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Regulation of requirements for disclosure of information by corporations in EU legislation

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Abstract

The article examines the legal aspects of information disclosure by corporations in EU legislation. It analyzes the requirements of EU corporate legislation in the sphere of financial reporting for admission of security papers to official data sheets (listing). The article also considers the problems of "control" and "participation" in corporations and their reflection in financial statements.

We can estimate the following basic trends in coordination of obligatory rules of compilation of financial statements, reflected in the Ukrainian legislation, and EU directives:

- enhancement of financial statements content by virtue of additional information concerning financial standing of the management entity (cash flow statement, additional information on separate parts of the financial reporting);
- implementation of consolidated financial statements for a group of enterprises.

The analysis of the foreign experience testifies that the development of book-keeping and accounting, complexity of delivering of consolidated financial statements requires a subsequent development of the Ukrainian economy legislation towards its harmonization with the European Union law. Particularly it is essential to draw out the criteria of control and participation with the aim

of determining the status of a parent company, which responsibilities as well include provision of consolidated financial statements.

Keywords

Corporate law, corporations, corporate reporting, control, securities, EU legislation.

Introduction

Corporate activities in the field of accounting information disclosure in the EU are governed by a set of provisions of regulations. Information disclosure is required when creating new enterprises, their acquisition, merger, consolidation, which is conducted in order to verify compliance with the conditions for the implementation and maintenance of a particular type of business and to ensure the monitoring of liquidity, solvency, large financial risks, administrative and accounting procedures and mechanisms of internal control. It may also be made in the process of review of administrative appeals against decisions of the competent authorities or in the trial, initiating special provisions implementation provided by the law.

Features of legal regulation of access to the financial statements of public business companies as issuers of securities are reflected in the works of V. Zai-

kin¹, E. Dubovitskaya², G.O. Kalashnikov, V.K. Mamutov³, G.P. Tolstopyatenko⁴ and others.

The purpose of this study is to analyze the provisions of the EU legislation on information disclosure by corporations.

Corporate EU legislation

Analysis of corporate law in the EU shows that users of financial state-

- 1 Zaikin, V. V., Kalashnikov, G. O. (2004), "Mechanisms of companies defense" ["Mekhanizmy zashchity kompanii"], *Upravlenie kompaniei*, No. 7, pp. 19-22.
- 2 Dubovitskaya, E. (2008), *European corporate right. Series: Civil and economic law of Germany and Europe [Evropeiskoe korporativnoe pravo. Seriya: Grazhdanskoe i ekonomicheskoe pravo Germanii i Evropy]*, Walters Cluwer, Moscow, 266 p.
- 3 Mamutov, V. K., Znamenskii, G. L., Khakhulina, K. S. (2002), *Economic law: textbook [Khozyaistvennoe pravo: Uchebnik]*, Yurinkom Inter, Kiev, 897 p.
- 4 Tolstopyatenko, G. P. (2001), *European tax law [Evropeiskoe nalogovoe pravo]*, Norma, Moscow, p. 174.

ments – shareholders, buyers of securities, creditors apply to court with claims for compensation for damage caused by the use of false financial and economic information. The defendants in these cases are presented by the governing bodies of companies and audit firms, which confirmed the completeness and accuracy of financial reports. In the U.S. and the UK rise the grounds for the claim are cases when the financial statements were not made public in a timely manner, as well as information contained did not meet the principles of the disclosure⁵.

Comparative analysis of EU legislation and the CIS countries in the field of financial reporting for the admission of securities to official listing shows that there are some differences concerning the submission of the listing particulars for admission to official listing of shares on the stock exchange. It relates, first of all, to the information about responsible parties for listing particulars and payment audit. Thus, EU legislation provides the obligation of companies to provide information about the names, addresses and comments of statutory auditors who carried out the audit of annual reports for the previous three financial years in accordance with national leg-

5 Littleton, A. (1966) "The antecedents of double entry book keeping", *Accounting Evolution to 1900*, Russell and Rusell, New York, pp. 13-21.

islation. At the same time, the Ukrainian legislation on the securities market focuses only on the information contained on the auditors who carry out the audit of statements for the previous (fiscal) year.

