COUNCIL OF
THE EUROPEAN UNION

Brussels, 28 May 2010

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EF 50
DRS 20
ECOFIN 325

COVER NOTE

from:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	27 May 2010
to:	Mr Pierre de BOISSIEU, Secretary-General of the Council of the European Union
Subject:	Commission Staff Working Document - The review of the operation of Directive 2004/109/EC : emerging issues Accompanying document to the Report from the commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Operation of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

Delegations will find attached Commission document SEC(2010) 611.

Encl.: SEC(2010)611.

EUROPEAN COMMISSION

Brussels, 27.5.2010
SEC(2010) 611

COMMISSION STAFF WORKING DOCUMENT

The review of the operation of Directive 2004/109/EC: emerging issues

Accompanying document to the

Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Operation of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

COM(2010)243

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INTRODUCTION

1. This Commission staff working document reviews the operation of Directive 2004/109/EC[1] on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (hereinafter the "Transparency Directive"). It supplements the Report from the Commission on the operation of this Directive.

2. The Transparency Directive requires issuers of securities in regulated markets within the EU to ensure appropriate transparency for investors through the disclosure of regulated information and its dissemination to the public throughout the EU. Such information consists of financial reports, information on major holdings of voting rights and information disclosed pursuant to Article 6 of the Market Abuse Directive.

   The objectives pursued by the Transparency Directive are important to financial markets and recognised by international standard setting bodies, such as IOSCO or the OECD. The current financial crisis demonstrates that the disclosure of accurate, comprehensive and timely information about securities issuers is essential in order to build sustained investor confidence and allow an informed assessment of their business performance and assets (see Annex 1 for further detail on the Transparency Directive and its importance for financial markets).

3. This Commission staff working document[2] is based in part on external studies conducted for the Commission and information collected from stakeholders and other external sources (see Annex 2 for further detail on the methodology of this report). This document (1) describes the impact of the Transparency Directive and how it has been complied with; and (2) presents the main issues emerging from the application of the Directive. This document is completed by several annexes.

1. THE TRANSPOSITION OF THE TRANSPARENCY DIRECTIVE: IMPACT AND COMPLIANCE

1.1. Impact of the Transparency Directive

4. The External Study on the application of the Transparency Directive conducted on behalf of the Commission (hereinafter "the External Study")[3] reflects that a strong majority of the stakeholders who participated in the survey consider the Transparency Directive to be useful for the proper and efficient functioning of the market. About two thirds of those stakeholders consider that the provisions of the Directive are appropriate to achieving its objectives of providing accurate, comprehensive and timely information to the market[4]. The stakeholders' perception is

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[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 and amending Directive 2001/34/EC, OJ L 390 of 31.12.2004, p.38. See: www.ec.europa.eu/internal_market/securities/transparency/index_en.htm

[2] This document does not reflect the views of the Commission as such, but rather those of its staff only.

[3] Mazars (2009). See Annex 2 of this paper for further information on the External Study.

[4] See Mazars (2009), section 1.7 (suitability of the provisions of the Directive).

also that the main obligations the Transparency Directive are sufficiently clear[5]. Concerning the provisions regarding the dissemination of regulated information, stakeholders' perception is that this is satisfactory and they generally believe that regulated information disclosed by issuers reaches investors, except perhaps in the case of information disclosed by smaller listed companies[6].

5. In terms of economic impacts of the Directive on financial markets, research conducted so far is not conclusive[7]. It seems rather that the Transparency Directive is neutral: while perceived as a simplifying factor for primary market issuance, there is a lack of empirical evidence to back up the perception. As concerns listings in regulated markets, the Directive does create neither obstacles, nor incentives. Other rules (e.g. the Prospectus Directive) are considered more important in this regard. Also, there is no economic evidence of the impact of the Directive with regard to making comparable information available to the market, resulting in particular from the low harmonisation achieved[8].

6. Two points have been frequently made regarding the general architecture of the Directive in the survey conducted by the External Study. Firstly, the minimum harmonisation character of the Transparency Directive allows Member States to adopt more stringent requirements[9]. Thus the transposition of the Directive[10] is relatively uneven as a result of different national requirements (see Annex 3 for more detail on the transposition process and Annex 4 regarding the use of implementing powers by the Commission). More stringent national requirements, in particular regarding the notification of major holdings of voting rights, are perceived as problematic by stakeholders[11]. This results in real and costly implementation

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5 *Ibid.*, section 1.4 (clarity of obligations).

6 *Ibid.*, sections 4.1 and 4.3 (dissemination of regulated information). See in particular section 4.3.2.5 (access to financial information on a cross-border basis of mid and small caps) about the poor cross-border dissemination of regulated information by smaller listed companies and the low interest shown by analysts and investors in those companies (referred to as the "black hole" problem).

7 See Mazars (2009), section 1.5 (impact of the directive). See also another recent external study recently conducted for the European Commission (CRA International (2009)). The aim of this study was to evaluate the economic impact of the whole Financial Services Action Plan of 1999. The impact of the Transparency Directive was evaluated together with other so-called information measures aiming at harmonising information disclosure and increasing market confidence. Overall, information disclosure measures within the FSAP were assessed to have a mixed impact on the market.

8 See CRA International (2009), p.173. According to this study, participants representing institutional investors indicated the importance of the availability of comparative information as investors are then able to systematically compare information between companies. This includes the ability to take information that is available in comparable electronic form and apply internal models to assess whether the companies meet investment objectives. In particular, interviewees made reference to the ability to more easily monitor investments that are made - both because accounting information is comparable and also because it is more freely available than in the past. Interviewees also drew attention to the benefits to risk management from the additional information available since this enables them to understand the risks involved with the investments they were making.

9 The Commission staff examined the question of more stringent national requirements in 2008 and produced a specific report with detailed information on this matter, which should be regarded as a complement to this paper. See European Commission (December 2008).

10 In 2008 CESR conducted a comprehensive mapping of the national requirements by each Member State pursuant to the Transparency Directive. See CESR (September 2008).

11 See generally Europe Economics (2009); and Mazars (2009), sections 1.3, 1.4.3 and 3.3.7.

problems[12]. This raises the question as to whether the current regime (i.e. a minimum harmonisation directive) is the appropriate tool to achieve an effective level harmonisation of transparency requirements in the EU[13].

Secondly, the absence of more flexible rules for smaller listed companies makes requirements too demanding and costly according to such companies, thus creating market inefficiency[14].

7. Additionally, it appears that the Directive's obligations need to be adapted to innovation in financial markets. In particular, insufficient disclosure of stock lending practices seemed to have increased the risk of empty voting and lack of disclosure regarding cash-settled derivatives has led to problems with "hidden ownership"[15]. Finally, the progress towards the establishment of a pan-European system of storage of regulated information, with a view to facilitate investors' access to information, is slow[16] and the impact of the Directive in this area has been insufficient[17].

1.2. Compliance with the Transparency Directive requirements

8. A review of issuers' practices shows that issuers generally comply with financial reporting obligations and that this is also the perception of stakeholders[18]. Moreover, issuers appear to voluntarily publish more information than the minimum requirements regarding half-yearly and quarterly financial information. Financial information disclosed is considered useful and sufficient for investment purposes[19]. Also, the simplification of language requirements for disclosure of financial information introduced in 2004 has been particularly welcome[20].

9. The cost of compliance with the obligations of the Transparency Directive[21] does not appear, *prima facie*, particularly high[22]. Concerning issuers' expenditure, more than two thirds of stakeholders surveyed in the External Study[23] did not consider the compliance cost with disclosure of financial information for issuers to be too onerous, albeit small and medium sized listed companies are more sensitive to the

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12 Mazars (2009), section 1.8 (level of harmonisation). See also European Commission (December 2008) and Annex 5 – Section D of this paper. See as well European Parliament (September 2008), recital J.

13 The fact that no harmonisation has yet been achieved is confirmed by another study conducted for the Commission, which explains that although the Transparency Directive has made progress towards harmonisation "*there remain numerous differences between Member States which would need to be overcome in order to see impacts through this channel and hence no harmonisation impact has yet been achieved*". See CRA International (2009), p. 173-174 and 182.

14 Mazars (2009), section 1.9 (SMEs and non regulated markets).

15 *Ibid*., section 3.6 (financial innovation)

16 See the Commission Recommendation 2007/657/EC of 11 October 2007 on the electronic network of officially appointed mechanisms for the central storage of regulated information referred to in Directive 2004/109/Ec of the European Parliament and of the Council, OJ L 267, 12.10.2007, p.16.

17 Mazars (2009), section 4.4 (storage of regulated information), in particular p. 137.

18 *Ibid*., section 2.3 (compliance review).

19 *Ibid*., section 2.4 (suitability of periodic information disclosed).

20 *Ibid*., executive summary, point 5..

21 It should be noted that the bulk of the requirements on the content (e.g. accounting standards) of annual and half-yearly financial reports are not contained in the Transparency Directive.

22 See Europe Economics (2009), a recent study conducted for the European Commission on cost of compliance with selected financial services directives (see Annex 5 of this paper for further detail on this study). This study survey the costs incurred by some categories of financial institutions.

23 Mazars (2009), section 2.3.5 (compliance cost).

cost of compliance. The introduction of the "Home Member State rule" as well as the simplification of the language regime for financial disclosures in 2004) should, in principle, have contributed to reducing issuers' costs[24].

However, the situation is different for investors. There are increased costs for cross-border investors resulting from the insufficiently harmonised requirements of the Directive[25]: some larger asset managers view the Transparency Directive as something of a missed opportunity to reduce costs due to the minimum harmonisation approach adopted in its implementation[26].

2. THE REVIEW OF THE OPERATION OF THE DIRECTIVE: EMERGING ISSUES

10. A number of issues emerge from the review of the operation of the Transparency Directive. First and foremost, the debate is raised as to whether the transparency rules should be specifically adapted to smaller listed companies with a view to maintaining and also increasing the attractiveness of regulated markets for this category of issuers (see Section 2.1)[27].

Other important emerging issues concerning the scope of the Directive are: the usefulness of quarterly financial disclosures (see Section 2.2); the need for greater harmonisation of the rules on notification of major holdings[28] (see Section 2.3); the need for greater sophistication of the Directive rules so as to cover market trends and innovations[29] (see Sections 2.4 to 2.6); or the question of the transparency rules in the non-regulated markets (see Section 2.7). These issues are equally related to the possibility to reduce the costs of compliance with the Directive[30], notably those associated to notification of major holdings[31] and those incurred by smaller listed companies.

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24 According to the "Home Member State Rule" (cf. Article 3(1)), issuers are only subject to the obligations set out by their Home Member State (normally the one of incorporation) but not to those of the Host Member State. This "Home Member State Rule" should avoid the dual (or multiple) application of rules to issuers. See European Commission (December 2008), §§ 7 and 8. Nevertheless, according to the External Study, companies not listed in their Member State of incorporation have expressed frustration as the Home Member State principle was to simplify matters, whereas in reality, they do not feel that this is the case – dual reporting and compliance with two different sets of rules would continue to exist due to supervisors' practices going beyond what is required by the Directive. See Mazars (2009), section 1.1.

25 See above §6 of this paper. See generally European Commission (2008), and in particular §9.

26 Europe Economics (2009), in particular p. 76. See also CRA International (2009) p.175 on this point: "*In the case of the Transparency Directive, a lack of harmonisation, means gains from this source are limited compared to those which could potentially be achieved.*" See also European Commission (December 2008), §§ 11 to 13 in relation to increased costs associated to more stringent national measures. Mazars (2009) also supports these conclusions, see section 1.1 of the Study report.

27 See for instance Mazars (2009), Possible Improvements 2 and 4.

28 See for instance Mazars (2009), Possible Improvements 1, 5 and 7. See also European Commission (December 2008).

29 See for instance Mazars (2009), Possible Improvements 6 and 8 to 14.

30 Reduction of administrative burden for EU businesses is an important objective of the European Commission. See European Commission (January 2007). See also: http://ec.europa.eu/enterprise/policies/better-regulation/administrative-burdens/index_en.htm and http://ec.europa.eu/governance/better_regulation/admin_costs_en.htm

31 For instance, the Commission has recently proposed that powers are granted to the future European Securities Markets Authority with a view to develop a standard form to be used for the notification of

11. Finally, while there are no major compliance problems, the review of the operation of the Directive shows that some adjustments to the text of the Directive would be beneficial in the interest of improved clarity[32] (see Section 2.8).

2.1. Smaller listed companies and disclosure requirements

12. An important recurrent issue is how to make access to regulated market more attractive[33] for small and medium-sized enterprises (SMEs). The argument is regularly advanced to the Commission staffs that the rules appear to be designed primarily for the "blue-chip" companies in the first place and that, for SMEs or smaller listed companies[34], the costs of being listed are proportionally higher[35]. In the External Study[36], stakeholders' views[37] are in favour of a distinct transparency regime for SMEs (understood as smaller listed companies)[38], in particular those of financial analysts, retail investors and issuers of shares (especially mid- and small caps)[39]. Stock exchanges and institutional investors are however more reluctant to

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major holdings of voting rights and financial instruments, with a view to simplify the application of the rules by cross-border investors. See draft Article 7 of the Commission Proposal of 26.10.2009 for a Directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority; COM(2009)576final. See also Mazars (2009), recommendation 13, which also supports the need for a single e-notification form.

32 See for instance, Mazars (2009), section 1.4.3 (assessment of the legal clarity for the operational functioning of the Directive).

33 In order to raise capital at competitive cost, the main alternatives to listing shares in regulated markets would be private equity, banking loans, acceding alternative (non-regulated) markets or issuing debt. It should be noted however that issuers of debt securities admitted to trading in regulated markets are also subject to the obligations of the Transparency Directive.

34 The concept of 'smaller listed companies' has not been defined for the purposes of this paper, but would encompass larger companies than SMEs (as traditionally defined in EU law). Recently, the European Commission, when referring to this category of listed companies, used the expression "issuers with reduced market capitalisation" in a proposal for directive (Proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; 23.9.2009; COM(2009) 491 final. See in particular recital 11). In this paper, the less technical expression "smaller listed companies" will be preferred.

35 Interestingly, anecdotal information collected in 2008 suggests that the costs associated with the Transparency Directive obligations do not seem to be the main driver for issuers' choice on non-regulated markets as opposed to regulated markets. See European Commission (December 2008), Annex 7.

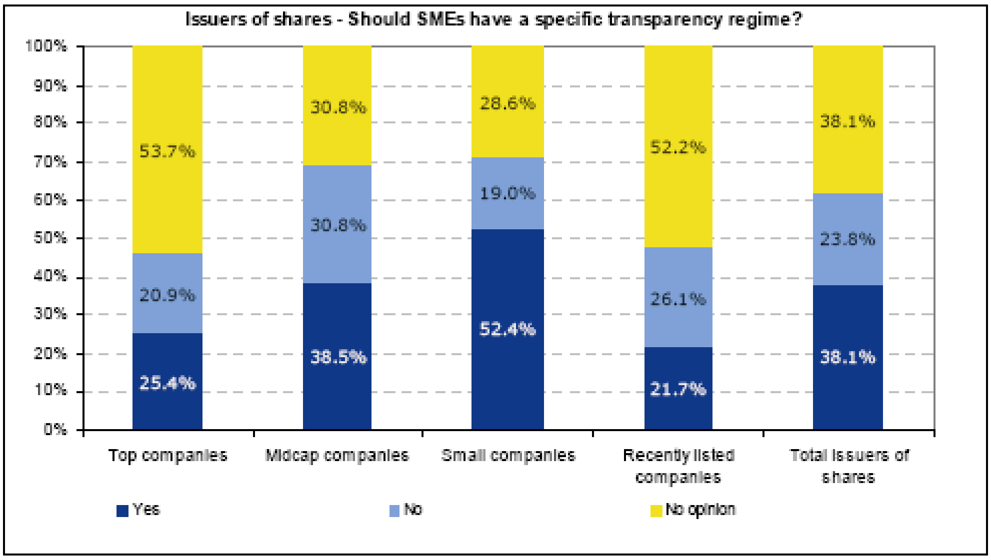
36 Mazars (2009), section 1.9.1.

37 Of the 14 EU MS surveyed, a strong opinion in favour of a specific regime is expressed in ES, FR, IT, LU and SK.

38 In Mazars (2009), reference is made to market capitalisation (between €250 M and €1 billion) and not the turnover, nor the number of employees, as the relevant criterion for defining smaller listed companies in this context.

39 On this issue, see also the recent report prepared at the request of the French Ministry of Economics: Demarigny (March 2010). This report explains that the EU Directives have set requirements, applicable to all issuers irrespective of their size, representing a barrier too high for small and medium companies in terms of compliance and costs. In addition, it explains that the trading and the liquidity has concentrated on major listed companies of the leading indexes: on average, 93% of listed companies that are not in the largest market capitalisations benefit from less than 7% of the liquidity. This reports

this. For Exchanges, in particular, the differentiation line should be made between regulated markets on the one hand and Exchange regulated or alternative markets on the other hand, for which rules should be much lighter (see Section 2.7 of this paper)[40].



According to that External Study, "*a specific regime for SMEs, limited to well-identified measures, would create a more favourable environment for listing and […] it would contribute to the efficiency of the market. […].*"[41]

The scope for simplification of the Transparency Directive rules for smaller listed companies, and therefore achieving savings, is however limited[42] – which leads those who oppose a specific regime for smaller listed companies to argue that the requirements are not too demanding and that if a company is not able to meet them it should not be listed at all.

13. However there are specific simplification measures which could be envisaged, without undermining investor protection, such as for instance: (i) providing for more flexible deadlines to the disclosure of financial reports; (ii) alleviating the obligation to publish quarterly financial information; (iii) harmonising the maximum content of reports; or (iv) facilitating cross border visibility of smaller listed companies.

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pleads for the establishment of a proportionate regulatory and financial environment for small and medium-sized issuers listed in Europe.

40 Mazars (2009), section 1.9.2.

41 Mazars (2009), Possible Improvement n°2.

42 The bulk of the issuers' costs associated with the Transparency Directive relate to the preparation of the financial reports. However, the accounting rules, as such, are not regulated by the Transparency Directive but by different EU (or national) instruments.
There is, however, a parallel reflection within the Commission on the simplification of accounting rules for SMEs. The Commission's Directorate General for Internal Market and Services published a consultation paper to gain an understanding of EU stakeholders' views on the International Financial Reporting Standard (IFRS) for Small and Medium-sized Entities (SMEs) issued by the International Accounting Standards Board on 9 July 2009. Deadline for comments: 12 March 10. See: http://ec.europa.eu/internal_market/consultations/2009/ifrs_for_sme_en.htm

14. *(i) More flexible deadlines to the disclosure of financial reports*[43]. Smaller listed companies generally express their dissatisfaction about the strict two-month deadline for the publication of the half-yearly financial report, which is difficult for them to respect since they are less well-equipped or have fewer resources devoted to the production of financial information. The difficulty is greater and more costing when half-yearly accounts should be audited by an external auditor[44].

This strict deadline also leads to an unintended bottleneck of disclosed half-yearly financial reports at the end of the second month – in particular for those issuers with accounting years corresponding to the calendar year (end August). This bottleneck disrupts the market, and analysts and the financial media in any event focus on top companies. Moreover, this contributes to the poor cross-border visibility for smaller listed companies (also referred to as the "black hole" problem)[45] resulting from the disclosure of financial information[46].

15. Some smaller listed companies have tried to overcome the difficulty by publishing the half-yearly reports on time and holding the analysts' meeting after the deadline. However, this has sometimes created artificial price movements as the judgement on the results is often different once explanations are given by management. Therefore, smaller listed companies are reluctant to separate the publication from the analysts meeting[47].

Spreading the publications over an extended period of time could therefore both alleviate the burden for smaller listed companies and contribute to a more fluid functioning of the market. The suggestion of having different deadlines for smaller listed companies is supported by an important number of stakeholders[48], has been recommended by IOSCO[49] and is currently practiced in the US[50]. It is also recommended in the External Study in order to enhanced market efficiency[51].

16. *(ii) Alleviating the obligation to publish quarterly financial information.* In this context, the question could be asked whether the disclosure by smaller listed companies of interim management statements (or, as appropriate, quarterly reports) leads to tangible benefits (see also Section 2.2). Possible ways forward could be to

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43 Mazars (2009), possible improvement n°2.

