of Article 4(1), point (14) of Directive 2004/39/EC, from the application of the provisions of paragraph 1, points (a), (b), (e) and (f), unless such companies have issued shares which are traded in a multilateral trading facility, within the meaning of Article 4(1), point (15) of Directive 2004/39/EC.

(*) OJ L 145, 30.4.2004, p. 1.

(**) OJ L 142, 30.4.2004, p. 12.

8. the following Section shall be inserted:

'SECTION 10A

Duty and liability for drawing up and publishing the annual accounts and the annual report

Article 50b

Member States shall ensure that the members of the administrative, management and supervisory bodies of the company have collectively the duty to ensure that the annual accounts, the annual report and, when provided separately, the corporate governance statement to be provided pursuant to Article 46a are drawn up and published in accordance

with the requirements of this Directive and, where applicable, in accordance with the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002. Such bodies shall act within the competences assigned to them by national law.

Article 50c

Member States shall ensure that their laws, regulations and administrative provisions on liability apply to the members of the administrative, management and supervisory bodies referred to in Article 50b, at least towards the company, for breach of the duty referred to in Article 50b.'

9. Article 53a shall be replaced by the following:

'Article 53a

Member States shall not make available the exemptions set out in Articles 11, 27, 43(1), points (7a) and (7b), 46, 47 and 51 in the case of companies whose securities are admitted to trading on a regulated market within the meaning of Article 4(1), point (14) of Directive 2004/39/EC.'

10. the following Article shall be inserted:

'Article 60a

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all the measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.'

11. Article 61a shall be replaced by the following:

'Article 61a

Not later than 1 July 2007, the Commission shall review the provisions in Articles 42a to 42f, Article 43(1)(10) and (14), Article 44(1), Article 46(2)(f) and Article 59(2)(a) and (b) in the light of the experience acquired in applying provisions on fair value accounting, with particular regard to IAS 39 as endorsed in accordance with Regulation (EC) No 1606/2002, and taking account of international developments in the field of accounting and, if appropriate, submit a proposal to the European Parliament and the Council with a view to amending the abovementioned Articles.'

Article 2

Amendments to Directive 83/349/EEC

Directive 83/349/EEC is hereby amended as follows:

1. In Article 34, the following points shall be inserted:

(7a) The nature and business purpose of any arrangements that are not included in the consolidated balance sheet, and the financial impact of those arrangements, provided that the risks or benefits arising from such arrangements are material and in so far as the disclosure of such risks or benefits is necessary for assessing the financial position of the undertakings included in the consolidation taken as a whole.

(7b) The transactions, save for intra-group transactions, entered into by the parent undertaking, or by other undertakings included in the consolidation, with related parties, including the amounts of such transactions, the nature of the related party relationship as well as other information about the transactions necessary for an understanding of the financial position of the undertakings included in the consolidation taken as a whole, if such transactions are material and have not been concluded under normal market conditions. Information about individual transactions may be aggregated according to their nature except where separate information is necessary for an understanding of the effects of the related party transactions on the financial position of the undertakings included in the consolidation taken as a whole.'

2. In Article 36(2), the following point shall be added:

(f) a description of the main features of the group's internal control and risk management systems in relation to the process for preparing consolidated accounts, where an undertaking has its securities admitted to trading on a regulated market within the meaning of Article 4(1), point (14) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (*). In the event that the consolidated annual report and the annual report are presented as a single report, this information must be included in the section of the report containing the corporate governance statement as provided for by Article 46a of Directive 78/660/EEC.

If a Member State permits the information required by paragraph 1 of Article 46a of Directive 78/660/EEC to be set out in a separate report published together with the annual report in the manner prescribed by

Article 47 of that Directive, the information provided under the first subparagraph shall also form part of that separate report. Article 37(1), second subparagraph of this Directive shall apply.

(*) OJ L 145, 30.4.2004, p. 1.'

3. The following Section shall be inserted:

'SECTION 3A

Duty and liability for drawing up and publishing the consolidated accounts and the consolidated annual report

Article 36a

Member States shall ensure that the members of the administrative, management and supervisory bodies of undertakings drawing up the consolidated accounts and the consolidated annual report have collectively the duty to ensure that the consolidated accounts, the consolidated annual report and, when provided separately, the corporate governance statement to be provided pursuant to Article 46a of Directive 78/660/EEC are drawn up and published in accordance with the requirements of this Directive and, where applicable, in accordance with the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (*). Such bodies shall act within the competences assigned to them by national law.

Article 36b

Member States shall ensure that their laws, regulations and administrative provisions on liability apply to the members of the administrative, management and supervisory bodies referred to in Article 36a, at least towards the undertaking drawing up the consolidated accounts, for breach of the duty referred to in Article 36a.

(*) OJ L 243, 11.9.2002, p. 1.'

4. In Article 41, the following paragraph shall be inserted:

'1a. "Related party" has the same meaning as in international accounting standards adopted in accordance with Regulation (EC) No 1606/2002.'

5. the following Article shall be inserted:

'Article 48

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all the measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.'

*Article 3***Amendment to Directive 86/635/EEC**

The first sentence of Article 1(1) of Directive 86/635/EEC shall be replaced by the following:

'Articles 2, 3, 4(1), (3) to (6), Articles 6, 7, 13, 14, 15(3) and (4), Articles 16 to 21, 29 to 35, 37 to 41, 42 first sentence, 42a to 42f, 45(1), 46(1) and (2), 46a, Articles 48 to 50, 50a, 50b, 50c, 51(1) and 51a, 56 to 59, 60a, 61 and 61a of Directive 78/660/EEC shall apply to the institutions mentioned in Article 2 of this Directive, except where this Directive provides otherwise.'

*Article 4***Amendment to Directive 91/674/EEC**

The first sentence of Article 1(1) of Directive 91/674/EEC shall be replaced by the following:

'Articles 2, 3, 4(1), (3) to (6), Articles 6, 7, 13, 14, 15(3) and (4), Articles 16 to 21, 29 to 35, 37 to 41, 42, 42a to 42f, 43 (1), points 1 to 7b and 9 to 14, 45(1), 46(1) and (2), 46a, 48 to 50, 50a, 50b, 50c, 51(1), 51a, 56 to 59, 60a, 61 and 61a of Directive 78/660/EEC shall apply to the undertakings mentioned in Article 2 of this Directive, except where this Directive provides otherwise.'

*Article 5***Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 5 September 2008 at the latest.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

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 6***Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*Article 7***Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 14 June 2006.

For the European Parliament
The President
J. BORRELL FONTELLES

For the Council
The President
H. WINKLER