The company which shares are admitted to official listing on a stock exchange, in accordance with Art. 67 of the Directive, as fast as possible must provide to any number of unspecified persons to get acquainted with its latest annual reports. It applies both to its own annual and consolidated annual reports. In the case where the annual reports do not provide a true and clear image of the assets and liabilities of the company, its financial condition and income or losses, the company should provide more detailed and/or additional information.

In case, when the company has significant changes in its activities, which may affect the value of the shares, the company must provide additional information to all users on the accounts, including all stock exchanges on which its securities are sold, within nine calendar days. To the pointed changes relate, first of all, changes in the rights that are associated with different categories of shares, changes in the structure (shareholders and distribution of active interests)⁶.

6 Moonitz, M. (1970), "Three contributions to the development of accounting princi-

The Directive contains a requirement for mandatory publication of two types of reports: the annual and semi-annual. Provision is made that a semi-annual report contains only basic information on the financial situation and the general development of the activities of the relevant company, whereas the annual report provides comprehensive information on financial and economic activities.

Semiannual report includes figures and explanation about the company, its profits and losses over the period of six months, in particular, net turnover, profits and expenses to the date or after taxes and dividends. The explanatory note indicates the trend of the company development, the factors that have affected the company during the reporting period. Peculiarities of data representation in the semi-annual report can be classified as follows:

- possibility of presenting forecast figures of profits and losses, provided that the company's shares are listed on the stock exchange of one country only;

- bindingness to argument the accountability in articles on each of data indicators from previous years, which will provide an opportunity to compare

ples prior to 1930", *Journal of accounting research*, No. 8, p. 145.

the results of financial and economic activities of the company;

- the company development forecast within the current financial year.

The legislation of Ukraine does not provide for mandatory the disclosure of semi-annual report, but the enterprises-issuers are required to provide semi-annual report to the State Commission on Securities and Stock Market.

Special information applies primarily to changes in economic activities that affect the value of securities and the amount of income upon them.

In disclosing this type of information a special attention in the EU legislation is paid to questions of disclosure in accounting of changes of rights to securities. Thereat the concept of rights to securities in the EU legislation is different from the concept of rights in the Ukrainian legislation.

Accounting Policies

One of the main requirements for corporations is the requirement of disclosure of accounting policies. Disclose an accounting policy in accordance with the legislation should public corporation. Its disclosure may be implemented on its own initiative of the corporation. The above entities must disclose the account-

ing methods adopted in the accounting policy, which significantly affect the assessment and decision-making of concerned users of financial statements.

Explanatory note to the company's annual report per annum must disclose the following information:

- factors that influenced on the final results of the activities of institutions and organizations within the reporting year;
- reasons for the change in the opening balance at the beginning of the year;
- full transcript of income, receivables and payables with the date of its occurrence;
- information on the non-repayable receipts (transfer) of fixed assets ;
- explanation for the excess of actual expenditure over the estimation;
- on punitive measures.

Comparative analysis of the provisions that govern the disclosure of information in the explanatory note shows that in the EU countries the Paragraph 43 of the Fourth EU Directive stipulates the need for disclosure of information regarding:

- related parties, names and legal addresses of every company, in which the company or entity who acts on its own behalf, but under instructions of

the company, holds at least a minimum share capital established by EU member states to a maximum of 20%. Moreover, owned share capital disclosed, the amount of capital and reserves, as well as financial results of this company within the last fiscal year. This information may not be reflected when an associated undertaking does not display balance and less than 50 % of its capital is owned by the company;

- amount and nominal value or, in its absence, reported value of shares subscribed during the year within the authorized capital;

– value of borrowed funds to be returned more than in five years, as well as all debt with respect to which the company has provided a valuable security, specifying the nature and form of the security separately for each item of creditors;

- total amount of financial liabilities that are not covered in the balance sheet, provided this information helps in assessing the financial condition.

Art. 89 of the Directive defines the conditions under which a person or entity must provide the company with the information on selling the securities. In particular, it is provided for cases when a person or entity acquires or sells shares of the company after the purchase or sale of the ratio of votes, owned by

such person or legal entity, reaches, exceeds or falls below one of the thresholds of 10%, 20%, 1/3, 50% and 2/3. In this case, such entity informs the company and competent authorities within seven calendar days of the percentage of votes it owns after such acquisition or sale⁷.