44 Additionally, the cost of such audit is presumably higher considering the short deadline.

45 While large investors seem to consider that the Directive has facilitated access to information disclosed by smaller listed companies, many smaller listed companies generally complain about the lack of interest by foreign investors. Investors and analysts are considered to concentrate on major companies. As outlined by the external study, "*market players seem to be in a "catch 22" situation: SMEs regret the low level of cross-border interest of analysts and investors and therefore are reluctant to spend money to ensure wider dissemination (translation into English in particular). On their side, analysts and investors believe that they do not receive sufficient information from non domestic SMEs, and therefore are reluctant to invest in those companies*." See Mazars (2009), section 4.3.2.5.

46 In some Member States the cost of publication of regulated information in printed press is invoked as a particular problem for smaller listed companies. Smaller listed companies expressed the view that posting information on their website should be sufficient to comply with the dissemination obligation of the Directive. See Mazars (2009), section 4.3.1.1.

47 See generally Mazars (2009), section 2.5.1.

48 Although a majority would oppose. See Mazars (2009), section 2.5.2.

49 IOSCO (February 2010), p.23.

50 See Mazars (2009), section 6.

51 *Ibid.*, Possible Improvement n°4.

reduce substantially the information to be provided by those companies in those interim management statements or to remove that obligation, at least temporarily[52].

17. (*iii) Harmonising the maximum content of reports.* It has also been suggested that obligations for listed companies could be made simpler if the content of the annual financial report was subject to maximum harmonisation regulation at EU level[53]. Such rationalisation could also integrate disclosures of corporate governance and non-financial nature (see Section 2.5). This point could at least be considered in relation to smaller listed companies.

18. *(iv) Facilitating cross border visibility of smaller listed companies.* Finally, regarding the poor cross-border visibility issue, improvements on the mechanisms to access regulated information over time could be a means of increasing interest of investors in smaller listed companies (see Section 2.6).

2.2. Financial disclosures: do quarterly disclosures contribute to short-termism?

19. The short-term vision of both issuers of securities and investors has been criticised by many voices reacting to the financial crisis[54]. In this context, one could wonder to what extent the requirement for issuers of shares to provide quarterly financial information[55] contributes to such short-termism: indeed, investors take this quarterly information into account for making their investment decisions.

20. Removing the Transparency Directive requirement to publish quarterly financial information would therefore appear, at first sight, as alleviating the short-term pressure on issuers of shares[56] and would therefore be coherent with recent Commission initiatives encouraging financial institutions and issuers to establish incentives for a longer-term vision[57]. In practice, however, it could be anticipated

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52 Mazars (2009) suggests considering exempting issuers from selected disclosure obligations during an initial period after listing. See Mazars (2009), possible improvement n°2, p. XIII and p. 13.

53 On a related issue, see the recommendation of a recent external study regarding the possible harmonisation of the content of corporate governance statements in a harmonised standard form. See Riskmetrics (2009), p. 181 and seq.
This issue is largely linked to the question of the corporate-governance related disclosures that are included in the annual financial report (see Annex 14). It is also linked to the scope of application of Article 8(2) of Directive 2001/34/EC (see Annex 6; see also European Commission (December 2008), Annex 4).

54 For instance, recent research related to risk-taking and compensation schemes in the financial sector suggests that short term investors (including institutional investors) incentivize (or put pressure on) management using short-term incentives (such as compensation schemes) to take large bets on risky propositions with a view to meeting, inter alia, quarterly targets. See Cheng, Hong & Scheinkman (2009), section IV.E.

55 Either quarterly financial reports or interim management statements as defined in Article 6 of the Transparency Directive. This requirement does only apply to issuers of shares. Concerning the national transposition of Article 6, see European Commission (December 2008), notes to table 4 in pp. 30-31 and CESR (September 2008), replies to questions 95-97.

56 It should however be noted that pursuant to the Market Abuse Directive, issuers of shares (among others) are expected to immediately disclose to the market any inside information that could have a significant effect on the price of the share.

57 The European Commission has, for instance, recommended that remuneration of directors in issuers and financial institutions takes into account the long term behaviour of companies. See European Commission Recommendation 2009/384/EC of 30.4.2009 *on remuneration policies in the financial services sector*, OJ L 120, 15.5.2009, p. 22; and Commission Recommendation 2009/385/EC of

that many issuers (in particular large ones) would continue to disclose quarterly financial information even in the absence of a legal obligation in EU law[58], so such removal would most likely only benefit smaller listed companies and certainly have a cost reduction effect for them[59].

Additionally, transparency of quarterly financial information is well perceived by market participants, which generally find such information valuable and think that it enhances the transparency and efficiency of markets[60]. This requirement was indeed one of the most important changes brought by the Transparency Directive in 2004.

21. A related problem is whether the level of detail of the Transparency Directive rules on disclosure of quarterly financial information is sufficient to facilitate issuers' compliance and to allow for predictability of the information to be disclosed. There is a market demand for more detailed rules in this regard, in particular regarding the content of interim management statements: "*issuers and users of information expressed a desire of a more detailed definition of the content of the interim management statements (Article 6(1)) to ensure more predictability and comparability (over time, cross-border and across-sector). However, there is a balance to be found, to let issuers decide which information is most relevant and pertinent ant to avoid a box ticking exercise*"[61].

2.3. Information about major holdings of voting rights: maximum harmonisation?

22. As mentioned in Section 1.2 above, the uneven transposition of the obligations on information about major holdings[62] results in compliance difficulties for investors.

30.4.2009 *complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies*, OJ L 120, 15.5.2009, p. 28. See also European Commission (April 2009).

58 The suppression of the obligation in EU law does not automatically entail the suppression of such obligation in national law, which may maintain more stringent requirements. Additionally, many large companies are also listed in the US, where the requirement for disclosure of quarterly reports would remain. Moreover, some regulated markets require the publication of quarterly financial reports, irrespective of what the law says (e.g. in Sweden). Finally, experience shows that when the market is used to a certain level of transparency, issuers (at least large ones) would continue to provide such transparency even when legal obligations are suppressed. See for instance the experience in the United Kingdom with regard to the "preliminary statements" in Mazars (2009), section 1.7 *in fine*.

59 See §§ 13-16 of this paper. Smaller companies will be facing a chicken & egg dilemma: since I do not attract investors' interest to my company, why spending money in preparing quarterly information?; at the same time, if I do not disclose quarterly information, how can I attract the interest of investors?

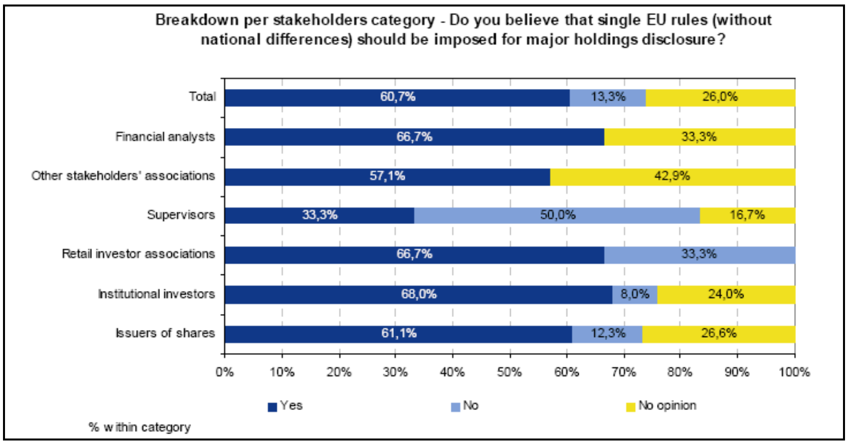
60 Mazars (2009), sections 2.6.3 and 2.6.4.

61 Mazars (2009), section 2.6.5. See also section 1.8.1 of that Study. See additionally CESR (February 2008), p. 3, where respondents to a CESR's call for evidence on possible level 3 work on this Directive identified the need to establish "*principles to prepare interim management statements*". See also CESR (October 2009), questions 3 to 9, which try to clarify part of the requirements of Article 6 of the Transparency Directive. On the question of comparability, see also Ernst & Young (2009).

62 The absence of maximum harmonisation for the disclosure of financial reports is of lesser importance, as a result of the home Member State rule: issuers are no longer subject to duplicity of obligations in case of double listing; while investors face multiple different national rules when complying with their obligations on information on major holdings. See European Commission (December 2008), in particular §§4-9 and Annex 4.
However, the External Study on the operation of the Directive underlines that stakeholders also point at the lack of harmonisation in relation to the requirements on the content of the Interim Management Statement (as well as to the practical functioning of the officially appointed mechanisms for the storage of regulated information). See Mazars (2009), section 1.8.1.

The provisions of the Directive on this issue are considered to be the most problematic according to the perception of stakeholders and the legal analysis made in the External Study[63]. The fundamental principles are not questioned: the information disclosed is considered useful for investment purposes[64] and the obligations are, in principle, not an unreasonable burden[65]. However, in practice, it appears that holdings are calculated in a different manner from country to country because of divergences in definitions, scope of the obligations, exemptions and thresholds[66]. As a result the question is raised as to whether the current regime (i.e. a minimum harmonisation directive[67]) on information about major holdings is the appropriate tool to achieve an effective harmonisation of transparency requirements in the EU.

23. The stakeholders surveyed in the External Study are largely in favour of single EU rules (without national differences) for disclosures of major holdings, without significant geographical differences. Supervisors do not follow this trend[68].



24. Several arguments are advanced in support of maximum harmonisation requirements in this area. Firstly, one rule at EU level would facilitate compliance by investors with cross-border investments[69], as well as diminishing their compliance costs[70]. National specificities, even those connected to contract law or company law, would not be insurmountable[71] and convergence in this area should be possible without

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63 See Mazars (2009), section 3.1..

64 *Ibid*. section 3.3.1.

65 *Ibid*. section 3.3.2.

66 *Ibid*., sections 1.8.1 and 3.3.7 and seq. On the question of more stringent requirements, see generally, European Commission (December 2008), Europe Economics (2009) and Mazars (2009), section 1.3.

67 It should be noted that the traditional counterbalance to minimum harmonisation, namely regulatory competition, does not work for issuers of shares in this area as a result of the Home Member State rule: issuers of shares are regulated by the rules of the Member State where their registered office is located irrespective of whether their shares are listed in a regulated market of that Member State or not.

68 Mazars (2009), section 3.8.3.1.

69 For instance, according to Mazars (2009), few stakeholders believe that the Directive has facilitated the cross-border declaration of thresholds (see section 3.3.4 of that Study).

70 See generally Section 1.2 and Annex 5 – Section D of this paper.

71 The main difficulty in this regards appears to be the question of when the “acquisition” (or “disposal”) of the voting rights becomes effective, which would then trigger the notification obligation. However, a solution to this issue was included in Article 9 of Commission Directive 2007/14/EC regarding the interpretation of Article 12(2) of the Transparency Directive.

losing transparency[72]. Furthermore, rules of maximum harmonisation nature would facilitate the convergence towards a single rule book in the securities area[73].

25. The External Study concludes that the Transparency Directive has not succeeded in simplifying the notification of major holdings in the EU so far and that maximum harmonisation is desirable in this area. For this study, the maximum harmonisation could include: "*the definition of the category of financial instruments or products to be included in the calculation of the threshold*[74]*, the exemptions, the timelines for notification and disclosures as well as the threshold levels (initial and subsequent) and the content of the notification*".[75]

26. If full harmonisation is not be possible or desirable[76], a reinforced harmonisation might also be a possible option: this would entail at a minimum a substantial convergence on a maximum number of issues[77]; voluntary limitation on the adoption of more stringent requirements[78]; strongly coordinated common application policy through CESR[79] (including guidance[80]) and development of facilitation tools for the private sector (such as electronic standard forms for the notification of major holdings[81]). It should be noted that the Commission has recently proposed to entrust

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72 On the contrary, the trend is towards more transparency. See Section 2.4 of this paper.

73 See for instance, the Presidency Conclusions of 18/19 June 2009 European Council meeting, Council document 11225/2/09 REV 2, §20.

74 The existing regime lacks consistency regarding the calculation of the thresholds triggering the disclosure obligations, leading to transparency gaps. The Directive establishes an obligation to disclose major holdings on the one hand, and an obligation to disclose holdings of financial instruments, on the other hand. As a result, an investor holding 4,9% of voting rights in shares and an option to call 4,9% of voting rights through the holding of financial instruments covered by Article 13 is not required to disclose any of these positions to the market under the Transparency Directive rules. The Commission had proposed in 2003 the aggregation of these two categories of holdings for the purposes of calculating whether the thresholds were reached or crossed. However, the Council and Parliament did not follow the Commission's views. It should be noted however, that in some Member States, holdings of voting rights and of financial instruments are aggregated for the purposes of calculating whether the notification obligation is triggered. For a detailed description of this issue, see Annex 7.

75 Mazars (2009), possible improvement n°7 and generally section 3.

76 It may be possible that convergence is only possible for certain issues, but not for all. Alternatively, it might be considered necessary to grant flexibility at national level in order to swiftly address new issues raised by financial innovation. See for instance, European Commission (December 2008), footnote 52, where it is underlined that more stringent national measures may be a driver of possible future convergence.

77 When asked on this question separately from the one on the single rules, the majority of the stakeholders surveyed in the external study on the operation of the Directive were also largely (about two thirds) favourable to a reduction of the national differences on the notification of major holdings. Mazars (2009), section 3.3.2.

78 See European Commission (December 2008), §§22-24.

79 In the future, through the soon to-be-created European Securities Markets Authority and its new powers, such as the possibility to develop binding technical standards.

80 See European Commission (December 2008), §§25-27 and Mazars (2009), Possible Improvement n°3.

81 *Ibid*. European Commission (December 2008), §27. A common electronic standard form for the notification of major holdings is largely supported by the stakeholders surveyed in the External Study: despite some doubts expressed by supervisors, a clear majority (above 60%) favours the use of such form. Indeed, this study also recommends the creation of a single e-notification form. According to this study, "*considerable simplification can be obtained by making a common electronic notification form for the EU mandatory especially if additional harmonisation is successfully introduced in the Directive. Specificities in national company law could be taken into account in subsections of the common form. The electronic form could be conceived in such a way that basic error would be signalled prior to*

the future European Securities Markets Authority with the development of technical standards for an electronic standard form for the notification of major holdings[82].

2.4. Information about major holdings of voting rights: specific issues

27. Whether maximum or reinforced harmonisation of the obligations on information about major holdings is desirable, the review of the operation of the Directive has revealed a number of specific issues which deserve closer examination.

28. The Transparency Directive obligations on information about major holdings of voting rights have a dual objective: on the one hand, they provide the market with information about significant transactions and trends, therefore contributing to making informed investment decisions, to the prevention of market abuse and ultimately to market efficiency; on the other hand, they facilitate the identification of major shareholders for company law or, more recently, corporate governance purposes[83]. There seems indeed to be an evolution towards facilitating the interaction between issuers and their shareholders. However, there are doubts as to whether the current rules capture all the relevant market movements and also allow issuers to effectively know who their shareholders are.

29. In the first place, the existing regime lacks consistency regarding the application of the thresholds triggering the disclosure obligations[84], leading to an uneven application of the rules. Additionally, the existing thresholds are considered by many to be too high to capture relevant shareholders movements. In some Member States (accounting for around 60% of total market capitalisation in the EU), the initial disclosure threshold of the Directive (5%) has been lowered to 2% or 3%. The European Parliament[85] and market experts[86] are in favour of setting a 3% threshold in the Directive. However, the External Study explains that stakeholders views, as expressed in the survey conducted, are mixed on the need to lower the initial disclosure threshold to 3% (or to 2%)[87]. While there are arguments in favour of[88] and against[89] the lowering the initial disclosure threshold, the External Study concludes

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validation, and the form routed to the relevant issuer and competent authority." See Mazars (2009), Possible Improvement n°13.

82 European Commission Proposal for a Directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority; COM(2009)0576 final of 26 October 2009. See draft Article 7 modifying Articles 12, 13 and 25 of the Transparency Directive.

83 See European Commission (December 1985), §2 and European Commission (March 2003), section 4.5.1. See also generally Schouten (2009).

84 See also footnote 74 and Annex 7.

85 The European Parliament called on the Commission in 2008 to prepare legislation lowering the threshold for the disclosure of major holdings to 3%. See European Parliament (September 2008), Annex to the Resolution.

86 Although warning about setting too lower disclosure levels, ESME expressed an opinion in favour of setting the 3% threshold. See ESME (December 2007), p.5.

87 Mazars (2009), section 3.4.1.

88 Such as such as better capturing shareholders' movements of interest to the market or facilitating shareholders' activism. See Mazars (2009), *ibid.* and European Commission (December 2008), §15.

89 Notably the impact on the market of corporate control. See European Commission (December 2008), §§16 and 21.

that lowering the initial threshold to 3% could be a possible improvement to the Directive, to the extent that such measure permits maximum harmonisation without disrupting the market[90]. See also Annex 8.

30. Moreover, the rules of the Transparency Directive do not adequately respond to new market developments resulting from financial innovation. Disclosure of cash-settled financial instruments is not required by the Directive, despite the fact that they may be used with a view to acquire control of voting rights[91]. Some Member States have already reacted to this risk by introducing legislation requiring disclosure of holdings of voting rights. Supervisors[92] and market experts[93] are calling for an EU regime in this area. Market participants would also be favourable to the introduction of disclosure obligations regarding cash-settled financial instruments[94]. The External Study also recommends requiring disclosure of cash-settled equity swaps or similar financial products[95]. For more detail on this issue, see Annex 9.

There are also calls to reduce the risk of "empty voting"[96] resulting, in particular, from the use of securities lending schemes[97]. This problem is also connected to the so-called "record date capture" issue[98]. The External Study shows a large stakeholder support to introduce measures to prevent "empty voting"[99] and suggest limiting empty voting practices[100]. The study describes different ways to address this problem: from the request for more transparency to the restriction or even the prohibition of empty voting. For more detail on this issue, see Annex 10.

31. Thirdly, issuers associations argue that the possible transparency improvements described in the precedent paragraphs would not be sufficient for corporate governance purposes. They favour the introduction of mechanisms allowing them to identify the ultimate investor (with smaller holdings) so as to be able to engage into real shareholders-issuers dialogue. These mechanisms would result in enhanced transparency towards the issuer but not necessarily towards the market. For more detail on this issue, see Annex 11.

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90 Mazars (2009), possible improvement n°8, pp. XIV and 77.

91 The so-called "hidden ownership" problem (use of equity derivatives to conceal economic ownership of shares). See generally Schouten (2009) as well as Hu & Black (2006) and Hu & Black (2007).

92 CESR (January 2010).

93 ESME (November 2009)

94 According to the external study on the operation of the Directive, 90% of the stakeholders expressing an opinion on this issue favour the inclusion of cash-settled equity swaps or cash-settled contracts for differences in the calculation of thresholds (fully or above a certain threshold). See Mazars (2009), sections 3.1 and 3.6.3.

95 Mazars (2009), Possible Improvement n°11.

96 "Empty voting" is the reverse situation to "hidden ownership": the exercise of voting power without corresponding economic interest. See generally Schouten (2009) as well as Hu & Black (2006) and Hu & Black (2007).

97 On the treatment of securities lending by the Directive, see Annex 10.

98 The situation in which the investor identified as shareholder on the record date sells his shares between such date and the date of the general meeting, but remains legally entitled to vote although it has no longer an economic interest n the issuer. If the selling transaction takes place two/three days before the general meeting, the market will not necessarily be informed of such transaction before the general meeting.

99 See Mazars (2009), section 3.6.2.

100 Mazars (2009), Possible Improvement n°10.

32. Furthermore, even when shareholders with major holdings of voting rights are well known, calls are being made to enhance the disclosure requirements for significant holdings. In some Member States, large investors are already requested to disclose their intentions as regards their holdings and how they financed their acquisition. There is some support for extending such obligations across EU countries[101]. At the same time, it should be noted that such enhanced transparency requirements may also have adverse consequences, in particular in the market for corporate control[102]. In any event, the External Study concludes by recommending the introduction of enhanced disclosure requirements for significant holdings[103].

Additionally, the question of whether large investors should disclose their voting policies remains on the table. For more detail on these issues, see Annex 12.

33. Finally, the comparison with the regime on major holdings disclosures in selected third countries shows the existence of alternative approaches[104]. Annex 13 provides a summary description of the most interesting features of third countries regimes.

2.5. Corporate governance-related, non-financial and other disclosure obligations

34. In addition to the disclosure of financial reports required by the Transparency Directive, EU law also requires (or, as appropriate, recommends) listed companies to make some periodic non-financial (but corporate governance-related) disclosures, generally in connection with the annual financial report. This relates in particular to the so-called Corporate Governance Statement[105]; the Report under Article 10 of the Takeover Bids Directive (when not included into the Corporate Governance Statement) or the disclosures related to the remuneration policy of the company[106].