In more detail EU legislation regulates the procedure for filing to special bodies of the statements of intent to acquire a certain stake in the company at the time of their acquisition, as well as a shorter period for disclosing information about purchasing shares is established.

Quantitative criteria established for the shares sale and purchase transactions, and disclosure of this information in the financial statements are closely connected with the legal definition of "voting right".

EU legislation gives a broad interpretation of the notion of voting right in comparison with the Ukrainian legislation. It includes the total value of the voting right, which belongs to:

- body in the shares of the company;
- business entities controlled by this body;
- bodies who act on behalf of that body;

– third party pursuant to a written agreement on a common policy⁸.

In addition, it also includes the voting right, associated with the shares owned by the person or entity, and which are made as a guarantee that this person has a lifelong interest, and the right which that person may only acquire on its own initiative in accordance with the official agreement. To this group of rights also belongs voting rights associated with the shares deposited in a legal entity or private person, that such body can manage at its discretion in the absence of specific instructions from their owners.

Financial statements

An important value has a legislative consolidation of the procedure for the submission of financial statements of the Directive, particularly, the circumstances in which the company is exempt from the reporting, as well as issues related to guidance and publication of confidential information about the company.

Art . 95 of the Directive contains a provision that the competent authorities as an exception may release the company from the obligation to provide informa-

⁷ Gilman, S. (1982), *Accounting Concepts of Profit*, Ronald Press, New York, p. 34.

⁸ Johnson, H. G. (1967), "Key Item Control", *Management Services*, No. 1(4), pp. 21-26.

tion to an indefinite number of persons, if such authorities consider that disclosure of such information would be contrary to the public interest or would cause significant harm to the respective companies, provided that in the latter case such an exemption is not to mislead an indefinite number of persons on the facts and circumstances, which disclosure is important for the evaluation of the relevant securities which may be transferred.

Particular significance have the questions of the validity of norms of the EU legislation in the field of financial statements in the third countries. Art. 82 of the Directive establishes the obligation for companies whose debt securities are listed on stock exchanges, which are located or operating in one or more countries that are not EU member states, for the provision of relevant information to the countries in regard to debt securities⁹.

Those business entities, that offer their securities to an indefinite number of persons during the period of their

admission to official listing on a stock exchange, are required to provide safeguards to protect the interests of actual and potential investors in most EU member states. Such safeguards include the provision of adequate and objective information regarding the financial condition of the issuer and the securities, in which respect the admission to official listing is required. Traditionally, listing details are published in the form of presentation of this information.

Comparative analysis of the legal provisions of EU law and provisions of Ukrainian legislation shows that there are certain differences in the individual procedures for financial reporting for companies for admission to listing on stock exchanges. In particular, the EU Directives:

- set higher requirements to audit the annual accounts of listed companies and content details for shares admission to official listing on the stock exchange;
- provide for mandatory disclosure of semiannual report of the company;
- use a broad interpretation of the concept of the "voting right".

An extensive interpretation of the notion of voting rights includes the total value of the voting rights, which belongs:

9 Heartly, T. K., Benda, V. G. (1998), *Bases of right for European community: Introduction to the constitutional and administrative right of European community. Trans. from Eng. [Osnovy prava Evropeiskogo soobshchestva: Vvedenie v konstitutsionnoe i administrativnoe pravo Evropeiskogo soobshchestva. Per. s angl.]*, YuNITI, Moscow; Colpi, Budapest, p. 45.

- directly to the body in the shares of the company;
- to business entities controlled by the body;
- to bodies who act on behalf of that body;
- to a third party pursuant to a written agreement on a common policy¹⁰.

In addition, it also includes the right to vote, associated with the shares owned by the person or entity, and that made as a guarantee that this person has a lifelong interest, and the right, that this body may acquire only on its own initiative in according to the official agreement. This group includes the voting right associated with shares deposited in such a legal entity or private person that such person can implement at its discretion in the absence of specific instructions from their owners.

In the Ukrainian law the concept of voting right is used in a narrower sense as the totality of the shares in statutory fund, which belongs to the individual, and to reflect the rights of others bodies the concept of "control" is used.

If annual financial statements published not in full, it should be noted that

¹⁰ Hoffman, S. (2008), *The Law and Business of International Project Finance*. 2nd ed., Transnational Publ., Kluwer Law Intern., Hague, pp. 72-83.

the published version of the statements is reduced, as well as to specify the registry, where the financial statements was directed to in accordance with Article 47(1). Failure to submit statements to the registry are subject to mandatory disclosure. The conclusion drawn by the body who is responsible for the audit of financial statements cannot be added to the published statements in abbreviated form.

However, it should be disclosed the fact of the presence (or absence) of slips in the audit conclusion or refusal of its formulation.

Art. 50: with the annual reporting there should be published the following information:

- intended uses of the profit or loss accounting;
- ways of using the profit or loss accounting.

Annual reporting of the companies must necessarily be audited, which provided by the person or persons who are authorized to audit financial statements in accordance with national legislation. In granting exemption from the obligation to publish annual accounts EU Member States should consolidate the legislative sanctions to be using in case of discrepancy of annual financial statements and annual reports of such companies with the Directive requirements.

Annual financial statements

National EU legislation regulates the manner of publication of the annual financial statements together with the auditor's final part of the conclusion. Annual financial statements in European countries include the balance (invoice/report form), income statement, losses (invoice/report form of expendable type, but with a predominance of a functional one), explanations, cash flow statement, statement of the company's chief executive (on the initiative of the company). Open joint stock companies, banks and other credit institutions, insurance companies, stock exchanges, investment funds and other funds that are created by private, public and state contributions, in some countries are required to publish an interim, semi-annual (quarterly) accounting statements. For example, in Denmark semiannual reporting (unaudited) submitted to stock exchange by OJSCs and major companies. In Germany OJSCs also provide stock exchange with the interim statements.

The obligation of the companies in the EU regarding the publication of statements is set based on a specific group of criteria, which include organizational legal form and bindingness to be registered in the commercial register at its location. For instance, in Austria compa-

nies registered in the Commercial Register are required to publish statements, in Portugal statements are published by large companies that have assets greater than 1.5 billion escudos, staff more than 250 people.

Publication in the legislation of the EU Member States is recognized as a publication of statements in a specialized publication, as well as providing that to stock exchange or a special government body responsible for the information publishing.

In Germany statements are submitted by all companies in the commercial registers at their location with simultaneous notification on the information in the Gazette Bundesanzeiger. In Denmark the publication of statements is recognized as its publication in the state register. In Greece the publication of statements is recognized as a set of annual reporting forms assignment to the public authority – the Ministry of Commerce. In Italy the publication is recognized as a statements assignment to the Register of Companies. Reports of Italian companies published abroad are compiled by international/American standards, OJSCs provide to stock exchange semi-annual reports (unaudited).

In Spain the publication is recognized as statements assignment in a pub-

lic register. In addition, OJSCs provide quarterly reports to stock exchange (un-audited).

For joint stock companies In Luxembourg the publication is recognized as an assignation of the statements in the Chambers of Commerce and its publication in a special edition "Memorial". For small and medium enterprises the publication is recognized as an assignation of the statements in the Chamber of Commerce.

In Finland the reports are submitted to the national patent and trade mark registration offices in computer form, which is recognized as a publication. All companies provide statements to the Ministry of Trade and Industry as well.

In France the publication of reports is required for joint stock, major collaborating limited liability companies, for medium-sized companies (reduced interpretation), for small enterprises (reduced statements and interpretation). Publication is recognized as a reporting to the Committee of enterprise management and its publication in an information network making it available to users.

In the UK the disclosure in the financial statements means complete disclosure of the information on conditional events and related parties. In the Nether-

lands (Holland) the publication is recognized as a publication of information in the Register of Companies. Statements reporting is required for all companies, including small, who provide a condensed balance sheet and explanation.

The publication of information on the registration of companies is of particular importance.

First Directive 1968 "On disclosure" addresses three main groups of issues that concern the protection of the interests of third parties and a list of the minimum amount of information to be published. Under the Directive basic data of the financial and accounting nature subject to mandatory publication: the amount of the signed capital, balance sheet of profits and losses for each financial year.