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101 According to the external study on the operation of the Directive, more than 50% of the stakeholders surveyed support that investors acquiring a certain significant holding of voting rights (such as 10%,15% or 20%) should be required to provide more detailed information than under the current rules. See Mazars (2009), section 3.7.

102 See European Commission (December 2008), §21.

103 "*12. Introduce enhanced disclosure requirements for significant holdings: the applicable thresholds should be significant enough to be meaningful (for example 10% and 20%). Information could include a statement regarding the investor's intent (regarding the potential acquisition of control, the desire to continue to buy shares, the willingness to change the composition of the Board, the intention to modify the strategy of the company), if possible some information on the sources of finance and the time horizon of the investment, and the status of the investor (fully exposed to the economic risk of the shares or not).*" Mazars (2009), Possible Improvement n°12.

104 In China and the US, a more complex system takes into account the relative position of the shareholder or its intent. For instance, in China, investors' disclosure obligations are different depending on their relative position within the issuer. In the US, simplified requirements are applicable to passive investors (not seeking to acquire or influence control of the issuer) and obligations are different depending on whether the investor makes a first disclosure for that issuer or an update on a previous disclosure. In Switzerland, the thresholds for the disclosure voting rights and of financial instruments given access to voting rights are not combined for the purposes of triggering the notification obligation. However, the moment a threshold is crossed, full information shall be disclosed on all positions. See generally Mazars (2009), section 6. See also IOSCO (June 2009a), Annex A.

105 Article 46a of the 4th Company Law Directive.

106 See Commission Recommendation 2004/913/EC and Commission Recommendation 2009/385/EC. See also recital 13 of the Transparency Directive, where it is stated that the European Parliament and the Council welcomed the Commission's commitment (in 2004) to consider enhancing the transparency on remuneration issues as well as the Commission's intention to make a Recommendation on this topic in the future (which eventually become Recommendation 2004/913).

The issue has been raised as to whether these disclosure requirements should be integrated into the Transparency Directive regime. See Annex 14 for more detail.

35. A related issue concerns disclosure of Environmental, Social and Governance (ESG) data made by listed companies. Article 46(1)(b) of the 4th Company Law Directive and 36(1) of the 7th Company Law Directive[107] requires companies to include information relating to environmental and employee matters in their annual report to the extent necessary for an understanding of the company's development, performance or position. Recital 14 of the Transparency Directive also contains an indirect reference to disclosure of this kind (on disclosures by oil and mining companies of payments to governments). A number of stakeholders are regularly requesting to improve and strengthen European legislation regarding ESG disclosures. In their view, the Transparency Directive appears as a possible appropriate vehicle to integrate such disclosures alongside financial reporting obligations of listed companies, and to address some of the perceived short-comings of current ESG disclosure rules and practice. See Annex 14 for more detail.

36. Finally, debate regarding disclosures in relation to short selling has led to the consideration of the possible application of the dissemination and storage rules of the Directive to certain types of short selling-related disclosures, which could become caught by the definition of "regulated information" in the same manner as certain disclosures requested under the Market Abuse Directive are caught[108].

2.6. Access to information on listed companies: storage of "regulated information"

37. The External Study shows that the dissemination rules of the Directive requiring the pushing of regulated information to media are positively perceived[109]. The poor cross-border dissemination of regulated information by smaller listed companies and the low interest shown by analysts and investors in such information (and *a fortiori* in those companies) remains, however, an issue (the so-called "black hole" problem[110]). It has also been outlined that some Member States still require a paper-based publication of some regulated information in newspapers, which would go against the modernisation spirit of the Directive[111].

38. The impact of the Directive rules on storage of regulated information is however less encouraging (for more detail on access to regulated information, see Annex 15). Access to historical information on listed companies on a pan-European scale has not been simplified: interested parties need to go through 27 different national

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107 Article 4(5) of the Transparency Directive requires that the annual management report is drawn up in accordance with Article 46 of the 4th Company Law Directive and, if the issuer is required to prepare consolidated accounts, in accordance with Article 36 of the 7th Company Law Directive.

108 See the consultation paper issued by CESR in 2009 (CESR (July 2009b), pp.5-6, 9 and 14), although its final report of March 2010 leaves the question open (CESR (March 2010), p. 10). On the short selling issue, see generally IOSCO (June 2009b).

109 Mazars (2009), section 4.3. Interestingly, this Study outlines that even if practices are very diverse in Member States, the way companies comply with the obligation to disseminate their Regulated information has not radically changed with the Directive. It also provides some information explaining that no enforcement by supervisors of the obligation to publish on an "EU wide" basis is happening.

110 Mazars (2009), sections 4.3.2.5 and 4.3.2.6. See also §14 of this Report.

111 Mazars (2009), section 4.3.1.1. However, see also recital 8 of the Transparency Directive.

databases[112] and the electronic network interconnecting them is only at an initial stage with rather modest results so far (see Annex 15). If compared with the US, where a single electronic database exists[113], the EU situation is not positive. This raises the question as to whether the Directive storage mechanisms, as currently designed, are able to fulfil the role of "gate" to historical financial information on listed companies at pan-European level[114].

39. A more centralised storage system[115] would certainly be able do so by facilitating the work of financial intermediaries and analysts on a wider EU scale[116]. It would also allow to address the black hole problem in a longer perspective. This is also the Commission's long term vision, as described in its 2008 Recommendation on storage of regulated information[117], as well as IOSCO's recommendation[118].

Enhancing the network of national storage mechanisms (or the *ex novo* creation of a centralised storage system) would require solving governance issues, in particular who should take responsibility for enhancing such network: actors such as the European Securities Market Authorities[119], the network of European business registries[120], the European Central Bank[121] or the Office for the Harmonisation of the Internal Market[122] could *a priori* be concerned. Decisions on costs, notably regarding the initial[123] investment, would also need to be taken[124]. The Commission will be

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112 In the Directive, these databases are referred to as "*officially appointed mechanism for the central storage of regulated information*" (cf. Article 21(2)). Additionally, according to Mazars (2009), stakeholders complaint about the lack of harmonisation on the practical functioning of these databases (see section 1.8.1 of that Study).

113 Mazars (2009), sections 4.4.3.5 and 6.4.3. See also http://www.sec.gov/edgar.shtml

114 According to Mazars (2009), stakeholders would use the companies' websites as primary source of information rather than the storage mechanism, although they would trust more the latter. See section 4.4.3 of that Study.

115 This would require, as minimum, a single point of access (not necessarily a single database) and some harmonisation of input standards: e.g. electronic standard forms for the notification of major holdings and of other disclosed information; use of interactive data (such as XBRL) etc. It would also require some interaction with other databases on securities (e.g. CESR's mifid database, ECB's centralised securities database etc.).

116 See Mazars (2009), section 4.4.3.6.

117 Commission Recommendation 2007/657/EC of 11 October 2007 on the electronic network of officially appointed mechanisms for the central storage of regulated information referred to in Directive 2004/109/EC of the European Parliament and of the Council, OJ L 267, 12.10.2007, p.16. See in particular §22.

118 IOSCO (February 2010), p.25.

119 ESMA will be CESR successor. CESR should prepare guidelines in 2010 regarding the future development of the electronic network of storage mechanisms (cf. Recommendation 2007/657 of the European Commission, §§21 and 22). CESR is also running the so-called Mifid database and is currently providing a temporary initial network of storage mechanism. See Annex 15 of this paper.

120 See www.ebr.org

121 The European Central Bank runs a "centralised securities database" which could have the potential to integrate regulated information on issues. See European Central Bank (February 2010).

122 OHIM is an EU agency that manages the EU trademark registry. As such, it has the know-how to keep registries and could potentially be an alternative to develop a pan-European storage system. See http://oami.europa.eu

123 Understood as one-off costs as opposed to regular on-going costs.

124 See in this regard Decision No 716/2009/EC of the European Parliament and of the Council of 16 September 2009 establishing a Community programme to support specific activities in the field of financial services, financial reporting and auditing, OJ L253, 25.9.2009, p.8. In principle this Decision allows for EU (partial) financing of, *inter alia*, certain CESR activities, including information

launching in 2010 a feasibility study on the development of a pan-European storage system for regulated information, which should be addressing those issues.

40. Should a more centralised storage system neither be possible nor desirable, certain stakeholders appear in favour of a simpler (and radical) solution: imposing minimum standards for issuers to store regulated information on their website[125] and inviting the users of financial information to use Internet search facilities[126]. This decentralisation would eliminate the storage mechanisms as such[127].

2.7. Non-regulated markets and disclosure requirements

41. The rules of the Transparency Directive do not apply to non-regulated markets (also known as alternative or exchange-regulated markets) and Member States have generally not extended the applicability of the detailed rules of the Directive to those markets[128]. At the same time, lighter transparency rules are generally applicable to issuers of securities traded in those markets[129]. This situation is well accepted by stakeholders and, according to the External Study, there is no support for extending the Transparency Directive requirements to issuers whose securities are traded on such exchange-regulated or alternative markets[130]. Stock exchanges, in particular, see those markets with lighter rules and lower compliance costs as an attractive possibility for smaller companies to get access to capital markets (see Section 2.1).

Concerning the facilitation tools[131] linked to the Transparency Directive, it is however conceivable to make them available to market participants in the non-regulated markets[132].

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technology projects of EU dimension. See also Decision No 922/2009/EC of the European Parliament and of the Council of 16 September 2009 on interoperability solutions for European public administrations (ISA), OJ L 206, 3.10.2009, p.20.

125 Storage of regulated information on the website of the issuer is already compulsory in several Member States. Disclosure of corporate governance related information on the issuers websites is also requested by the Shareholders Rights Directive. In any event, stakeholders would already be using the companies' websites as primary source of information. See Mazars (2009), section 4.4.3.

126 Mazars (2009), section 4.4.3.6, *in fine*.

127 The External Study seems to suggest a middle solution: a single EU access point at CESR level with a direct Internet link to a compulsory and harmonised section of the issuers' website where the information would be stored. See Mazars (2009), Possible Improvement n°14.

128 The application of the Transparency Directive rules to alternative markets would imply higher compliance costs for issuers of securities traded on those markets. Those costs would in particular result from the need to present financial statements in IFRS and its related auditing and legal costs. The disseminations rules would also imply higher compliance costs for issuers.

129 See European Commission (December 2008), Annex 7. Those lighter rules generally request issuers to disclose at least an annual financial report, although not necessarily presenting the financial statements in IFRS.

130 Mazars (2009), section 1.9.2.

131 E.g. possible use of (adapted) electronic standard forms for notification of major holdings (see Section 2.3) or of the storage mechanism (see Section 2.6)

132 For instance, the Belgian officially appointed mechanism for the storage of regulated information will soon be in a position to include information on companies whose securities are traded in an alternative market in Belgium.

2.8. Issues for clarification and/or technical adjustments

42. The review of the operation of the Transparency Directive shows that some of its requirements are not always clear, leading to uncertainty as regards those obligations. For instance, CESR regularly publishes interpretative documents, in a "questions-and-answers" format, regarding the Directive obligations[133]. The External Study also identified some requirements that would benefit from further clarity[134]. As a result, some technical adjustments to the text of the Directive would possibly be beneficial with a view to clarifying its obligations.

Annex 6 to this report provides a detailed description of number of these clarity issues[135]. This Annex also addresses the question of the possible prolongation of the exemption in Article 30(4).

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133 CESR (October 2009).

134 Mazars (2009), see sections 1.4.3 (on definitions); 2.4.7 (on financial reporting); 2.6.5 (content of interim management statements); 3.3.7 (on major holdings notifications); 3.6.1.4 (on stock lending); and 3.6.3.2 (on financial instruments) of that study. At the same time, it should be noted that the stakeholders' perception about the overall clarity of the Directive is positive and that, in case of lack of clarity, stakeholders tend to attribute such lack of clarity to national laws, guidance or market practices more often than to the Directive itself (see sections 1.4.1 and 1.4.2 of that study).

135 Annex 7 also provides a description of another not-sufficiently clear requirement.

ANNEX 1 – THE TRANSPARENCY DIRECTIVE AND ITS IMPORTANCE FOR FINANCIAL MARKETS

1.1. This Annex presents:

- A) a description of the Transparency Directive;
- B) the changes introduced to the Transparency Directive since 2004; and
- C) the importance of the Transparency Directive for financial markets

A) Description of the Transparency Directive

1.2. Directive 2004/109/EC[136] (the "Transparency Directive") requires issuers of securities in regulated markets within the EU to ensure appropriate transparency for investors through a regular flow of information by disclosing periodic and on-going regulated information and by disseminating such information to the public throughout the Community. Regulated information consists of financial reports, information on major holdings of voting rights and information disclosed pursuant to the Market Abuse Directive. For this, shareholders, or natural persons or legal entities holding voting rights or financial instruments that result in an entitlement to acquire existing shares with voting rights, should also inform issuers of the acquisition of or other changes in major holdings in companies so that the latter are in a position to keep the public informed.

1.3. Whilst it is not a revolutionary legal text, the Transparency Directive is an important instrument for the modernisation of the EU financial markets[137] (see also Section C of this Annex on the importance of the Transparency Directive for financial markets). It builds on the transparency requirements previously established in Directive 2001/34/EC[138]. As a result of the modification of Directive 2001/34/EC, new rules on transparency requirements apply to the issuers of securities in regulated markets within the Community while at the same time leaving freedom to Member States as to the requirements that should be applicable in the alternative markets.

1.4. The Transparency Directive contains rules on: disclosure of information (such as deadlines, content, formats, language etc); dissemination of information to the public and the competent authorities; storage of disclosed information by the officially

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136 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 and amending Directive 2001/34/EC, OJ L 390 of 31.12.2004, p.38. The text of the directive is available at: http://www.ec.europa.eu/internal_market/securities/transparency/index_en.htm

137 See generally the European Financial integration report 2007 and previous similar reports, at: http://www.ec.europa.eu/internal_market/finances/fim/index_en.htm

138 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, OJ L 184, 6.7.2001, p. 1. Directive 2001/34/EC is itself a codification of previous directives, see recital 1 of that Directive.

appointed storage mechanisms; liability of issuers regarding disclosed information; supervision by competent authorities and penalties for lack of compliance. The Directive determines which national law is applicable, irrespective of place of listing of the issuer: the so-called home/host Member State rule. The Directive also contains some provisions regarding the treatment of issuers from third country.

1.5. The main novelties of the Transparency Directive, compared to the previous regime under Directive 2001/34/EC, are:

- The so-called home/host Member State rule and its consequences regarding the applicable law and the supervisory powers of competent authorities (Article 3);
- The shortening of the deadlines for the disclosure of annual financial report and half-yearly financial reports (Articles 4 and 5);
- The requirement to disclose quarterly financial reports or "interim management statements" (Article 6);
- The modernisation of the rules regarding disclosure of holdings of voting rights (Article 10) and the requirement to disclose holdings of financial instruments that may allow to control voting rights (Article 13);
- The obligation on the dissemination of regulated information to the public (Article 21 of the methods of dissemination; Article 20 on the language);
- The rules on supervision by the competent authorities (Articles 19 and 24).

1.6. The transposition deadline of the Transparency Directive was 20 January 2007.

1.7. The Transparency Directive was completed by Commission Directive 2007/14/EC[139,] to be transposed by 8 March 2008. Commission Directive 2007/14/EC contains implementing measures adopted pursuant to the Transparency Directive mandate in order to complete the legal framework established by the Transparency Directive. In adopting these implementing measures, the Commission took into account the advice provided by CESR (Committee of European Securities Regulators). See Annex 4 for more detail on the use of implementing powers.

1.8. The Transparency Directive is further supplemented by soft-law. This notably includes: (i) the Commission recommendation on storage of regulated information[140]; (ii) the standard form[141] developed by the Commission services for the notification of

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139 Commission Directive of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; OJ L 69, 9.3.2007, p. 27. The text of the directive is available at: www.ec.europa.eu/internal_market/securities/transparency/index_en.htm

140 Commission Recommendation of 11 October 2007 on the electronic network of officially appointed mechanisms for the central storage of regulated information referred to in Directive 2004/109/EC of the European Parliament and of the Council, OJ L267, 12.10.2007, p.16. The text of the recommendation is available at: www.ec.europa.eu/internal_market/securities/transparency/index_en.htm

141 The text of the standard form is available at: http://www.ec.europa.eu/internal_market/securities/transparency/index_en.htm

major holdings; and (iii) the interpretative work undertaken by CESR with regard to the alignment of the exercise of supervisory powers by the national competent authorities (see in particular the "*Frequently Asked Questions regarding the Transparency Directive: common positions agreed by CESR members*"[142]).

1.9. The Transparency Directive obligations are often closely connected to obligations set out in other Community texts, either in the corporate governance/company law field or in the financial markets/securities field.

– Firstly, the Transparency Directive covers fields that may be directly related to other EU legal instruments, such as the Shareholders Rights Directive[143] or the accounting rules[144].

– Secondly, other EU instruments, such as the Prospectus Directive[145], the 2006 modification to the accounting directives[146] or the Takeover Bids Directive[147] may also include disclosure requirements which either form part of or are very close to the core area of the Transparency Directive obligations.

– Thirdly, the Transparency Directive is the instrument for implementing disclosure obligations under other directives, such as the Market Abuse Directive[148].

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142 Latest version from October 2009, www.cesr.eu

143 See Articles 17 and 18 of the Transparency Directive, concerning the relation between issuers of securities and the securities holders. Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, p.17. See: www.ec.europa.eu/internal_market/company/shareholders/indexa_en.htm

144 See Articles 4 to 7 of the Transparency Directive, concerning financial reporting. Accounting Rules: 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 243, 11.9.2002, p. 1; Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies, OJ L 222, 14.8.1978, p. 11 (directive as last amended by Directive 2006/46/EC[144]); Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts, OJ L 193, 18.7.1983, p. 1 (directive as last amended by Directive 2006/46/EC).
See: www.ec.europa.eu/internal_market/accounting/officialdocs_en.htm

145 See in particular Article 10 of the Prospectus Directive regarding the production of an annual summary of information disclosed. Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345, 31.12.2003, p. 64. See: www.ec.europa.eu/internal_market/securities/prospectus/index_en.htm. See also ESME (June 2008), *Position on Article 10 of the Prospectus Directive in relation to the Transparency Directive*, available at: www.ec.europa.eu/internal_market/securities/esme/index_en.htm

146 See, for instance, Articles Article 46a of the Fourth Company Law Directive and Article 36 of 7th Company Law Directive, as amended by Directive 2006/46/EC regarding the disclosure of the corporate governance statement.

147 See in particular Article 10 of the Takeover Bids Directive which imposes some disclosure requirements on issuers regarding the content of the annual report. See also Articles 15 and 16 of that Directive on the squeeze-out and sell-out rights. For the exercise of these rights, knowledge of the upwards crossing of the 90% threshold is needed. Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover bids. OJ L142, 30.4.2004, p.12.
See: www.ec.europa.eu/internal_market/company/takeoverbids/index_en.htm

148 See in particular Article 6 of Directive 2003/06/EC of 28 January 2003 on insider dealing and market manipulation (market abuse); OJ L 96, 12.4.2003, p. 16; and Article 2 of the Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of

– Finally, the Transparency Directive is also a "distant cousin" of the 1st Company Law Directive[149] which also contains disclosure obligations, although not limited to listed companies.

__B) The changes introduced to the Transparency Directive since 2004__

1.10. Since its adoption in 2004, the Transparency Directive has been a stable text. It was modified once, in order to align the procedure for the exercise of implementing powers conferred on the European Commission to the new regulatory procedure with scrutiny[150].

1.11. In September and October 2009, the European Commission has tabled two draft directives which include draft amendments to certain Articles of the Transparency Directive.

1.12. The first proposal concerns the review of Directive 2003/71/EC (Prospectus Directive)[151], which would impact on the definition of home Member State in the Transparency Directive. The proposed changes to the Prospectus Directive notably include removing the limitation on the determination of the home Member State for issues of non-equity securities with a denomination below EUR 1.000[152]. As a consequence of this proposal, all issuers will be allowed to choose, for the purposes of the Prospectus Directive, the home Member State for all non-equity security independently of the denomination. This change would trigger the need to make a corresponding adjustment to the mechanism for the determination of the home and the host Member States in Article 2(1)(i)(i) of the Transparency Directive 2004/109/EC.

1.13. In addition, the draft directive modifying the Prospectus Directive also proposes to repeal Article 10 of such Directive[153]. The proposal to repeal Article 10 also impacts

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market manipulation, OJ L 339, 24.12.2003, p.70.
See: www.ec.europa.eu/internal_market/securities/abuse/index_en.htm

149 First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies, within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65, 14.3.1968, p.8. This Directive was last amended by Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ L 221, 4.9.2003, p.13.
See: www.ec.europa.eu/internal_market/company/official/index_en.htm

150 Directive 2008/22/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as regards the implementing powers conferred on the Commission; OJ L 76, 19.3.2008, p. 50–53

151 Proposal for a Directive of the European Parliament and of the Council amending directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; COM(2009)0491 final of 23 September 2009. See draft Article 2, modifying Article 2(1)(i) of the Transparency Directive.

152 See proposed changes to Article 2(1)(m)(ii).

153 As a consequence of the entry into force of the Transparency Directive, the obligation in the Prospectus Directive for the issuer to provide annually a document containing or referring to all information published in the twelve months preceding the issuance of the prospectus has become a dual obligation and obsolete. As a consequence, a registration document, instead of being updated in accordance with

on the determination of home Member States under the Transparency Directive for issuers of shares (and of low value debt securities) incorporated in a third country, since reference was made to that Article for the determination of the home Member State. As a result, a technical adjustment is needed in order to avoid a legal vacuum. As a result, the reference to Article 10 of the Prospectus Directive is replaced by a reference to point (iii) of Article 2(1)(m) of the Prospectus Directive.

1.14. The second proposal relates to the granting of powers to the future European Securities Markets Authority[154]. The proposal for a Regulation establishing a European Securities and Markets Authority adopted by the Commission on 23 September 2009[155] provides that the Authority may develop draft technical standards in the securities markets area. The draft directive proposed by the Commission on 26 October 2009 identifies areas for technical standards in relation to several directives. Concerning the Transparency Directive, Article 7 of that draft directives foresees that the Authority may develop technical standards in relation to a standard form to be used for the notification of major holdings of voting rights and of financial instruments giving access to voting rights[156] (cf. Articles 12 and 13 of the Transparency Directive). This is an issue of technical nature not involving policy decisions, since the content of the notification obligation is determined by the Transparency Directive and its implementing measures.

1.15. Additionally, the draft directive also proposes to make clear that communication of information from national supervisory authorities to the future European Securities Markets Authority shall not be considered to be a breach of professional secrecy (cf. Article 25 of the Transparency Directive). This proposed amendment aims at ensuring that there are no legal obstacles to the information sharing obligations included in the Regulations establishing the Authorities. Indeed, the new supervisory architecture will require national supervisory authorities to cooperate closely with the European Supervisory Authorities. In particular, these should receive sufficient information from the national supervisory authorities in order to be able to discharge their duties under the regulation.

Article 10, should be supplemented in accordance with the normal procedure to supplement prospectuses. See recital 14 Proposal for a Directive of the European Parliament and of the Council amending directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; COM(2009)0491 final of 23 September 2009. See also the opinion of ESME regarding Article 10 of the Prospectus Directive, ESME (June 2008).

154 European Commission Proposal for a Directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority; COM(2009)0576 final of 26 October 2009. See draft Article 7 modifying Articles 12, 13 and 25 of the Transparency Directive. Available at: http://ec.europa.eu/internal_market/finances/committees/index_en.htm

155 European Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority, COM(2009)503 final of 23 September 2009. Available at: http://ec.europa.eu/internal_market/finances/committees/index_en.htm

156 Financial instruments that result in an entitlement to acquire, on such holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued of an issuer whose shares are admitted to trading on a regulated market

1.16. These two draft Directives are currently being discussed by Council and Parliament.

1.17. Finally, it must be also underlined that in 2006, the European Commission also proposed to modify Article 17 of the Transparency Directive in the context of the proposal for a new directive on the exercise of voting rights by shareholders[157]. The objective of this proposed amendment was to avoid duplication of obligations without repealing the Article in its entirety, as such Article deals not only with information to be provided in the context of General Meetings but also, more broadly, with all information to be made available to shareholders and persons referred to in Article 10 of the Transparency Directive. This proposed amendment was eventually not taken in the final text of the new Directive on the exercise of shareholders rights[158].

<u>C) The importance of the Transparency Directive for the financial markets</u>

1.18. Section C) of this Annex presents:

- C1) The objective of the Transparency Directive
- C2) Existing international standards and third country transparency regimes
- C3) Move for an enhanced transparency in the context of the recent financial crisis
- C4) Enhanced transparency as a tool to restore market confidence

C1) The objective of the Transparency Directive

1.19. In March 2000 the Lisbon European Council decided that a single financial market would be a key factor in promoting the competitiveness of the European economy and that an integrated market, properly regulated and prudentially sound, will lower the cost of capital for companies of all sizes, deliver major benefits to consumers and contribute to developing stronger economic and social cohesion throughout Europe.

1.20. Transparency of information about securities issuers enhances both investor protection and market efficiency and thus contributes to growth and job creation by better allocation of capital and by reducing costs. On the other hand, lack of transparency with regard to such information could hinder investor confidence and affect market resilience, reducing investment and slowing economic growth.

1.21. The current financial crisis demonstrated that the disclosure of accurate, comprehensive and timely information about securities issuers was essential in order to build sustained investor confidence and allow an informed assessment of their business performance and assets.

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157 Proposal for a Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC; COM(2005) 685 final of 5 January 2006. See in particular draft Article 17.

158 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, p. 17.

1.22. The Transparency Directive comes within the scope of this objective. Its main purpose is to promote transparency in EU capital markets and to ensure grater investor protection throughout the Community by prescribing rules for securities traded on EU regulated markets and the issuers of such securities[159].

C2) Existing international standards and third country transparency regimes

1.23. The provisions of the Transparency Directive are in line and consistent with the existing international standards on ongoing disclosure of information, in particular the IOSCO Principles for Ongoing Disclosure[160], a body of high level principles for ongoing disclosure and material development disclosure by all listed entities. However, these principles cover mostly the ongoing disclosure of material events and do not contain specific guidelines on the disclosure of periodic information.

1.24. The 2004 OECD principles of corporate governance also request that the corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company[161].

1.25. In July 2009 IOSCO published a consultation report[162] on the principles for periodic disclosure which sets out specific guidance on the disclosure of annual and other periodic interim reports as well as on the disclosure of securities ownership. The Final Report of IOSCO, together with the feedback statement to the consultation, was disclosed in February 2010. In the introduction to this Report, the IOSCO recognises that disclosure of material events on an ad hoc basis alone is not sufficient for investors to be able to make investment decisions. Even though issuers may be required to disclose material events to the public shortly after they occur, these disclosures are ad hoc and investors are not able to make investment decisions on these types of disclosures alone. For this reason, issuers should be required to make certain periodic reports, such as annual reports and other interim reports, in which certain prescribed disclosures must be provided at regular intervals to the public. These periodic reports facilitate investor decision-making and monitoring of the markets by making it possible for investors to compare the performance of the same company over regular intervals, and by enabling investors to make useful comparisons among different companies[163].

1.26. Major third countries, such as US, China, Switzerland and Japan, apply similar rules with regard to the publication of financial information, including the publication of the annual, half-yearly and other interim reports, and the disclosure of major holdings[164].

C3) Move for an enhanced transparency in the context of the recent financial crisis

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159 See recitals 1 and 2 of the Transparency Directive.

160 IOSCO (2002).

161 OECD (2004), p.22-23 and 49 and seq.

162 IOSCO (July 2009).

163 IOSCO (February 2010), p. 4.

164 See for instance, Schouten & Siems (2009).

1.27. The current financial crisis highlighted once again the importance of transparency across the financial markets. In the conclusions to the G20 Summits 2009 in London and Pittsburgh, G20 leaders called upon grater transparency, accountability and integrity of global financial markets[165], and in particular for enhanced disclosure of financial information. Also, the G20 Working Group[166] recommended in its report to find solutions in order to promote transparency of economic results in financial reports.

1.28. On EU side, in the context of the measures for financial recovery[167], improving access to up-to-date and official information on companies can be seen as a means to restore confidence in the markets all over Europe. De Larosière report[168] identified the lack of transparency as one of the factors which contributes to and aggravated the financial crisis and recommended to enhance transparency in different areas of financial markets, in particular with regard to financial information provided to investors.

1.29. Following this call from the European and world leaders, international organisation, national authorities and industry have undertaken significant work in order to improve transparency and disclosure of financial information by companies. In September 2009, IOSCO published a consultation report on Transparency of Structured Finance Products[169] which provides guidance to market authorities on enhancing post-trade transparency of structured finance products in their jurisdictions.

1.30. In October 2009, CEBS released a consultation paper Disclosure Guidelines: *Lessons Learnt from the Financial Crisis*, which serves as guide to financial institutions in providing adequate public disclosure. The guidelines take the form of high-level principles and address both the form and content of disclosures while also providing guidance on presentational aspects.

1.31. Also in October 2009, the British Bankers' Association (BBA) released its Code for Financial Reporting Disclosure[170] to correspond with the UK FSA publication of Discussion Paper 09/5, *Enhancing Financial Disclosures by UK Credit Institutions*[171]. This code commits BBA members to a "regular dialogue on financial statement disclosures" with their supervisors to "enhance comparability and understanding" and to combine quantitative disclosures with "sufficient qualitative narrative to meaningfully explain [their] significance."

1.32. Other initiatives were undertaken on national and international level and the European Commission is currently working on measures with regard to disclosure mechanisms of different financial products and derivatives.

C4) Enhanced transparency as a tool to restore market confidence

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165 See G-20 (April 2009), together G-20 (March 2009). See also G-20 (September 2009).
166 See G-20 (March 2009)
167 European Commission (March 2009).
168 De Larosière High Level Group (2009).
169 IOSCO (September 2009).
170 BBA (October 2009).
171 UK FSA (October 2009).

1.33. Transparency is key for robust, well functioning markets providing reliable price discovery mechanisms. The recent period of market turmoil and illiquidity has highlighted the importance to market confidence of reliable and useful financial disclosures. Financial reporting permits the measurement of the financial condition and performance of companies and is the cornerstone of a well-functioning financial system. Sound disclosure, accounting and valuation practices are essential to achieve transparency, to maintain market confidence and to promote effective market discipline[172].

1.34. When announcing the launch by the European Commission of a public consultation on possible ways to enhance co-operation between business registers, Commissioner McCreevy said: "*The current financial crisis highlighted once again the importance of transparency across the financial markets. Improving access to up-to-date and official information on companies for creditors, business partners and consumers could serve as means to restore confidence in the markets*"[173].

1.35. In the post-crisis environment, the transparency needs of the new global marketplace, with its heightened prudential and conduct-of-business regulation and its new macro-prudential and systemic oversight, will continue to evolve. Regulatory reforms are developing transparency requirements and guidelines on product transparency and disclosure. While these reforms are not yet complete, among the regulatory requirements, industry guidance, market demand, and evolving practice there can be no doubt that the overall trend in product transparency and companies disclosures will be dramatically different in the near future compared with that before 2007. Also, the interconnectedness of the global financial system suggests a need for greater systemic exposure and product transparency to help mitigate systemic risk[174].

1.36. From the EU perspective, companies increasingly expand beyond national borders using the opportunities offered by the Single Market. Cross-border groups as well as a high number of restructuring operations, such as mergers and divisions involve companies from different Member States of the EU. Furthermore, over the past decade the jurisprudence of the European Court of Justice has opened up the possibility for businesses to incorporate in one Member State and conduct their business activity partly or entirely in another.

1.37. In this context, there is an increasing demand for access to information on companies, either for commercial purposes or to facilitate access to justice. However, while official information on companies is easily available in the country of their registration, access to the same information from another Member State may be hindered by technical or language barriers.

1.38. In these circumstances, facilitating cross-border access to official and reliable company information for creditors, business partners and consumers is necessary to ensure an appropriate degree of transparency and legal certainty in the markets all over the EU. To achieve this, the Commission services are currently working on the ways to improve access to information on companies across EU, in particular by

172 See for instance, Financial Stability Forum (2008).
173 European Commission IP/09/1677.
174 See, for instance, Institute of International Finance (2009).

exploring ways to enhance the cooperation of business registries[175] and to create a single point of access to regulated information and a European electronic network for storage of information on listed companies (see Annex 15).

[175] See European Commission (November 2009a).

ANNEX 2 – METHODOLOGY FOR THIS REPORT

2.1. The Transparency Directive lays down 3 reporting obligations on the Commission:

– Article 33 requires the Commission to, by 30 June 2009, "*report on the operation of this Directive to the European Parliament and to the Council including the appropriateness of ending the exemption for existing debt securities after the 10-year period as provided for by Article 30(4) and its potential impact on the European financial markets*".

– Article 27(3) requires the Commission to, by December 2010, "*review the provisions concerning its implementing powers and present a report to the European Parliament and to the Council on the functioning of those powers. The report shall examine, in particular, the need to propose amendments to this Directive in order to ensure the appropriate scope of the implementing powers conferred on the Commission. The conclusion as to whether or not amendment is necessary shall be accompanied by a detailed statement of reasons. If necessary, the report shall be accompanied by a legislative proposal to amend the provisions conferring implementing powers on the Commission*".

– Article 6(3) requires the Commission to "*provide a report to the European Parliament and the Council by 20 January 2010 on the transparency of quarterly financial reporting and statements by the management of issuers to examine whether the information provided meets the objective of allowing investors to make an informed assessment of the financial position of the issuer. Such a report shall include an impact assessment on areas where the Commission considers proposing amendments to this Article*".

2.2. This Commission staff working document integrates these three reporting requirements into a single consolidated report. For the preparation of this working document, the Commission staff used different sources of information.

2.3. Firstly, the Commission staff prepared in 2008 a report on more stringent national measures concerning the Transparency Directive[176]. The report on more stringent national measures was a preparatory step in the preparation of the present report. It (1) presented the more stringent national rules in relation to the minimum harmonisation nature of the Transparency Directive; (2) described their main impact in terms of negative perception, increased costs but also enhanced transparency; and (3) outlined the initiatives being taken to address such more stringent national measures (such as voluntary regulatory convergence or the facilitation of cross-border compliance with different national rules). The 2008 report concluded that while the flexibility offered by the Directive results on more transparency in the market, there are also practical difficulties for investors' complying with their obligations and may have adverse effects on the market for corporate control. Annex 2 to the 2008 report described the sources of information used for the preparation of

[176] European Commission (December 2008).

that paper, including consultations with national competent authorities, CESR, ESME and an information gathering exercise with selected stakeholders (namely, ABI (Association of British insurers), BusinessEurope (EU industry), CCBE (Association of European bars and law societies), Deminor (small investors), EBF (European Banking Federation), EcoDA (European Confederation of Directors' Associations), EFAMA (asset managers), EuropeanIssuers (issuers), FESE (Federation of European Stock Exchanges) and SIFMA/ICMA (Securities Industry and Financial Markets Association))

2.4. Secondly, three complementary external studies conducted for the Commission in 2008 and 2009 addressed different aspects of the Transparency Directive. A first study on the economic impacts of the Financial Services Action Plan[177] establishes the causal links between the 42 measures FSAP measures (including the Transparency Directive) analysed in the study and their original policy objectives and the resulting market impacts across the relevant segments of the market. The findings are divided into 3 key sectors – the banking, insurance and securities sectors. The study is both quantitative, based on a wide range of indicators and available data sets, and qualitative, by drawing on interviews with the industry and regulators in 10 selected Member States. A second study dealt with the cost of compliance with six selected FSAP measures (including the Transparency Directive)[178]. This study examines where the major costs are in terms of the implementation and ongoing costs for firms of complying with the measures selected. The cost of compliance was defined as a "net change to companies' operational expenses due to implementation of the selected EU regulatory measures". This definition requires that all other factors which could impact on these costs have been removed from this analysis. The study is based on information provided directly to the consultants through surveys and interviews with companies of varying size across a broad range of Member States.

2.5. Last but not least, a study on the application of selected obligations of the Directive was conducted in 2009[179]. The 2009 specific study on the application of the Transparency Directive evaluates the perception of stakeholders with regard to the Directive; examines the operation of the directive with regard to some selected issues and compares the directive with similar obligations in third countries. It also provides some conclusions and practical recommendations for improvement.

2.6. Thirdly, substantial information was collected from Member States authorities during the transposition of the Directive: e.g. in the context of the transposition meetings organised with Member States authorities, from bilateral contacts or in relation to the report on more stringent national measures (above). Also, useful information arose from consultation papers issued by national authorities in the area covered by the Directive, in particular regarding national evolutions (e.g. the UK FSA consultation on cash-settled derivatives or the French AMF report on major holdings notifications and notifications of intentions).

177 CRA International (2009).
178 Europe Economics (2009).
179 Mazars (2009).

2.7. Since the adoption of the Directive, CESR[180] has provided an invaluable contribution to the Commission services with a view to develop the EU legal framework in this area and to facilitate its smooth application. A first expert group on the Transparency Directive within CESR prepared CESR's opinions on the development of implementing legislation by the Commission (see also Annex 4). The European Securities Committee[181] was also involved in this process. A second expert group within CESR took over in 2007 (or 2008). It carries out level 3 work with a view to provide supervisory convergence in the day-to-day implementation across the EU and clarity for market participants. In this context, CESR mapped out the way this Directive is transposed by national legislation[182]. CESR also regularly discloses a clarification document on "Frequently asked questions" regarding this Directive[183]. Upon invitation by the Commission, CESR also prepared a report mapping out national supervisory and sanctioning powers under this Directive[184]. Commission staff participated in the work carried out by CESR in this field. Both the information collected in the meetings of the expert groups and the results of CESR's work have been of particular importance for the preparation of this report.

2.8. Fourthly, experts groups advising the Commission, such as ESME[185] and European Corporate Governance Forum (ECGF)[186], made important contributions by identifying areas where legislation would need to be improved or which deserved being regulated. ESME was invited to conduct selective work in the area covered by the Directive. This resulted in four different papers produced by ESME[187] which address different areas: (1) *First report on the Transparency Directive* (December 2007) which focused on major holdings notification obligations; (2) *Preliminary views on The definition of "acting in concert" between the Transparency Directive and the Takeover Bids Directive* (December 2008), on the applicability of Article 10(a) of the Transparency Directive; (3) *Opinion on Disaggregation of Shareholdings* (June 2009), in connection to the major holdings notification obligations; and (4) *Views on the issue of transparency of holdings of cash-settled derivatives* (November 2009), concerning the possibility to require disclosure of large holdings of cash-settled derivatives.

2.9. ESME prepared other papers regarding financial markets which are indirectly related to the Transparency Directive, such as: the *Report on MiFID and admission of*

180 The Committee of European Securities Regulators (CESR) was created by Commission Decision 2001/527/EC of 6 June 2001 *establishing the Committee of European Securities Regulators*, OJ L 191, 13.7.2001, p.43. See: www.cesr.eu

181 The European Securities Committee (ESC) was created by Commission Decision 2001/528/EC of 6 June 2001 *establishing the European Securities Committee*, OJ L 191, 13.7.2001, p. 45. For information on the activities of the ESC, see: http://ec.europa.eu/internal_market/securities/esc/index_en.htm

182 CESR (September 2008).

183 CESR (October 2009).

184 CESR (July 2009).

185 A group of market experts advising the Commission in the field of securities law. It was created by Commission Decision 2006/288/EC of 30 March 2006 *setting up a European Securities Markets Expert Group to provide legal and economic advice on the application of the EU securities Directives*, OJ L 106, 19/04/2006, p. 14. See: www.ec.europa.eu/internal_market/securities/esme/index_en.htm

186 The European Corporate Governance Forum (ECGF) was created by Commission Decision 2004/706/EC of 15 October 2004 *establishing the European Corporate Governance Forum*, OJ L 321, 22.10.2004, p. 53. For information on the activities of the ECGF, see: http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm

187 ESME papers are available at: http://ec.europa.eu/internal_market/securities/esme/index_en.htm

securities to official stock exchange listing (December 2007), which addresses Directive 2001/34/EC; F*inancial instruments impact of definitions on the perimeter of FSAP directives* (March 2008); *Report on Competent Authority pertaining to Issuers Publication of Regulated Information* (March 2008); or the *Position on Article 10 of the Prospectus Directive in relation to the Transparency Directive* (June 2008), which suggested repealing Article 10 of the Prospectus Directive considering the disclosure and storage requirements in the Transparency Directive.

2.10. The ECGF focused on corporate governance issues for listed companies, some of which are indirectly related to the Transparency Directive in so far as they relate to disclosure obligations: e.g. *Statement of the European Corporate Governance Forum on Cross-border issues of Corporate Governance Codes* (March 2009), *Statement of the European Corporate Governance Forum on Director Remuneration* (March 2009) and the Statement of the *European Corporate Governance Forum on empty voting* (February 2010).