The development of regulatory framework concerning the information disclosure by corporations in Ukraine

Subsequent development of the regulatory framework concerning the information disclosure by corporations assumes:

– establishing the coherence of economic and accounting legislation,

strengthening the differentiation of requirements for accounting, disclosure of accounting policies and financial reporting by business entities with different legal status in the Commercial Code of Ukraine;

– development of guidelines that govern the procedure for the preparation of financial statements on the basis of accounting information for business entities for the Commission on Securities and Stock Exchange and the Antimonopoly Committee, as well as regulations that govern the industry peculiarities of accounting based on the new national standards;

– determination of the legal status and the procedure for participation of public accounting organizations in the development of the regulatory framework on accounting and financial reporting in Ukraine and ensuring the gradual growth of their role in the development and implementation of accounting standards, forms and rules of the financial statements.

Appropriate expansion of Ukrainian normative acts which govern the submission and publication of statements by stock companies being security issuers – will facilitate the adaptation of the company law of Ukraine to the EU legislation.

The form of the financial statements as a way of providing information on business entities in Ukraine becomes of a particular importance. Unification of financial reporting is aimed at providing common approaches of the individual items of balance and additional reporting information provision, which allow assessing the financial condition of a business entity regardless of the country that it operates in. Therefore, it is important to provide financial information in the statements by Ukrainian business entities to avoid the need of harmonizing the format of Ukrainian and international standards¹¹.

Main directions of harmonization of mandatory rules for the preparation of financial statements in Ukraine with the EU directives may be formulated as follows:

– expansion of the content of financial statements with the additional information on the financial condition of a business entity (cash flow statement, additional information about individual pieces of reporting);

– introduction of the consolidated financial statements for a group of companies. As a result of the development of

11 "13th corporate directive of ES, 2004/25/EB" ["13-taya korporativnaya direktiva ES, 2004/25/EB"], *Official Journal of the European Union*, 2004, L142/12.

the Ukrainian economy a large number of firms operate with associate private funds, often international. It was therefore necessary to develop a provision on the consolidated financial statements. According to Art. 12 of the 1999 Act companies that have subsidiaries along with the financial statements on their own business operations are required to provide consolidated financial statements. In many cases, the present financial condition of individual companies can only be characterized by the consolidated financial statements of the combined group, which shows the financial position, results of operations and cash flow of the legal entity and its subsidiaries as a single economic unit.

Consolidated financial statements

In the International Accounting Standards the need to provide consolidated financial statements by the parent company is determined by such factors: the company owns the majority of shares of another company, which is included in its structure; owns the majority of shares of another company, but does not possess full voting status; exercises actual control by participating in meetings of the Board of Directors influencing the

decisions. It is recommended to use the "equitable participation" method with the reporting assignation. It is mostly used in the Anglo American legal system, because the existence of a system of case law allows outlining the theory of "equitable participation". Practical use of this method allows a joint operation agreement, which would determine the percentage of participation. It is very difficult to establish the degree of control in the absence of such a document.

In accordance with the concept of consolidated financial statements preparation adopted in civil law countries, in particular in France, before the consolidation of accounts the participation and control levels in every society included in the group are determined. Participation level reflects a share of each participant in a society that is included in the group, at the level of the capital, funds and results distribution, and the control level – some votes, which are owned by the participant in each society in the group. Percentage of the participation control is crucial when selecting the method of consolidation of financial statements. In accordance with the established policy in France the participation recording in the company starts from the time when the investor holds at least ten percent of participation and control. With a complete

control used the full accounts integration method, with a common control – proportional integration method, with an assigned participation – the method of equivalence. In case where the interest of participation or control in the economic society is less than 20%, the company is not included in a group which consolidates¹².

German Commercial Code established special criteria, according to which the consolidated statements assignment is required. They include turnover, balance result and number of workers. Traditional German control concept allows the presence of the control de facto, i.e., the ownership not less than twenty percent of the participation.

Special attention should also be paid to the question of applying the accounting policies. According to the 1999 Law business entities can choose their own methods of inventory account and profit generation provided by the relevant national accounting standards. In accordance with the standard "Consolidated Financial Statements" enterprises of one group prepare their financial statements

using uniform accounting policies for similar transactions and other events in identical circumstances. If it is not possible to apply uniform accounting policies during the preparation of the consolidated financial statements, this fact should be reported in the notes to the consolidated financial statements. In some cases, a change in accounting policy can significantly affect the results of the financial and economic activities of the corporation, e.g., French law governs the conduct of the set of special procedures that ensure comparability of the financial results of the group of companies during the preparation of consolidated financial statements¹³.