2.11. Fifthly, during the past years the Commission services have received views of relevant private sector stakeholders on the operation of the Directive at different occasions, primarily, in the context of the survey on more stringent requirements and of the three external studies mentioned above. Bilateral contacts with major European stakeholders' associations (e.g. FESE, EFAMA, EuropeanIssuers etc), national associations (e.g. *Observatoire de la Communication Financière* in France) or individual companies (e.g. investors, issuers, service providers etc) have also been held where necessary.

2.12. Finally, other external sources of information or academic research[188] have been used where appropriate.

2.13. See <u>References</u> for further detail on papers mentioned.

[188] See <u>References</u> for a selection of academic papers.

ANNEX 3 – THE TRANSPOSITION OF THE TRANSPARENCY DIRECTIVE

3.1. Few Member States transposed the Transparency Directive on time: i.e. before 20 January 2007: only DE notified to the Commission of the adoption of the national measures before the deadline and other 5 Member States shortly afterwards: RO, UK, FI, LT and BG.

3.2. Most Member States were, however, delayed in their transposition process. Such delay is largely explained by the different transposition deadline of the Commission implementing measures (Directive 2007/14/EC), which was 8 March 2008. Several Member States transposed both Directives in one set, being late with the transposition of the Transparency Directive but were on time as regards the implementing measures: DK, SE, ES, PT, EE, LU, CY and BE.

3.3. Other factors also affected the transposition process. For instance, some countries informed the Commission of difficulties to cope with the transposition of several EU directives in the securities field at the same time, due to insufficient capacity to deal with several changes at the same time[189]. The problem of the sequencing of level 1 and level 2 measures has also been raised in this context[190]. For instance, the Directive modifying the date of transposition of MiFID explained that: *"It is also necessary that Directive 2004/39/EC and its implementing measures be transposed into national law or apply directly in Member States simultaneously for the Directive to produce its full effect"*.[191]

3.4. Beyond spring 2008, a significant delay in the transposition of the Transparency Directive and of Directive 2007/14/EC remained only with regard to four countries (Hungary, Netherlands, Poland and the Czech Republic). As a result, the Commission decided to tighten its enforcement action against these four countries and sent reasoned opinions on 8 May 2008. The Commission decided to refer to the European Court of justice three Member States, the Netherlands on 18 September 2008, Poland on 29 January 2009 and the Czech Republic on 25 June 2009. These

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189 For instance, the parallel transposition of the sophisticated MiFID, due by 31 January 2007, which was undertaken as a matter of priority in some Member States and took available resources. MiFID was originally due to be transposed by April 2006, but due to difficulties in its transposition, the transposition deadline was extended until 31 January 2007 with an additional 9-month period for firms to adapt their systems to MiFID changes (until 1 November 2007). See Directive 2006/31/EC of the European Parliament and of the Council of 5 April 2006 amending directive 2004/39/EC on markets in financial instruments, as regards certain deadlines OJ L 114, 27.4.2006, p. 60

190 According to Commission research, it appears that the sequencing of the negotiations and adoption of framework co-decision legislation (Level 1) with implementing measures (Level 2) has resulted in some bottlenecks and unrealistic timetables. In practice, a significant portion of the transposition period set in Level 1 legislation is taken up with the preparation of implementing measures, without which Member States cannot effectively proceed with their transposition. It is, however, hazardous to estimate the duration of the negotiation process at Level 2 at the time of adoption of the framework legislation. See European Commission (November 2007), section 3.2.

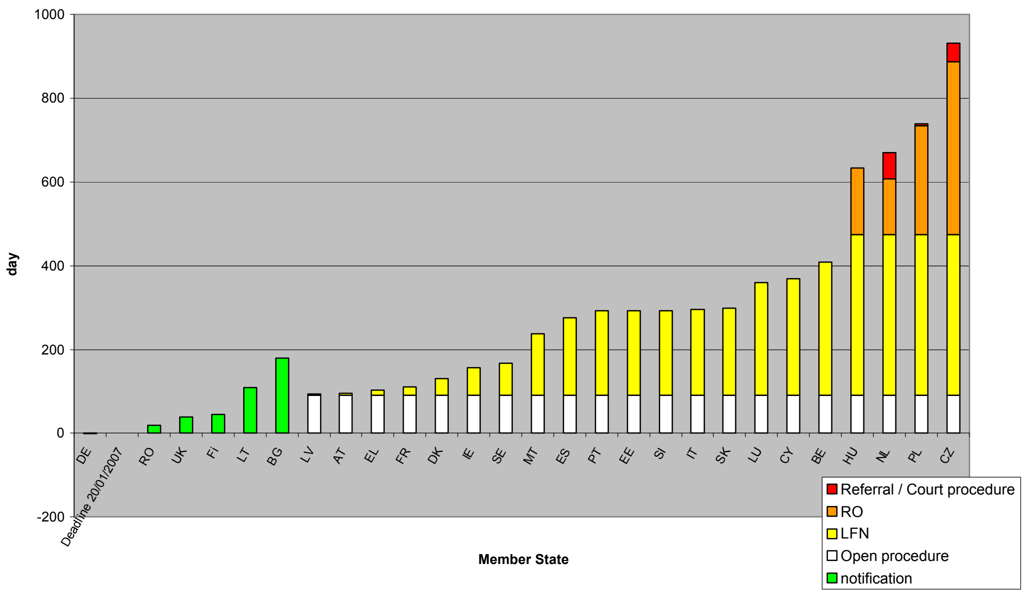
191 See recital 4 to Directive 2006/31/EC, cited in footnote 189.

referrals were eventually withdrawn as Member States communicated national measures shortly after[192].

3.5. In the case of France and Italy, the main national laws were in place, but the supplementary decrees and orders to be prepared by the securities regulators (AMF and CONSOB) were adopted with significant delays. The lengthy consultation processes followed by both AMF and CONSOB also added to the delay. This affected the overall application of the regulatory framework and was reflected in the transposition record of Directive 2007/14/EC. The Commission also pursued infringement proceedings against France and Italy for failure to communicate all the transposition measures of Directive 2007/14/EC within the relevant deadline and sent reasoned opinions on 2 February 2009[193]. National transposition measures were notified before the procedure could have reached the stage of court referral.

3.6. The following charts provide an overall view on the transposition process of the Transparency Directive and Directive 2007/14/EC as well as of the enforcement action taken by the Commission[194] (dates in the charts refer to the date of notification, not of entry into force of the legislation).

Length of implementation of the Transparecny Directive 2004/109/EC



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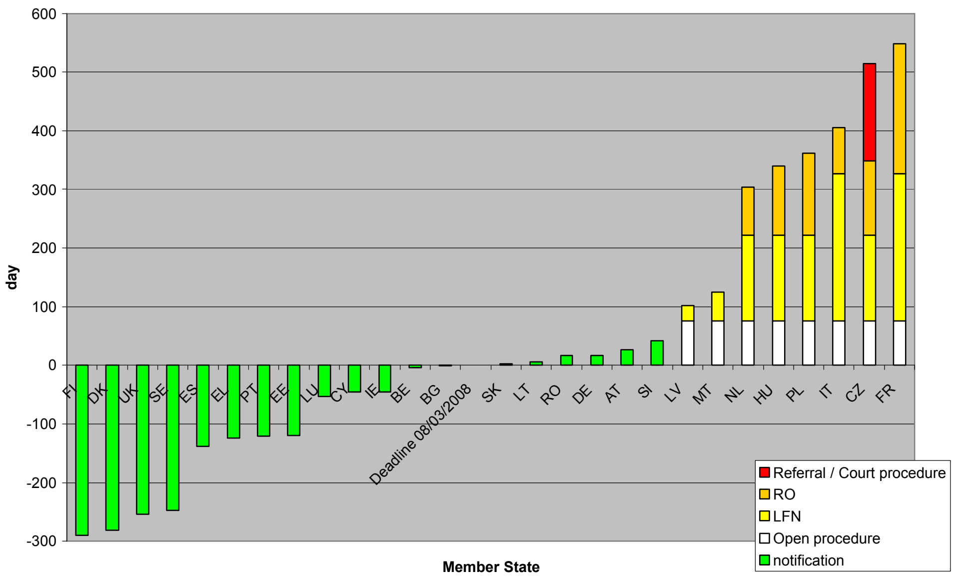
192 See IP/08/692 of 6.5.2008; IP/08/1368 of 18 September 2008; IP/08/1519 of 16.10.2008; IP/09/176 of 29 January 2009; IP/09/2009 of 19 February 2009 and IP/09/1005 of 25 June 2009. While the Commission also opened infringement proceedings by sending letters of formal notice to other Member States, it decided not to send reasoned opinions until after 8 March 2009 – therefore granting Member States a grace period until the end of the transposition period of Directive 2007/14/EC.

193 See IP/08/692 of 6.5.2008; IP/08/1368 of 18 September 2008; IP/08/1519 of 16.10.2008; IP/09/176 of 29 January 2009; IP/09/2009 of 19 February 2009 and IP/09/1005 of 25 June 2009.

194 Although some of the cases against the HU, NL, PL, CZ, FR and IT were brought before the European Court of Justice, transposition was completed before the Court took any decision.

Length of transposition of Directive 2007/14/EC



3.7. Transposition delays did not, however, lead to a general regulatory vacuum: there was national law in place pursuant to Directive 2001/34/EC – and to the previous directives – addressing most of the Directive requirements. However, late transposition affected the entry into force of some of the Directive novelties, such as: the requirement to disclose quarterly financial reports or "interim management statements" (Article 6); the requirement to disclose holdings of financial instruments that may allow to control voting rights (Article 13); or the obligation on the dissemination of regulated information to the public (Article 21 of the methods of dissemination).

3.8. The application of the home Member State principle (Article 3) and the new rules on languages (Article 20) were also important novelties of the Directive in so far as they prevented a host Member State to impose their national requirements on issuers with securities listed in that Member State but incorporated in a different Member State. However, even in the case of absence of transposition of the Directive, issuers could prevail themselves of the Directive rules on this issue as a result of the so-called direct effect doctrine. Therefore the restrictions to host Member States were operational from the first day.

However, the late transposition of the Directive in some countries led to a few awkward transitional situations where companies listed in one Member State (having transposed the Directive) but incorporated in another Member State (not having transposed the Directive) were not regulated by either of them as a result of the application of the Home/Host Member State principle. This result was due to the fact that the criterion for the application of the older legislation in the home Member State was the fact of being listed in that Member State rather than the incorporation principle retained in the Directive. These rather anecdotal cases were solved through supervisory cooperation and voluntary compliance by the companies concerned. In any event, these cases was transitional in nature and, technically speaking, should not happen in the future unless the general rules on the Home Member State are changed.

3.9. It should be finally noted that the Commission did not receive any official complaint for breach of Community law by Member States concerning the Transparency Directive in the period following its adoption. This absence of complaints indirectly showed that market participants were not disrupted by the late transposition of the measures in some Member States.

ANNEX 4 – THE USE BY THE COMMISSION OF IMPLEMENTING POWERS

4.1. **Introduction**. The Transparency Directive is a Lamfalussy process directive[195]. In this context, implementing powers were granted by Council and Parliament to the Commission in a number of areas under the Transparency Directive (see below tables 4.1 and 4.2).

The procedural rules for the exercise of these powers were foreseen in Article 27 of the Directive, by reference to the so-called comitology Decision[196]. These procedural rules in the Directive were changed in 2008[197], in order to align them to the regulatory procedure with scrutiny introduced in the Comitology Decision in 2006[198][199]. Concerning the Transparency Directive, most of the empowerments for implemented measures became subject to the new regulatory procedure with scrutiny.

4.2. **Request for a report**. Article 27(3) of the Transparency Directive, as modified in the 2008 review, requires the Commission to, by December 2010, "*review the provisions concerning its implementing powers and present a report to the European Parliament and to the Council on the functioning of those powers. The report shall examine, in particular, the need to propose amendments to this Directive in order to ensure the appropriate scope of the implementing powers conferred on the Commission. The conclusion as to whether or not amendment is necessary shall be accompanied by a detailed statement of reasons. If necessary, the report shall be accompanied by a legislative proposal to amend the provisions conferring implementing powers on the Commission*". This annex replies to this invitation.

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195 The launch of the Lamfalussy process in 2001 aimed at putting in place an efficient mechanism to begin converging European financial supervisory practice and enable Community financial services legislation to respond rapidly and flexibly to developments in financial markets. Under this approach, financial regulation is passed in two levels: (i) at "level 1", framework legislation setting out the core principles and defining implementing powers is adopted by co-decision; and (ii) the technical details are formally adopted by the Commission as implementing measures at "level 2", after a vote of the competent regulatory Committee – in this case, the European Securities Committee – and taking account of the European Parliament's position. For the technical preparation of the implementing measures in the securities area, the Commission is advised by the Committee of European Securities Regulators (CESR), made up of representatives of national supervisory bodies – also referred to as a "level 3" committee. For further information on the Lamfalussy process, see generally Commission (November 2007).

196 Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184 of 17.7.1999, p.23.

197 Directive 2008/22/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as regards the implementing powers conferred on the Commission, OJ L 76 of 19.3.2008, p.50.

198 See Council Decision 2006/512/EC of 17 July 2006, amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200 of 22.7.2006, p.11, as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006) which introduced the regulatory procedure with scrutiny for the adoption of measures of general scope and designed to amend non-essential elements of a basic instrument..

199 This paper does not address the impact of the entry into force of the Lisbon Treaty on the procedural rules concerning comitology.

4.3. **The use of the implementing powers by the Commission**. Pursuant to the implementing powers conferred on it, the Commission adopted in 2007 a directive[200] laying down detailed rules for the implementation of several provisions of the Transparency Directive. The provisions concerned by Directive 2007/14/EC were:

Table 4.1 – Implementing powers exercised (Directive 2007/14/EC)

Empowerment (Directive 2004/109)	Articles concerned (Directive 2004/109)	Subject
Article 2(3)(a)	Article 2(1)(ii)	Procedural arrangements for the choice of the home Member State
Article 5(6)(c)	Article 5(3), second subparagraph	Minimum content of the half-yearly non-consolidated financial statements
Article 5(6), first subparagraph	Article 5(4), second sentence	Major related parties' transactions
Article 9(7)	Article 9(4)	Maximum length of the usual 'short settlement cycle'
Article 9(7)	Article 9(5)	Control mechanisms by competent authorities as regards market makers
Article 12(8)(b) Article 14(2)	Article 12(2) and (6) Article 14(1)	Calendar of trading days
Article 12(8)(c)	Article 12(2)	Shareholders and natural persons or legal entities referred to in Article 10 of the Transparency Directive required to make the notification of major holdings
Article 12(8)(d)	Article 12(2)	Circumstances under which the notifying person should have learned of acquisition or disposal or of the possibility to exercise voting rights
Article 12(8)(e)	Article 12(4), first subparagraph Article 12(5), first subparagraph	Conditions of independence to be complied with by management companies and investment firms involved in individual portfolio management
Article 13(2)	Article 13(1)	Types of financial instruments that result in an entitlement to acquire, on the holder's own initiative alone, shares to which voting rights are attached
Article 21(4)(a)	Article 21(1)	Minimum standards for the dissemination of regulated information
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Article 4(2)(b)
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Article 5(4)
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Articles 4(2) and 5(2)(c)
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Article 6
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Article 4(3)
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Article 4(3), second subparagraph
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Article 12(6)
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Article 14
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Article 15
Article 23(4)(ii)	Article 23(1)	Requirements equivalent to Articles 17(2)(a) and 18(2)(a)
Article 23(7)	Article 23(6)	Equivalence in relation to the test of independence for parent undertakings of management companies and investment firms

[200] Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; OJ L 69, 9.3.2007, p. 27.

4.4. In the specific area of equivalence of accounting standards, the Commission has also adopted three legal texts on the basis of its implementing powers:

– Commission Decision 2006/891/EC of 4 December 2006 on the use by third country issuers of securities of information prepared under internationally accepted accounting standards[201]. This Decision was repealed by Commission Decision 2008/961/EC, below.

– Commission Regulation (EC) No 1569/2007 of 21 December 2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council[202]. This Regulation, adopted pursuant to Article 23(4)(i) of the Transparency Directive, set out the way on which third-country Generally Accepted Accounting Principles (GAAPs) can be found equivalent to International Financial Reporting Standards (IFRS) which are adopted by the EU[203].

– Commission Decision 2008/961/EC of 12 December 2008 on the use by third countries' issuers of securities of certain third country's national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements[204]. This decision, adopted pursuant to Article 23(4) of the Transparency Directive, determines that the GAAPs) of US and Japan are found to be equivalent to International Financial Reporting Standards (IFRS) as adopted by the EU. Also, third country issuers are permitted to prepare their financial statements in accordance with the GAAPs of China, Canada, South Korea and India. The Commission will review the situation of some of these countries (China, Canada, South Korea, India) by 2011 at the latest[205].

4.5. All the exercised implementing powers followed the regulatory procedure foreseen when the Directive was adopted in 2004. The regulatory procedure with scrutiny introduced in 2008 has not yet been used as regards the Transparency Directive.

4.6. **Areas where the implementing powers have not been used so far**. Although Directive 2007/14/EC was rather comprehensive, the Commission has not exercised all its implementing powers concerning the Transparency Directive. This concerns the following provisions:

Table 4.2 – Specific implementing powers NOT exercised		
Specific Empowerment	**Articles concerned**	**Subject**
Article 2(3)(b)	Article 2(1)(i)(ii)	Adjustment of the 3-year period for the choice of the Home Member State by third country issuers
Article 2(3)(c)	Article 2(1)(l)	Indicative list of means which are not to be considered as electronic means
Article 4(6)	Article 4(1)	Conditions on the availability to the public of the annual financial report

201 OJ L 343 of 8.12.2006, p. 96
202 OJ L 340 of 22.12.2007, p.66.
203 IP/80/20 of 8.1.2008.
204 OJ L 340 of 19.12.2008, p.112
205 See IP/08/1962 of 12 December 2008.

Article 4(6) *in fine**	Article 4(1)	Adaptation of the 5-year period for the availability to the public
Article 5(6)(a)	Article 5(1)	Conditions on the availability to the public of the half-yearly financial report
Article 5(6) *in fine**	Article 5(1)	Adaptation of the 5-year period for the availability to the public
Article 5(6)(b)	Article 5(1)	Nature of the auditors' review
Article 12(8)(a)	Article 12(1)	Standard form for the notification of major holdings
Article 13(2)(c), *in fine*	Article 13(1)	Standard form for the notification of financial instruments
Article 17(4)	Article 17(2)(c)	Type of financial institution
Article 18(5)	Article 18(2)(c)	Type of financial institution
Article 19(4)	Article 19(1)	Filing of information with the competent authority
Article 21(4)(b)	Article 21(2)	Minimum standards for the central storage mechanism
Article 21(4), last sentence	Article 21(1)	List of media for the dissemination of information to the public
Article 22(2)*	Articles 19(1) and 21(2)	Network of central storage mechanisms
Article 23(5)*	Article 23(2)	Type of information disclosed in a third country that is of importance to the public in the Community

Since the 2008 amendment, many of these empowerments are subject to the regulatory procedure with scrutiny (i.e. all but the empowerments in Articles 2(3)(c), 4(6)[206], 5(6)(a) and 22(2)). It should also be noted that the degree of compulsion of the empowerments market with an asterisk (*) appears lower because of the use of the word "may" instead of "shall" in the Directive text.

4.7. Nevertheless, the Commission services have undertaken specific preparatory work with regard to some of these implementing powers[207]. This relates in particular to the development of a standard form for the notification of major holdings and to the question of the central storage of regulated information. The empowerments in Articles 4(6), 4(6) in fine, 5(6), 5(6) in fine, 12(8)(a), 12(2)(c), 19(4), 21(4)(b) and 22(2) are directly or indirectly linked to these areas.

4.8. **The specific case of the standard forms for the notification of major holdings of voting rights and financial instruments**. The aim of the Directive was to establish standard forms to be used throughout the Community for the purposes of notifying the required information on major holdings of voting rights and of financial instruments as well as for filing such information with the national competent authority. Upon request of the Commission, CESR delivered its advice on this point in 2005[208]. In November 2005, DG Internal Market and Services consulted the public on the possible content of the implementing measures to the Transparency Directive[209]. Part II of the consultation document presented a possible draft recommendation on the use of the standard forms, which would accompany the future Commission implementing measures. The main reason for consulting stakeholders on a possible non-biding text was the difficulty to impose a form in

206 Interestingly, adapting the five-year period during which the financial reports should remain available to the public is subject to two different procedures depending if it is the annual report (regulatory procedure) or the half-yearly report (regulatory procedure with scrutiny).

207 The empowerments in Articles 17(4) and 18(5) are related to the Directive on Shareholder Rights.

208 CESR (June 2005), p.47 and seq.

209 See http://ec.europa.eu/internal_market/securities/transparency/index_en.htm#mesures

isolation from the development of the network of central storage mechanisms. Discussions with Member States within the European Securities Committee also showed the difficulty to establish a single form, considering different national requirements associated to the disclosure of major holdings. As a result, in March 2007, at the moment of the adoption of the Commission implementing measures (Directive 2007/14/EC), the Commissioner responsible for internal market called on CESR members to perform a market test on the voluntary use of forms developed by the Commission services[210]. In appears that in the vast majority of Member States a form for the notification of major holdings is being used, in many cases built up on the model developed by the Commission services but often adopted to national specificities[211].

4.9. In this context, CESR has recently undertaken some work with a view to converge into a single electronic notification form capable of integrating the different additional national requirements. Considering the evolution of this work as well as the fact that the development of the form is an issue of technical nature not involving policy choices (i.e. the content of the notifications requirements are established in Article 12 of Directive 2004/109/EC and in Article 11 of Directive 2007/14/EC), the Commission has recently proposed that the European Securities Markets Authority should be entitled to develop technical standards in relation to these forms[212]. If Council and Parliament accept such proposal, the empowerments in Articles 12(8)(a) and 13(2)(c) *in fine* for the adoption of Commission's implementing measures would be repealed (see also Annex 1 – Section B, above).

4.10. **The specific case of the central storage of regulated information** (see also Annex 15). The Directive requires Member States to set up (at least) one "*officially appointed mechanism for the central storage of regulated information*"[213]. It foresees as well the possibility for the Commission to adopt implementing measures specifying the minimum standards for the central storage of regulated information[214]. As a second step, the Directive encourages the creation of an electronic network (or a platform of electronic networks) of storage mechanisms across Member States[215]. Implementing powers are also foreseen for the Commission in this regard, after having reviewed the guidelines prepared by CESR on this issue. The Directive also provides for implementing powers on issues closely connected to the storage of regulated information: (i) the technical conditions under which a published (annual

210 See the letter of Commissioner McCreevy to CESR of 5.3.2007, available at: http://ec.europa.eu/internal_market/securities/transparency/index_en.htm#mesures

211 See European Commission (December 2008), p.15: "*In 23 of the Member States the use of a form for the notification of major holdings of voting rights is recommended (in the case of Spain, the form is compulsory). Only in AT, MT, PL and SK is a form not yet recommended. The standard form developed by the Commission services is used in many of the 23 Member States, although it has often been adapted to national specificities, notably in order to accommodate the more stringent requirements.*"

212 Proposal for a Directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority; COM(2009)0576 final of 26 October 2009. See draft Article 7 modifying Articles 12, 13 and 25 of the Transparency Directive.

213 Cf. Article 21(2).

214 Cf. Article 21(4).

215 Cf. Article 22.

or half-yearly) financial report is to remain available to the public for 5 years, (including the possible adaptation of the five-year period)[216] and (ii) filing of disclosed regulated information with the competent authority in the home Member State by electronic means[217]. In both cases, a working storage mechanism would be the reply to the problem.

4.11. Upon request of the Commission, CESR prepared in 2005 a progress report[218] on this issue and later in 2006 a formal advice on possible implementing measures on storage of regulated information and filing with the competent authority[219].

Building on CESR advice, DG Internal Market and Services consulted the public on this issue in March 2007. The consultation document[220] contained: (i) draft minimum quality standards for the central storage and (ii) draft minimum conditions for a pan-European network of national central storage mechanisms. Preliminary discussions with Member States within the European Securities Committee were also held: preference was expressed for continuing the work toward the development of a pan-European network of central storage mechanisms without limiting the flexibility of the national mechanism in this process through the enactment of Commission's implementing measures on minimum quality standards. The issues of governance of a pan-European network and the question of Information and Communication Technology convergence appeared as priority issues compared to the quality standards.

4.12. As a result the Commission adopted a non-binding Recommendation[221] with a view to give support to work undertaken by CESR regarding the pan-European network and to its suggested way forward: the so-called Model C[222]. The recommendation also contains suggestions on minimum quality standards. CESR is currently developing Model C. In the recommendation, the Commission also invited CESR to draw up, by 30 September 2010 appropriate guidelines for the future development of the electronic network beyond Model C. The possible exercise of implementing powers under Articles 4(6), 5(6), 19(4), 21(2) and 22(2) should be considered at that time (see also Annex 15 on this issue).

4.13. **The new developments**. It should be noted that in September 2009, the Commission proposed the creation of a European Securities Markets Authority that would replace CESR (see above Annex 1 – Section B). This new Authority will be empowered to develop draft technical standards, to be formally adopted by the Commission, in the

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216 Cf. Articles 4(6) and 5(6).

217 Cf. Article 19(4).

218 CESR (March 2005).

219 CESR (June 2006).

220 See http://ec.europa.eu/internal_market/securities/transparency/index_en.htm#storage

221 Commission Recommendation 2007/657/EC of 11 October 2007 on the electronic network of officially appointed mechanisms for the central storage of regulated information referred to in Directive 2004/109/EC of the European Parliament and of the Council, OJ L267, 12.10.2007, p.16. The text of the recommendation is available at: www.ec.europa.eu/internal_market/securities/transparency/index_en.htm

222 Under Model C, the pan-European network would be accessed via a common interface which would contain a list of all EU listed companies. By clicking on the name of the relevant company, the user would be directed to the site of the relevant storage mechanism. The data would remain at national level and the only common element would be the list of listed companies.

securities markets area. Those technical standards will be binding and should clarify the conditions of application of a Directive or, as appropriate, of its implementing measures. As underlined before, the Commission has proposed that its current implementing powers on the development of the standard forms for the notification of voting rights and of financial instruments be repealed and transformed into EMSA powers to develop technical standards on this issue.

4.14. The Commission is not precluding from proposing in the future that ESMA receives additional powers with a view to developing technical standards on other issues connected to the Transparency Directive.

4.15. **Conclusions**. This Annex shows that there is a need to maintain the empowerments for Commission's implementing measures regarding the areas in which they have been used, in case adjustments are needed in the future. Also, there is a need to maintain the empowerments directly and indirectly linked to storage of regulated information and filing with national authority since work on this issue is still in progress (see Annex 15). The empowerments in relation to articles 17 & 18 could be maintained too since their future use will depend on the impact of the Directive on shareholder rights.

4.16. The creation of ESMA opens the possibility for transferring some of these empowerments to ESMA, so that it develops technical standards on some areas. Possible areas for this transfer could be the empowerment for establishing the list of electronic means or the conditions for the availability of the financial reports.

ANNEX 5 – COST OF COMPLIANCE WITH THE DIRECTIVE

5.1. This Annex:

- A) introduces the scope and methodology of an external study on cost of compliance with, inter alia, the Transparency Directive;
- B) describes the findings of the study with regard to the one-off costs;
- C) equally for the on-going costs; and
- D) shows the impact of the minimum harmonisation nature of the Transparency Directive.

A) The external study on cost of compliance

5.2. A recent external study has examined for the Commission the cost impact of compliance for certain types of firms within the financial industry with six key EU directives in the financial services area, including the Transparency Directive[223]. The survey concentrated on firms from four sectors within the financial services industry in the EU: banks and financial conglomerates, asset managers, investment banks and financial markets.

5.3. The study focuses on the so-called 'incremental compliance costs' caused by regulation, not on the total costs of activities that happens to contribute to regulatory compliance[224].

5.4. The study identifies separately cost impacts that are of one-off nature (i.e. those costs that only have to be incurred once in making the transition, such as IT investment and the re-shaping of business processes) from those that are recurring in nature (on-going costs as a result of regulation). The ongoing costs of compliance for any given firm are typically lower than the one-off costs. Looking at the different sectors surveyed, recurring costs are mostly between 15 and 20 per cent of the implementation cost recorded (with some exceptions)[225].

5.5. This study shows that firms have adopted different strategies in approaching the implementation of the Directive both regarding one-off (in particular, in their willingness to put maximum reliance upon the automation of processes) and ongoing costs. The dispersion in the ongoing costs — and general business experience —

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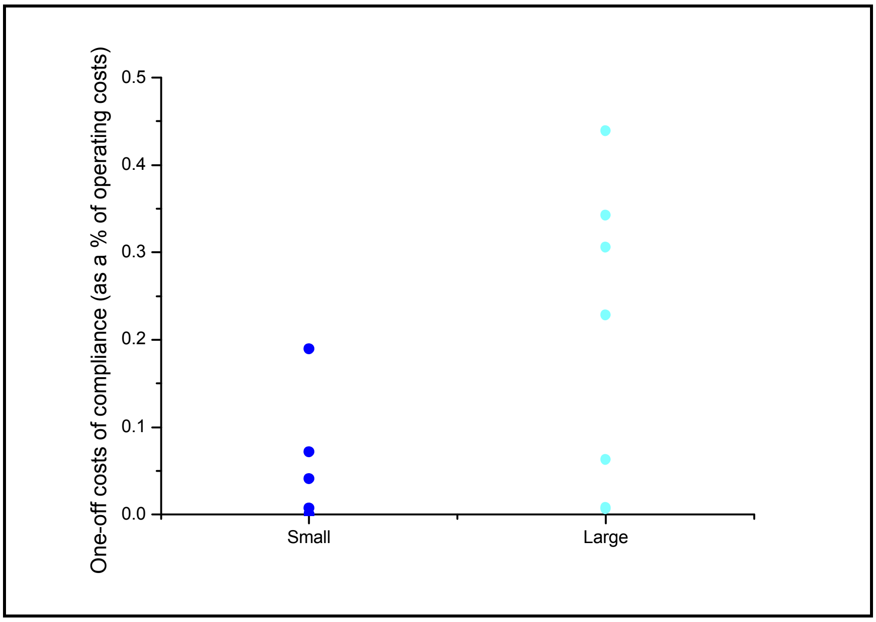
223 Europe Economics (2009). The six directives concerned are the so-called Prospectus Directive, the Financial Conglomerates Directive, the Capital Requirements Directive, the Transparency Directive, the Markets in Financial Instruments Directive – MiFID and the Anti-Money Laundering Directive. These measures were part of the Commission's Financial Services Action Plan (FSAP) of 1999 (the so-called 3rd AML Directive of 2005 replaced in the meantime the precedent, second, AML Directive of 2001 which was the measure addressed in the FSAP).

224 *Ibid*., §2.14. For an explanation of the methodology of that study, see: section 2; the introductions to sections 4 and 5; as well as Appendix 1 of the final report.

225 *Ibid*., §15 and seq.

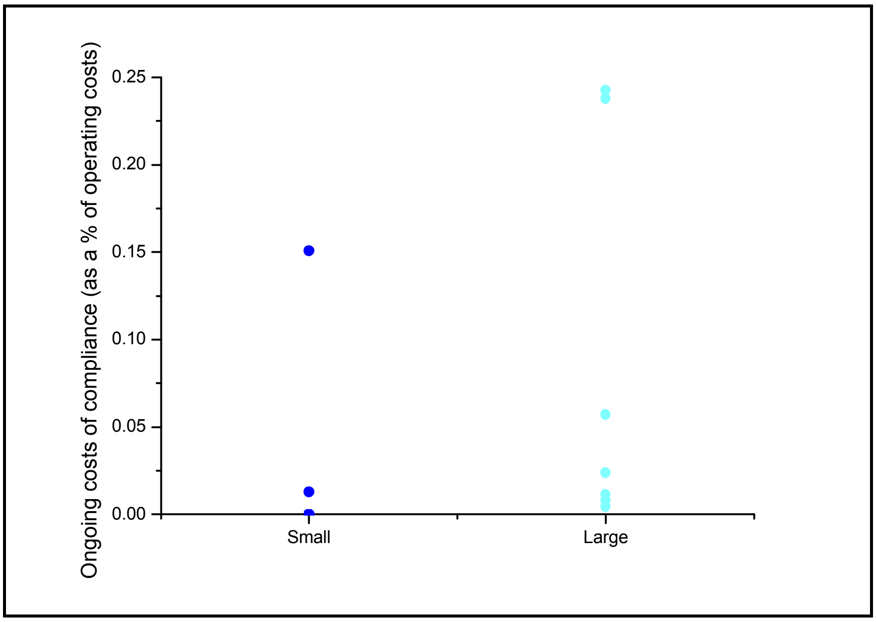
suggest that firms have experienced differing levels of success in achieving this objective. Indeed the study shows a wide dispersion of results. Figures 5.1 and 5.2 illustrate this divergence in scale, by showing the dispersion of the results obtained for the Transparency Directive.

Figure 5.1: Dispersion of the one-off costs of the Transparency Directive by firm size (asset managers), expressed as a percentage of 2007 operating expenses



Source: Europe Economics (2009), figure 4.10.

Figure 5.2: Dispersion of the on-going costs of the Transparency Directive by firm size (asset managers), expressed as a percentage of 2007 operating expenses.



Source: Europe Economics (2009), figure 5.9.

B) The one-off costs of compliance

5.6. Concerning the one-off costs of compliance (see Table 5.1) for banks, financial conglomerates and investment banks[226] compliance with the Transparency Directive roughly accounts for 1% of all their financial services regulatory costs[227]. If a comparison is done with the costs of compliance for asset managers, Table 5.1 shows that the one-off costs of compliance with the Transparency Directive take a higher proportion of asset managers' total costs[228].

TABLE 5.1 – AML Directive – One-off costs of compliance

	Banks & financial conglomerates	Investment banks	Asset managers	Financial markets [229]
Mean[230] (percentage of 2007 operating expenses)	0.03%	0.01%	0.22%	0.44%
Median[231] (percentage of 2007 operating expenses)	0.01%	0.04%	0.02%	0.09%
Total financial services regulatory compliance costs[232] (percentage of 2007 operating expenses)	2.90%	2.25%	1.58%	3.40%
Mean: average absolute value of the incremental cost changes, per firm (€000s)	425	319	353	89
Total financial services regulatory compliance costs (€000s)	45,149	24,569	5,565	694
Average of operating costs (€000s)	1,558,072	1,030,071	384,582	20,403

Source: Europe Economics (2009), tables 4.1, 4.2 and 4.3.

5.7. Out of the six directives examined by the study, the Transparency Directive comes fourth in terms of cost impact for banks, financial conglomerates, investment banks and asset managers, well behind the Capital Requirements Directive, MiFID and the Anti-Money Laundering Directive. These three other directives represented the most important regulatory changes in this area in recent times and their compliance costs are significantly higher[233]: e.g. the Capital Requirements Directive accounted for more than half of the total financial services regulatory compliance costs for banks, financial conglomerates and investment banks. For this institutions, the Transparency Directive impact is ten times lower that that of the AML Directive. In the case of asset managers the impact of MiFID equals that of the Capital Requirements Directive: both together account for around two thirds of costs. However, the cost

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226 The study also provides further breakdowns of costs, per size and geographical origin concerning banks (and financial conglomerates) and investment banks. See *Ibid*. §4.20 to 4.25 and 4.93 to 4.94.

227 The non-EU regulation costs are reflected in the study, on an aggregated basis, in the total costs.

228 The study also provides further breakdowns of costs, per size and geographical origin concerning asset managers. See *Ibid*. §4.64 to 4.68.

229 Financial markets (e.g. stock exchanges operators) are not directly subject to the obligations of the Transparency Directive, but they incurred in some costs such as: the re-writing of the Exchange's rulebooks and some re-training of relevant surveillance staff. In order to allow for comparisons, their costs are also shown in Table 6.1. See also *Ibid*., §4.108 and seq..

230 The middle value in a series of data points arranged sequentially. The sequence from which this median has been selected is based upon the estimated one-off costs of compliance expressed as a percentage of the relevant firm's more recent operating expenditure.

231 Aggregate one-off costs of compliance expressed as a percentage of the relevant firms' aggregated most recent operating expenditure. This implies that the experience of the larger firms will carry more weight in the sample presented.

232 Including other FSAP measures and other financial services regulation, whether EU, nationally or extra-territorially derived.

233 *Ibid*., tables 4.1, 4.2 and 4.3.

gap between the AML Directive (third) and the Transparency Directive (fourth) is smaller than for banks[234].

5.8. Concerning the possibilities for financial institutions to achieve synergies between application of the Transparency Directive requirements and those of the other measures mentioned above, it should be generally noted that very few businesses surveyed by the study believed that any significant cost-reducing synergies had been achieved in the implementation of the various measures: the variation in the implementation dates was the most frequently cited factor behind this[235]. Another component to this problem was that firms felt that the detail necessary to properly prepare for IT changes was not always forthcoming from the implementing authorities in a sufficiently timely manner. In any event, no synergies in connection to the Transparency Directive were identified.

5.9. The main source of Transparency Directive related compliance spending for banks, investment banks and financial conglomerates (see Table 5.2 for banks and financial conglomerates and Table 5.3 for investment banks) is investment in/updating IT[236] (similarly high IT costs appear for almost all the directives covered in the study). In any event, this Directive was not typically a major source of cost to banks although the innovation of parent company reporting introduced some additional cost to affected banks (i.e. largely those with asset management subsidiaries) [237].

TABLE 5.2 – Cost drivers of the selected directives (banks and financial conglomerates) – one-off costs

Directive	Prospectus	FCD	CRD	Transparency	MiFID	3AMLD
Familiarisation with Directive	49%	15%	2%	13%	3%	3%
Consultancy fees	5%	11%	20%	5%	13%	11%
Legal advice	23%	5%	5%	5%	7%	1%
Training	13%	8%	5%	11%	15%	22%
Staff recruitment costs	0%	2%	4%	1%	2%	2%
Investment in/updating IT	2%	47%	57%	63%	52%	54%
Project management	8%	9%	8%	3%	7%	7%
Other	0%	2%	0%	0%	0%	0%

Source: Europe Economics (2009), table 4.10.

TABLE 5.3 – Cost drivers of the selected directives (investment banks) – one-off costs

Directive	Prospectus	FCD	CRD	Transparency	MiFID	3AMLD
Familiarisation with Directive	9%	7%	3%	7%	6%	5%
Consultancy fees	13%	0%	19%	10%	16%	12%
Legal advice	18%	10%	2%	4%	4%	6%
Training	14%	15%	2%	4%	10%	13%
Staff recruitment costs	4%	0%	1%	10%	1%	0%
Investment/ updating IT	27%	39%	62%	36%	49%	53%
Project management	14%	29%	10%	29%	14%	12%
Other	0%	0%	1%	0%	1%	0%

Source: Europe Economics (2009), table 4.27.

234 *Ibid*., tables 4.1., 4.2 and 4.3.

235 *Ibid*., §§4.14 to 4.17.

236 The *ex ante* impact assessment conducted in the UK for the transposition of the Transparency Directive indicated an expected cost to a bank of adapting its existing systems to be around €365,000 to €731,000 in the UK. Based on the average operating cost of all the banks and financial conglomerates in the study sample, this would represent between 0.02 and 0.04 per cent of operating costs. The results of the study analysis show a lower one-off cost of 0.01 per cent of operating costs across all participating banks (with the median result below this). See *Ibid*., §4.44. See also UK Treasury (2005) on cost issues.

237 *Ibid*., §4.43.

5.10. For asset managers the cost breakdown is different, with legal advice and consultancy fees involving similar or higher costs than IT related expenditure (see Table 5.4 for asset managers)[238].

TABLE 5.4 – Cost drivers of the selected directives (asset managers) – one-off costs

Directive	Prospectus	FCD	CRD	Transparency	MiFID	3AMLD
Familiarisation with Directive	6%	53%	5%	2%	6%	4%
Consultancy fees	30%	0%	19%	25%	16%	9%
Legal advice	21%	0%	0%	32%	4%	4%
Training	0%	2%	0%	0%	9%	17%
Staff recruitment costs	0%	0%	2%	0%	3%	3%
Investment/updating IT	24%	0%	62%	23%	48%	51%
Project management	19%	45%	11%	19%	14%	12%
Other	0%	0%	0%	0%	0%	0%

Source: Europe Economics (2009), table 4.19.

5.11. In terms of asset managers IT spending[239], the requirement for parent company reporting meant that for some asset managers a large IT project was or is required in order to allow such an aggregation of holdings across all portfolios. Specific issues identified within such projects for flagging share-holdings include: (i) the total actual outstanding shares in companies is not held within a single database (this information is required for the denominators in calculating an asset manager's positions). The requirement to look across various databases incurs direct costs (through data licenses on both a one-off and ongoing basis) and as a potential trigger to establishing data warehousing facilities; (ii) where the disclosure threshold was previously five per cent and is now lower, this has magnified the importance of such flagging as share-holdings on such a scale are markedly more commonplace; and (iii) the need to consider derivative positions is a further complication.