Analysis of foreign experience shows that the development of accounting and reporting, complexity of the problems of providing consolidated reporting needs the subsequent development in the economic legislation of Ukraine in the direction of harmonization with the EU legislation. In particular, it is necessary to develop criteria for control and participation to determine the status of the

12 Kalashnikov, G. O. (2004), "Regulating of the companies merges by the right of EU: control questions" ["Regulirovanie sliyanii kompanii po pravu ES: voprosy kontrolya"], *Mezhdunarodnoe publichnoe i chastnoe pravo*, No. 2, pp. 25-31.

13 "1-st project of 9th corporate directive of EU, 1st part" ["1-i proekt 9-toi korporativnoi direktivy ES, 1 chast"], *DOK*, 1975, XI, p. 328; "1-st project of 9th corporate directive of EU, 2nd part" ["1-i proekt 9-toi korporativnoi direktivy ES, 2 chast"], *DOK*, 1975, XI, p. 593.

parent company, which is responsible for the provision of consolidated financial statements.

Similar positions concerning the reports of independent companies and schemes underlie the Consolidated Statement, which, in turn, consists of the consolidated balance sheet, the consolidated profit and loss account, addenda and audit report (in accordance with the Eighth Directive)¹⁴.

Consolidated statements are prepared in the following cases:

- parent company owns the majority of votes at the general meeting of shareholders or members of the enterprise;

- parent company has the right to appoint or remove the majority of the directors of another company, which in turn is a subsidiary company;

- main company has a special influence upon another company being its shareholder or member in line with the agreement between them or under the provisions of the charter of the second company.

14 "Communication from the Commission to the Council and the European Parliament. Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward. Brussels, 21 May 2003", available at: http://europa.eu.int/comm/internal_market/en/company/company/official/

Moreover, the a member state has the right to require the consolidated statement preparation when one company actually has a dominant influence over the other, and when the corporate governance of the first and second companies is carried out on a uniform basis of the first company.

In certain situations the consolidated statement preparation by the competent authority of a member state may be optional, for instance, when the main company itself is dependent upon another company.

Consolidated statement may be prepared either by the decision of company's administrative authorities or by the court, as well as at the request of the company's employees.

The Art. 17 of the Directive under the "partnership share" implies confirmed or not evidenced by certificates rights to participate in the capital of other companies that promote the company's development by creating long-term relationships with these entities. Owning a part of the capital of another company is considered as a "partnership share" when it exceeds a certain percentage established by the EU member states and, in turn, does not exceed 20%¹⁵.

15 "7th corporate directive of EU, 83/349/EEB" ["7-aya korporativnaya direktiva ES, 83/349/EEB"], *Official Journal of the European Union*, 1983, L. 193.

Conclusion

Main directions of harmonization of mandatory rules for the preparation of financial statements, as reflected in the Ukrainian legislation, with the EU directives can be determined as follows: – expansion of the content of financial statements with the additional information on the financial condition of a business entity (cash flow statement, additional information about individual pieces of reporting); – introduction of the consolidated financial statements for a group of companies.

Analysis of foreign experience shows that the development of accounting and reporting, the complexity of the problems of providing consolidated reporting needs in the subsequent development in the economic legislation of Ukraine in the direction of harmonization with the EU legislation. Particularly, it is necessary to develop criteria for control and participation to determine the status of the parent company, which is responsible for the provision of the consolidated financial statements.

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Регулирование требований к раскрытию информации корпорациями в законодательстве ЕС

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Аннотация

Исследуются правовые аспекты раскрытия информации корпорациями в законодательстве ЕС. Анализируются требования корпоративного законодательства ЕС в сфере представления финансовой отчетности для допуска ценных бумаг к официальному листингу. Рассматриваются вопросы «контроля» и «участия» в корпорациях и их отражение в финансовой отчетности.

Ключевые слова

Корпоративное право, корпорации, корпоративная отчетность, контроль, ценные бумаги, законодательство ЕС.

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