C) The ongoing cost of compliance

5.12. Concerning the ongoing cost of compliance (see Table 5.5), for banks, financial conglomerates and investment banks, compliance with the Transparency Directive roughly accounts for 2% of all their financial services regulatory costs in the case of banks, while the percentages increases to roughly 5% for asset managers[240]. This is partially explained because for asset managers, the on-going cost of compliance with the AML Directive take a lower proportion of asset managers' total costs[241].

5.13. In relative terms, these costs are slightly higher than the one-off cost of compliance, possibly explained by the relatively lower on going costs of compliance with the Capital Requirements Directive and MiFID. In any event, as for the one-off costs, these two other directives bear the bulk of the compliance costs, with the AML Directive ranking third and the Transparency Directive fourth (except for asset managers, for which the Prospectus Directive involves more compliance costs) out of the six directives examined by the study.

238 See generally, *Ibid*., §§4.79 to 4.81 (for asset managers)
239 *Ibid*., §§4.79 and 4.80.
240 The study also provides further breakdowns of costs, per size and geographical origin. See §§5.12 to 5.17 (for banks), 5.42 to 5.45 (for asset managers) and 5.62 (for investment banks).
241 Financial markets (e.g. stock exchanges operators) are not directly subject to the obligations of the Transparency Directive. But in order to allow for comparisons, their costs are also shown in Table 5.5.

TABLE 5.5 – Transparency Directive – Ongoing cost of compliance

	Banks & financial conglomerates	Investment banks	Asset managers	Financial markets
Mean[242] (percentage of 2007 operating expenses)	0.01%	0.03%	0.08%	0.33%
Median[243] (percentage of 2007 operating expenses)	0.00%	0.00%	0.01%	0.00%
Total financial services regulatory compliance costs[244] (percentage of 2007 operating expenses)	0.59%	0.38%	0.85%	1.70%
Mean: average absolute value of the ongoing costs incurred, per firm (€000s)	147	245	127	67
Total financial services regulatory compliance costs (€000s)	8,540	3,807	2,532	347
Average of operating costs (€000s)	1,558,072	1,030,071	384,582	20,403

Source: Europe Economics (2009), tables 5.1, 5.2 and 5.3.

5.14. The most important ongoing costs of compliance with the Transparency Directive for banks, investment banks and financial conglomerates concern IT expenditure, additional staff costs and audit costs (see Table 5.6 for banks and financial conglomerates and Table 5.7 for investment banks).

TABLE 5.6 – Cost drivers of the selected directives (banks and financial conglomerates) – ongoing cost

	Prospectus	FCD	CRD	Transparency	MiFID	3AMLD
Additional staff	37%	6%	43%	15%	35%	37%
Internal reporting	2%	7%	8%	4%	7%	4%
IT	15%	6%	26%	49%	28%	31%
External reporting	16%	65%	10%	8%	10%	5%
Training	19%	4%	6%	8%	10%	13%
Audit	10%	11%	7%	15%	9%	10%
Other	0%	0%	0%	0%	0%	0%

Source: Europe Economics (2009), table 5.10.

TABLE 5.7 – Cost drivers of the selected directives (investment banks) – ongoing cost

Directive	Prospectus	FCD	CRD	Transparency	MiFID	3AMLD
Additional staff	0%	0%	34%	33%	26%	23%
Internal reporting	0%	23%	7%	7%	6%	12%
IT	1%	35%	32%	19%	45%	29%
External reporting	48%	12%	10%	8%	13%	9%
Training	47%	31%	6%	12%	6%	16%
Monitoring/audit	3%	0%	10%	21%	4%	10%
Other	0%	0%	0%	0%	0%	0%

Source: Europe Economics (2009), table 5.27.

5.15. Concerning asset managers (see Table 5.8), most of the on-going costs relate from additional staff. Even for those who made specific IT investment in order to automate their ongoing disclosure requirements, typically there has been a

242 The middle value in a series of data points arranged sequentially. The sequence from which this median has been selected is based upon the estimated ongoing costs of compliance expressed as a percentage of the relevant firm's more recent operating expenditure.

243 Aggregate ongoing costs of compliance expressed as a percentage of the relevant firms' aggregated most recent annual operating expenditure. This implies that the experience of the larger firms will carry more weight in the sample presented.

244 Including other FSAP measures and other financial services regulation, whether EU, nationally or extra-territorially derived.

requirement to increase staffing levels in order to maintain such systems and ensure some oversight of them[245]. Some larger asset managers view the Transparency Directive as something of a missed opportunity to reduce costs due to the minimum harmonisation approach adopted in its implementation. The key issue encountered is the need to keep an eye on the local implementation which has not (in many cases) reduced the number of share-holding limits that a transnational business needs to be aware of[246].

TABLE 5.8 – Cost drivers of the selected directives (asset managers) – ongoing cost

Directive	Prospectus	FCD	CRD	Transparency	MiFID	3AMLD
Additional staff	50%	0%	25%	69%	20%	13%
Internal reporting	0%	3%	6%	0%	12%	3%
IT	50%	0%	13%	17%	28%	27%
External reporting	0%	97%	30%	1%	17%	14%
Training	0%	0%	11%	1%	7%	22%
Audit	0%	0%	15%	12%	16%	21%
Other	0%	0%	0%	0%	0%	0%

Source: Europe Economics (2009), table 5.18.

D) The impact of the minimum harmonisation nature of the Transparency Directive

5.16. The external study also identifies some costs issues resulting from the adoption of more strigent national measures when implementing the Transparency Directive. More precisely, the study considered the ongoing and one-off incremental costs of complying with the Transparency Directive for the asset managers surveyed, comparing the results for transnational asset managers with those that largely operate in just one Member State. The results were notably different. The latter consistently had a lower cost of compliance with the Transparency Directive. This analysis is summarised in the following box.

BOX 5.1 – The impact of minimum harmonisation on asset managers

The approach adopted for the implementation of the Transparency Directive has been of minimum harmonisation. A number of the asset managers surveyed operate in multiple jurisdictions and therefore need to monitor the local implementation in each of the countries in which they operate. Indeed, some of the larger, transnational asset managers participating in our study view the Directive as something of a "missed opportunity" to reduce costs for this reason.

There are three broad areas of the implementation of the Transparency Directive which vary across the Member States[247]. First, the initial threshold for disclosure of the major holdings of voting rights by investors. The Directive states that investors should declare when the proportion of voting rights reaches, exceeds or falls below the thresholds of 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent and 75 per cent. With regards to the initial disclosure Italy and Portugal have imposed a lower threshold of two per cent, and Germany, Ireland, Spain and the UK have adopted three per cent. Whilst Belgium and France are at the Directive level of five per cent, they allow issuers to set a lower threshold in their own articles of association.

Second, the deadlines for reporting major holdings of voting rights by investors vary. The Directive states that investors should report major holdings of voting rights as soon as possible after they have crossed the aforementioned thresholds, but no later than four days. Some Member States have imposed more stringent timetables: both Greece and Romania have set a limit of three days; Austria,

245 *Ibid.*, §5.47.
246 *Ibid.*, §5.48. See also the example provided in relation to aggregation of voting rights within a group of companies in Germany (§§ 5.49 to 5.50).
247 See European Commission (December 2008)

Hungary, Ireland and the UK have imposed a deadline of two days; Cyprus, Denmark and Sweden have opted for just one day, with Finland requiring reporting without delay.

A further source of differentiation in implementation is with regards to the calculation of group holdings — voting rights are not aggregated in a similar fashion in all Member States. In Germany, for example, group exemptions to report just at the parent level only apply to share-holdings and not voting rights; thus, each legal entity in a group is required to file in respect of what are essentially the same voting rights. This issue of aggregation is complicated by the treatment of derivative positions and is further clouded by the different approaches to this matter in different Member States.

Looking at both the ongoing and one-off incremental costs of complying with the Transparency Directive for the asset managers surveyed, the results for transnational asset managers compared to those that largely operate in just one Member State are markedly different. The latter consistently had a lower cost of compliance with the Transparency Directive. The mean ongoing cost of compliance with the Transparency Directive was 0.05 per cent (of total operating expenses) more for transnational asset managers compared to asset managers that operate largely in just one country. The one-off incremental costs were 0.12 per cent (of operating expenses) higher. Looking at the medians, the results are consistent (in the sense that transnational players have higher costs) but are geared more towards a higher differential in the one-off costs — where the gap is 0.23 per cent of operating costs. However, the median difference in ongoing costs is lower, at just 0.02 per cent.

Looking at the kind of costs incurred, the differentiated implementation across the EU27 must have complicated the design and management of the IT projects required to meet the flagging requirements after aggregating holdings across all portfolios. These systems tend not to be fully automated so that an ongoing incremental cost exists also.

Although it is not possible to quantify how much of the additional cost impact experienced by transnational asset managers has been driven by a minimum rather than maximum harmonisation approach, it is clear that there has been some contribution to the level of cost experienced by transnational asset managers due to this effect. This point was directly confirmed to us by at least some of the affected participants.

Source: Europe Economics (2009), box 4.1.

5.17. Similar conclusions are found on another study conducted for the Commission[248], which outlines the lack of harmonisation impact of the Transparency Directive. Many interviewees in that study raised concerns that the implementation of the Transparency Directive had brought considerable systems costs. Some of them indicated that there were not-insignificant ongoing monitoring costs that were incurred because of the national differences. This means that companies need to continually monitor the local rules in each member state that they invest in. Interestingly, interviewees did not believe that investment decisions were being distorted by this monitoring cost, but rather this was seen as increasing the fixed cost of doing business.

[248] CRA International (2009), p.173 and seq.

ANNEX 6 – ISSUES FOR TECHNICAL ADJUSTMENTS IN THE DIRECTIVE

6.1. The review of the operation of the Transparency Directive shows that some of its requirements are not always clear, leading to uncertainty as regards those obligations. For instance, CESR regularly publishes interpretative documents, in a "questions-and-answers" format, regarding the Directive obligations[249]. Also, stakeholders identified some clarification issues in their replies to a call for evidence launched by CESR in 2007. The feedback statement published by CESR provides details on those issues[250]. The External Study also identified some requirements that would benefit from further clarity[251].

6.2. Some technical adjustments to the text of the Directive would possibly be beneficial with a view to clarifying its obligations. The following issues have been identified:

– Choice of Home Member State for third country issuers. The choice of third country issuers is valid for 3 years. However, this leads to practical problems when such issuer is no longer listed in the regulated market of the Home Member State and only remains listed in one host Member State[252].

– Definition of "*shareholder*". Interested parties explain that there is a possible contradiction between the definition of shareholder in Article 2(1)(e)(ii)[253] and the case included in Article 10 (g)[254].

– Definition of "*issuer*"[255].

– Definition of "*financial institution*" in Articles 17 and 18[256].

– Treatment of global depository receipts when the underlying shares are not admitted to trading in a regulated market within the EU/EEA. The scope of the Directive rules is not fully clear on these cases.

249 CESR (October 2009).

250 CESR (February 2008).

251 Mazars (2009), see sections 1.4.3 (on definitions); 2.4.7 (on financial reporting); 2.6.5 (content of interim management statements); 3.3.7 (on major holdings notifications); 3.6.1.4 (on stock lending); and 3.6.3.2 (on financial instruments) of that study. At the same time, it should be noted that the stakeholders' perception about the overall clarity of the Directive is positive and that, in case of lack of clarity, stakeholders tend to attribute such lack of clarity to national laws, guidance or market practices more often than to the Directive itself (see sections 1.4.1 and 1.4.2 of that study).

252 CESR (October 2009), question 1.

253 "*'shareholder' means any natural person or legal entity governed by private or public law, who holds, directly or indirectly: [...] (ii) shares of the issuer in its own name, but on behalf of another natural person or legal entity.*"

254 "*The notification requirements defined in paragraphs 1 and 2 of Article 9 shall apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them: [...] (g) voting rights held by a third party in its own name on behalf of that person or entity.*"

255 Mazars (2009), section 1.4.3.

256 Mazars (2009), section 1.4.3.

– Deadline for the publication of annual financial reports and half-yearly financial reports. The text of the Directive is not clear as regards whether the reports to be disclosed within the Directive deadline are those approved by the board or by the general meeting.

– The use of similar terms ("*material events*" and "*important events*") in Articles 5 and 6[257].

– Meaning of "*true and fair view*" in Article 5[258].

– Content of interim management statements in Article 6[259].

– Disclosure of holdings per class of share (Article 9(1))[260].

– Notion of "acting in concert" in Article 10(a). Interested parties require the clarification of some elements of the definition in Article 10 (a), namely, what does "*lasting common policy towards the management of the issuer*" or "*agreement*" mean?[261] Also, clarification of the situations of joint investors' accounts has also been requested[262].

– Who should notify in the situation of joint control over a controlled undertaking[263].

– The rules on aggregation/dissaggregation of holdings between parent company and subsidiary[264]. Interested parties invoke that such rules could be made clearer[265]. The link between the disclosure obligations in the Transparency Directive and the rules in the Directive on takeover bids has also been raised[266].

– The extension of the exemption of Article 12(4) to non-UCITS asset management firms[267].

– The rules on calculation on thresholds[268]. Interested parties explain that the exceptions to the aggregation of holdings when calculating whether thresholds are reached or crossed could be made clearer. In particular, reference has been made to the exceptions for underwriters in case of public offering, the trading book, the market makers exemptions or the netting of long and short positions in financial

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257 Mazars (2009), section 1.4.3.
258 Mazars (2009), section 2.4.7.
259 Mazars (2009), section 2.6.5. See additionally CESR (February 2008), p. 3, where respondents to a CESR's call for evidence on possible level 3 work on this Directive identified the need to establish "*principles to prepare interim management statements*". See also CESR (October 2009), questions 3 to 9, which try to clarify part of the requirements of Article 6 of the Transparency Directive.
260 CESR (October 2009), question 10.
261 ESME (November 2008), pp. 2 and 5.
262 CESR (October 2009), question 12.
263 Mazars (2009), section 3.3.7.
264 CESR (February 2008), p. 3.
265 See for instance, CESR (October 2009), question 11.
266 ESME (June 2009).
267 Mazars (2009), section 3.3.7.
268 See generally, CESR (February 2008), p. 3.

instruments[269]. Other questions have also been raised[270] such as the treatment of the voting caps and the total number of voting rights for the denominator when up-to-date figures are publicly known before the disclosure by the issuer under Article 15 of the Directive.

– The treatment of stock lending under Article 10(b) (see Annex 10)[271].

– The liability of issuers for false disclosures on major holdings. Issuers disclose to the market the notification of major holdings they receive. While they have no means to control that such notifications are correct, they are forced to disclose them to the market and may incur in liability issues[272].

– The definition of new loan issues in Article 16(3)[273]. Interested parties invoke that "new loan issues" is an unclear term.

– The responsibility of home and host Member States when the issuer's securities are not admitted to trading in the home Member States (Article 21(3)) and the filing of information with the authority of the home Member State (Article 19(3))[274]. In accordance with Article 21(3), where securities are admitted to trading in the host Member State and not in the home Member State, the host Member State shall ensure disclosure of regulated information in accordance with Article 21(1). However, Article 19(3) requires the filing of information with the competent authority of the home Member State. Some host Member States require filing of information also with their competent authority.

– The scope of Article 8(2) of Directive 2001/34/EC. The scope of Article 8(2) of Directive 2001/34/EC regarding issuers disclosure of periodic and on-going regulated information is unclear and seems to open the door to double requirements against the spirit of the Home Member State rule of the Transparency Directive[275].

The Article 30(4) exemption for bond issuers

6.3. Article 33 of the Transparency Directive requires the Commission to report, among others, on the appropriateness of ending the exemption for existing debt securities after the 10-year period as provided for by Article 30(4).

6.4. In accordance with Article 5 of the Transparency Directive, issuers of debt securities are required to make public half-yearly financial reports. However, Article 30(4) allows Member States to exempt large debt issuers, during a transitional period of 10 years, from the obligation to disclose half-yearly financial reports, provided certain conditions were met.

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269 CESR (October 2009), question 13.
270 Mazars (2009), section 3.3.7.
271 CESR (February 2008), p. 2.
272 Mazars (2009), section 3.3.1.
273 Mazars (2009), section 2.4.7. Also, CESR (February 2008), p. 3.
274 CESR (October 2009), question 16.
275 European Commission (December 2008), Annex 4, in particular footnote 90. See also European Corporate Governance Forum (March 2009a).

> 4. The home Member State may exempt issuers only in respect of those debt securities which have already been admitted to trading on a regulated market in the Community prior to 1 January 2005 from disclosing half-yearly financial report in accordance with Article 5 for 10 years following 1 January 2005, provided that the home Member State had decided to allow such issuers to benefit from the provisions of Article 27 of Directive 2001/34/EC at the point of admission of those debt securities.

The exemption could only be granted by Member States in respect of those debt securities admitted to trading on a regulated market prior to 1 January 2005 which may be purchased by professional investors only[276].

6.5. At the time of preparing the Transparency Directive, stakeholders feared extensive delisting by issuers of debt securities, and possible losses to investors thereby, if issuers were not in a position to meet the new disclosure requirements of the Transparency Directive. Furthermore, issuers had applied for the admission to listing of their large debt securities prior to 1st January 2005 on the basis of the then existing disclosure regulatory framework. Therefore, the Commission proposed a limited "grand-father" clause which resulted in a temporary exemption in Article 30(4)[277].

6.6. In principle, there are a priori no compelling reasons for extending the exemption granted by Article 30(4). Corporate issuers very rarely issue long term bonds beyond 10 years. Therefore, such transitional period should be enough for those issuers. However, in practice, it is conceivable that large debt securities admitted to trading before 1 January 2005 could still be traded after 1st January 2015.

The number of such debt issuer that could potentially have "Eurobonds" outstanding after 1st January 2015 is estimated to be rather low: a few tens of issuers and few hundreds of special purpose vehicles (SPVs)[278]. However, those concerned are likely to be a one time or specialised issuer (such as financing SPVs) or SMEs. For both categories, preparing half-yearly financial reports may involve substantial cost[279]. If these estimations are confirmed, it could be conceivable to support the extension of the exemption for an additional appropriate period, so as to avoid impacting on small issuers.

6.7. In any case, it should be noted that there is no market support for such exemption. In the External Study, the stakeholders surveyed did not express a strong opinion on the

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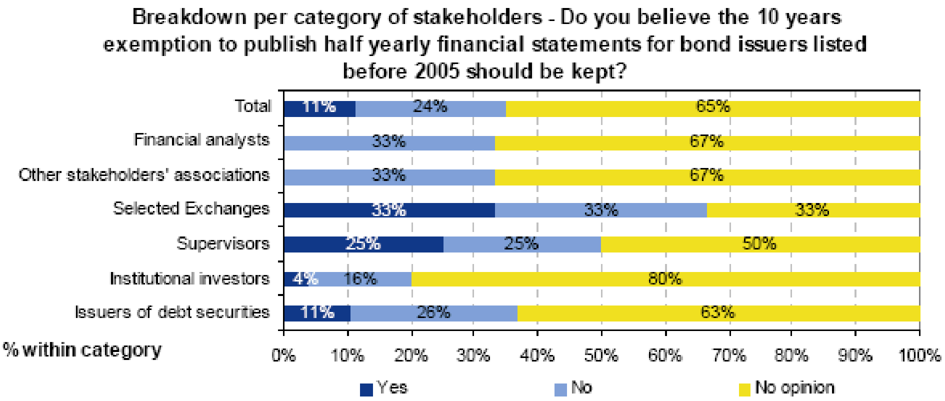
276 Article 27 of Directive 2001/34/EC stated that: "*Where the application for admission to official listing relates to debt securities nearly all of which, because of their nature, are normally bought and traded in by a limited number of investors who are particularly knowledgeable in investment matters, the competent authorities may allow the omission from the listing particulars of certain information provided for by Schedule B of Annex I or allow its inclusion in summary form, on conditions that such information is not material from the point of view of the investors concerned.*"
Article 27 of Directive 2001/34/EC was repealed by the Prospectus Directive.
See also recital 12 of the Transparency Directive

277 See European Commission (March 2003), section 5.8.1. The transitional period proposed by the Commission was 3 years but the adopted Directive establish it at 10 years.

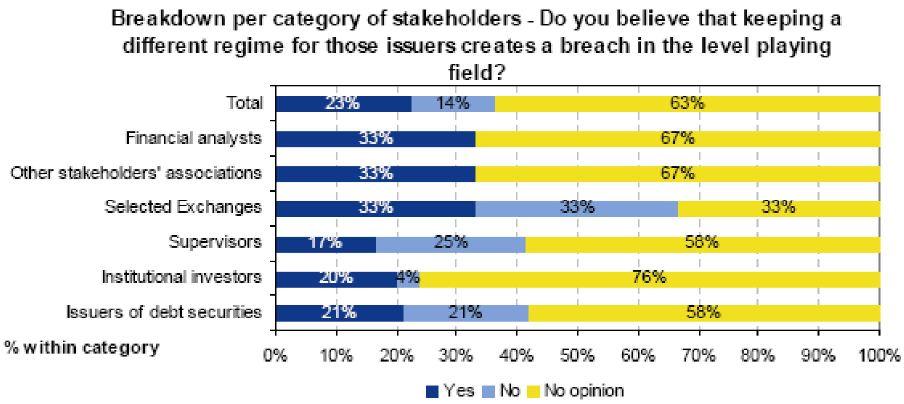
278 Mazars (2009), section 5.3.2 *in fine*.

279 *Ibid*.

opportunity to keep the exemption to publish half-yearly for bond issuers listed before 2005. When they have expressed an opinion, a small preference is expressed in favour of ending such exemption[280].



6.8. Moreover, when they have expressed an opinion, a majority of stakeholders hold that the existence of different transparency regimes for debt securities can create a breach in the level playing field[281].



6.9. Concerning issuers of debt securities admitted to listing after 1st of January 2005, they did so in full knowledge of the new disclosure obligations. In any case, it is noted that in accordance to Article 8(1)(b), the obligations of Articles 4 (annual financial report), 5 (half-yearly financial report) and 6 (interim management statements) shall not apply to an issuer exclusively of debt securities admitted to trading on a regulated market, the denomination per unit of which is at least EUR 50 000.

280 Mazars (2009), section 5.3.1. This view is expressed in particular by financial analysts, industry associations, institutional investors and even debt issuers. On the contrary, exchanges and supervisors are more in favour of keeping such exemption.

281 Mazars (2009), section 5.3.2. This view is however not shared by supervisors. Also debt securities issuers and exchanges have mixed views on the issue.

ANNEX 7 – AGGREGATION OF HOLDINGS OF VOTING RIGHTS AND FINANCIAL INSTRUMENTS?

7.1. One of the novelties of the Transparency Directive in 2004 was the introduction of a requirement to notify to the issuer (and subsequently disclose to the market) the major holdings of certain financial instruments giving access to shares under certain circumstances[282].

7.2. The Commission proposal for a Directive of 2003[283] merged this requirement with the existing one on the notification of major holdings of voting rights already existing under the rules of Directive 2001/34/EC. As a result, the holdings of voting rights and of (certain) financial instruments would be aggregated for the purposes of triggering the notification obligation.

The proposed Article 9 was drafted as follows: "*The home Member State shall ensure that, where the security holder, or any natural person or legal entity entitled to exercise voting rights […] acquires or disposes of voting rights or capital of the issuer, the security holder notifies the issuer of the proportion of voting rights and capital of the issuer held by the security holder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of […]*".

This Article was completed by the definition of "security holder" in the proposed Article 2(1)(e): "*'security holder' means any natural or legal entity governed by private or public law, who, directly or through intermediaries, acquires or disposes of: […] (iv) derivative securities entitling a natural person or legal entity to acquire, on its initiative or to dispose of, on the sole initiative of a third party, shares to which voting rights with the issuer are attached.*"[284]

7.3. Eventually, the Commission proposal was amended on this point by Council and Parliament during the negotiations. The final text of the Directive included a new Article 13 specifically addressing the holdings of (certain) financial instruments. Paragraph (1) of Article 13 states the following:

"1. The notification requirement laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly, financial instruments that result in an entitlement to acquire, on such holder's own initiative alone, under a

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282 Financial instruments that result in an entitlement to acquire, on such holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued of an issuer whose shares are admitted to trading on a regulated market.

283 European Commission (March 2003).

284 According to the Explanatory Memorandum, the "fourth sub-paragraph extends the definition of to holders of derivative securities, such as convertible or exchangeable bonds (but not options […]) […]". See European Commission (March 2003), section 5.2.2.1.
The aggregation requirements appears very clearly from the proposed Article 9(3)(a), where it is explained that Member States may decide to set 10% as the first threshold where the investor only acquire derivative securities. *A contrario*, this means that where the investor acquires derivative securities in addition to shares or voting rights, the 5% threshold would necessarily apply. See also European Commission (March 2003), section 4.5.3.

formal agreement, shares to which voting rights are attached, already issued of an issuer whose shares are admitted to trading on a regulated market."

7.4. The introduction of Article 13 has resulted, according to the External Study, in lack of clarity as to the exact scope of the obligation[285].

7.5. **The question at stake is whether investors must aggregate their holdings of voting rights with their holdings of financial instruments (within the meaning of Article 13) for the purposes of evaluating whether the relevant thresholds referred to in Article 9 are reached or crossed and therefore the notification obligation triggered.**

7.6. Member States have taken different views when implementing the Directive into national law. A few of them (AT, BG, CY, ES, LU[286], IT and PL) consider that Article 13 enacts a notification obligation which is independent of that of Article 9: in other terms, the notification obligation is triggered independently. On the contrary, in 19 Member States (BE, DE[287], DK, EE, EL, FI, FR, HU, IE, LT, MT, NL, PT, SE, SI, SK and UK), as well as in Norway and Iceland, investors must aggregate their holdings of voting rights with their holdings of financial instruments (within the sense of Article 13) for the purposes of evaluating whether the relevant threshold referred to in Article 9 is reached or crossed.

7.7. There are different arguments supporting the two positions and there has never been a decision of the Court of Justice on this issue. On the one side, those in favour of separate notification obligations argue that Article 13 comes after Articles 9 to 12 (dealing with the notification obligations in relation to voting rights) which would show the intention of the co-legislators to establish a distinct notification procedure for the financial instruments. Article 13 contains a reference to Article 9 and thus, to the general notification thresholds contained therein. However Article 13 does not refer to Article 12, which sets the modalities for the notification mechanisms. From this perspective, if the intention of the co-legislators would have been to automatically apply the requirements of Article 12 also in the context of Article 13, it would have been logical to include in Article 13 a reference not only to Article 9, but also to Article 12.

Moreover, if the intention was that Article 12 would in any event apply also in the context of Article 13, the Commission's implementing powers concerning notification modalities in Article 13 would appear redundant. This interpretation would be further supported by Article 11 of Commission Directive 2007/14/EC:

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285 See for instance, Mazars (2009), p.112: "*The Directive does not specify whether holdings of shares should be aggregated with holdings of financial instruments. Certain Member States have taken the view that Articles 9 and 10 on the one hand and Article 13 on the other hand should be applied in parallel, whereas other Member States require investors to aggregate the holdings of shares/voting rights with the holdings of qualifying financial instruments. As a result, when no aggregation is required, a shareholder may potentially hold 4.99 % voting rights though shares and another 4.99 % through financial instruments without any notification.*"

286 In the case of LU, it is a mixed situation: the threshold is triggered independently, but if the notification obligation arises, the notifying party should disclose its holdings in relation to both voting rights and financial instruments irrespective of which of the two categories triggered the threshold)

287 DE changed in 2008 its initial legislation transposing the Directive on this point, so as to require aggregation.

Article 11(4) of Directive 2007/14/EC states explicitly that the notification period in Article 12(2) of the Transparency Directive shall apply. There would be no need for such a reference if all provisions of Article 12 would be generally applicable in the context of Article 13, unless stated otherwise in the implementing measures. Additionally, the Directive provides in Article 12(8)(a) and 13(2)(c) for the adoption of two separate standard notification forms. If the intention of the co-legislators was that the modalities of the notification would be the same under Articles 9, 10 and 13, it would be illogical to mention the adoption of standards forms through comitology in both Articles 12 and 13.

This was also the position of CESR in 2005, which stated that "*[t]he Level 1 text does not require aggregation between financial instruments relevant under Article 13 and holdings of voting rights under Article 9 or 10*"[288]. From this perspective, imposing aggregation of voting rights and financial instruments for the purposes of calculating whether the thresholds are reached or crossed would be a more stringent requirement than that of the Directive[289].

7.8. On the other side, other parties consider that the first sentence of Article 13(1) requires such aggregation[290].For them, it is a matter of interpretation of the Directive rather than a question of whether aggregation is a more stringent requirement acceptable under Article 3(1)[291].

7.9. The discussion is not merely academic. If aggregation is required by the Directive, the first group of Member States would be infringing it. If on the contrary, two separate notification obligations exist, while imposing aggregation would be an acceptable more stringent requirement under Article 3(1), the applicability of Article 12 to the notification obligation foreseen in Article 13 would be, however, questionable. This would in particular impact on the applicability of the exemption for management companies and investment firms to aggregate their holdings of financial instruments with those of their parent companies (see Article 12(3) to (5))[292].

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288 See CESR (June 2005), §375.

289 According to Article 3(1) of the Directive, such more stringent requirements would be acceptable.

290 Article 13(1) indicates that "*[t]he notification requirements laid down in Article 9 shall <u>also</u> apply to a natural person or legal entity who holds, directly or indirectly, financial instruments…*" [emphasis added]

291 See European Commission (December 2008), p.22.

292 Article 12 regulates not only the question of the relations between parent and subsidiaries but also a number of other matters. In principle Article 12 must either be considered to be fully applicable also in the context of Article 13, or not applicable at all. An interpretation according to which certain paragraphs of Article 12 could be "cheery-picked" to apply also in the context of Article 13 would not be acceptable. From this perspective, the exemption in paragraphs (4) and (5) of Article 12 could not be applied to holdings of financial instruments. National measures extending this exemption would not be imposing more stringent requirements but rather more lenient ones.
The other paragraphs of Article 12 would be however less concerned. Requirements equivalent to those of Article 12(1) and (2) are already set out in Article 11(3) and (4) of Directive 2007/14/EC for the notification of financial instruments. Also, the requirements contained in Article 12(6) and (7) could easily be applied in national law to financial instruments and would be in any event be covered by Article 3(1).

7.10. Additionally, clarifying the applicable rules regarding this issue would be beneficial in the event that notification obligations regarding cash-settled derivatives were imposed at EU level[293] (see Annex 9).

7.11. Finally, in addition to the unclear legal points, it should be noted that the implementation of Article 13 results in insufficient harmonisation, leading to higher cost and burden for cross-border investors in the EU (see Sections 1.2 and 2.4 of this Report).

[293] For instance, in the UK aggregation of cash-settled derivatives with other holdings is required for the purposes of calculating whether the relevant thresholds are reached or crossed.

ANNEX 8 – LOWERING OF THRESHOLDS FOR THE NOTIFICATION OF MAJOR HOLDINGS

8.1. **The lowest or initial threshold for the disclosure of major holdings of voting rights** was set at 5% by the Transparency Directive in 2004 (cf. Article 9(1)). This was a novelty at the time, since Directive 2001/34/EEC, the precedent legal text, had set the initial disclosure threshold at 10% (cf. Article 89(1)). Indeed, the disclosure thresholds codified in Directive 2001/34/EEC were shaped in a way reflecting national company law requirements: e.g. thresholds necessary to represent blocking minorities on annual shareholder meetings; to achieve changes to the company's statutes or exercising special rights, etc[294].

The 10% threshold as an initial threshold appeared, however, obsolete over time. On the one hand, more (and lower) disclosures were needed both for securities market transparency purposes (in particular from the perspective of preventing market abuse or market manipulation, given the impact on pricing of dealings in major holdings) and for corporate governance purposes (given the increased interest of investors in the company performance)[295]. On the other hand, most Member States had already lowered the initial threshold before the amendment introduced by the Transparency Directive. Indeed, the Commission explained in 2003 that in 12 of the then 15 EU Member States, the initial disclosure threshold was already set at a lower level than 10%: 2% for IT, 3% for UK and 5% for the rest. Only in LU, PT and SE the initial disclosure threshold was set at 10%[296].

8.2. The Transparency Directive allowed Member States to set out (or, as applicable, to maintain) disclosure requirements on major holdings of voting rights at an earlier stage than 5%. As a result, **other Member States joined Italy and the United Kingdom in establishing such lower thresholds**. As of end 2009[297], the following Member States have introduced those lower disclosure thresholds: 2% (IT, PT); 3% (CZ, DE, ES, IE, UK)[298]. It should also be noted that the initial disclosure threshold is also indirectly lowered in those Member States in which aggregation of voting rights and of financial instruments giving access to voting rights[299] is required (see Annex 7).

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294 European Commission (March 2003), section 4.5.1.

295 When describing the proposed new regime in 2003 of what later became the Transparency Directive the Commission was referring to the proposed rules, by contrast to those of Directive 2001/34/EEC in the following terms: *"[...] This system would reflect not only the actual influence an investor on securities markets may take in a publicly traded company, but more generally its major interest in the company performance, business strategy and earnings. Already seven Member States apply such a more securities market directive transparency regime at national level. [...]"*. See European Commission (March 2003), section 4.5.1.

296 *Ibid.*

297 See European Commission (December 2008); Annex 5, p.25.

298 The possibility of establishing the 3% threshold as initial threshold is being considered in the Netherlands. A proposal has been submitted to the national parliament.

299 Financial instruments that result in an entitlement to acquire, on such holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued of an issuer whose shares are admitted to trading on a regulated market.

Additionally, in several Member States issuers of shares can set lower thresholds for notification[300] of major holdings in their own articles of association, either on the basis of an explicit authorisation in the law or in the absence of an express prohibition (in which case, freedom of contract would apply)[301]. The law may specify which is the lowest threshold: for instance, in FR, it can be set at 0,5% while in BE is can be set at 1%. Both in FR and BE, this is possibility is regularly used[302].

8.3. Therefore, **there appears to be a convergence towards the setting of a lower disclosure threshold at 3%**. The European Parliament called on the Commission in 2008 to prepare legislation lowering the threshold for the disclosure of major holdings to 3%[303]. Although warning about setting too low disclosure levels, ESME also expressed an opinion in favour of setting the 3% threshold[304].

This appears to be the market trend too. In practice, the seven Member States with lower disclosure thresholds account for around 60% of the market capitalisation (issuers of shares) in the EU regulated markets[305].

8.4. The **external study conducted for the Commission** on the operation of the Transparency Directive explains that stakeholders views, as expressed in the survey conducted, are mixed on the need to lower the initial disclosure threshold to 3% (or to 2% (see Chart 8.1).

Chart 8.1 – Views on whether the initial threshold should be lowered to 2% or 3%, breakdown per stakeholder category. Cf. Mazars (2009), p.93.

300 To the issuer, but not to the market.

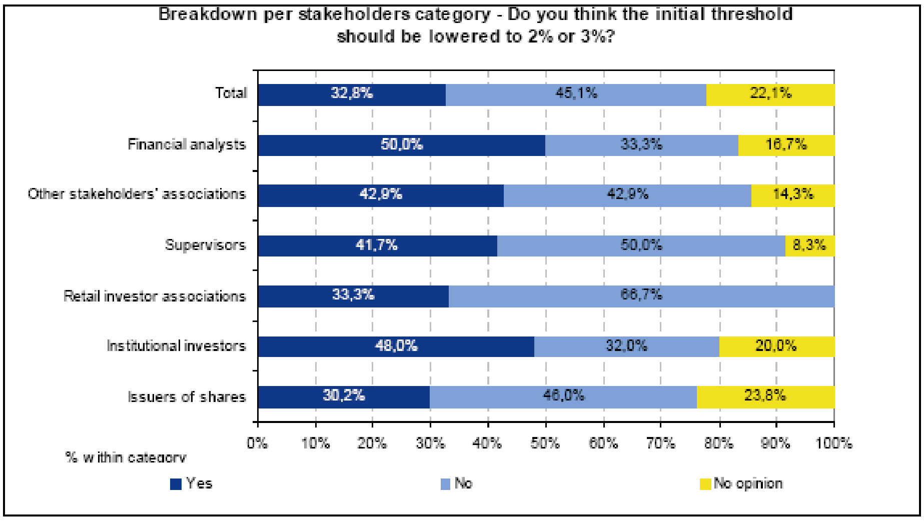
301 AT, BE, CY, CZ, DK, EE, FI, FR, HU, IT, LU, LV and PT. See European Commission (December 2008); Annex 5, p.26 and CESR (September 2008), Annex 2, replies to questions 13 and 14.

302 See for instance, the information disclosed by the Belgian supervisor on this issue: http://www.cbfa.be/eng/gv/ah/not/dbeginfrmemittenten.asp

303 European Parliament (September 2008), annex to the Resolution.

304 ESME (December 2007), p.5.

305 Source: own elaboration with FESE data of December 2009. The regulated markets in CZ, DE, ES, IT, IE and UK account for 59% of market capitalisation value. The data for PT regulated market have not been taken into account for this calculation since FESE only discloses Euronext aggregated data.
Having said this, if Euronext countries were added to this calculation (considering that in practice, in FR and BE lower disclosure thresholds are regularly applied by listed companies themselves, and that in the NL there is a legislative proposal to set a 3% threshold), the percentage of total market capitalisation would raise above 75%.



45% of stakeholders do not consider that lowering the initial threshold is necessary but there is some disagreement: users of information (financial analysts and institutional investors) are generally in favour of lowering it; supervisors are split on the matter; and, on balance, issuers of shares do not favour a lowering of the legal initial threshold to 2 or 3%[306].

8.5. According to this study, however, during interviews issuers were less negative on this possibility[307] and other stakeholders were more openly in favour of a harmonised lowering of the initial threshold. However, emphasis on harmonisation was particularly exercised: issuers and investors made clear that full harmonisation of a number of provisions of the Directive is a priority for them. If the price to pay to have a full harmonisation of thresholds is to lower the initial threshold, then a number of stakeholders would be prepared to support this. In addition, generally, issuers are of the opinion that the 5% initial threshold is too high. The most frequently figure mentioned for a harmonised initial threshold in the EU was 3%[308].

Of those against lowering the initial threshold, the more cautious were intermediaries that use the "trading book" exemption[309]. They would be against lowering the level of exemptions.

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306 Mazars (2009), section 3.4.1.

307 It appeared that issuers were relatively neutral or have nothing against more precise requirements allowing them to identify their shareholders:
"*It should be noted that, generally speaking, issuers are indifferent as regards the level of the initial threshold. The issuers' priority is to better identify their shareholders, in order to anticipate evolutions that may impact the general strategy of the company. The legal thresholds are an important source of information but the level of granularity resulting from the Directive is not considered sufficient. Issuers use specialised procedures or require external consultants to identify their shareholders below 5% (the services are often proposed by custodians and/or data disseminators). In Top Companies, this identification of shareholders is often done twice a year.*
In terms of the methodology of the study, it should be said that several issuers confessed during interviews that their main priority in participating in this study was to make sure that a revision of the Directive will not result in a new wave of requirements. In other words, they have adopted a very conservative attitude when responding to the on-line questionnaire. […]".
Ibid.

308 *Ibid.*

309 Cf. Article 9(6) of the Transparency Directive.

8.6. There are **arguments supporting such lowering of the threshold,** such as better capturing shareholders' movements of interest to the market or facilitating shareholders' activism. For instance, the external study outlines that investors consider that "*transparency of ownership is one of the parameters of investment decisions and that 'shareholder activism' can have significant impact even if those shareholders have less than 5% of the voting rights*"[310]. Indeed, in some cases, it may be necessary to go below such level if one wants to capture the major shareholders[311].

According to the external study, for intermediaries and institutional investors the lowering of the initial threshold would have no effect on investment decision when the initial threshold is known. In fact, the burden to notify is not on the one that takes the investment decision but on a separate department of the intermediary or of the institutional investor or on the custodian[312].

In terms of administrative burden for investors, establishing a new (lower) threshold may increase the likelihood of having to notify holdings, but does not result in major difficulties. Indeed, the new threshold will be added to existing monitoring software alerting of the crossing of the relevant threshold. The difficulty for investors would rather lie on the calculation of relevant voting rights[313].

Finally, the external study anticipates that there would not be market disruptions as a result of the lowering of the threshold. Indeed, interviews with supervisors in Member States that decided to lower the initial threshold to 3% when transposing the Directive did not report any disruptions in the market caused by such change. It is a fact that they were confronted with a wave of notifications and therefore provided for a transition period. The purpose of the transition period was to allow those investors holding an interest between 3% and 5% in a company to realise that they were required to notify such interest. Generally, that transition period lasted 6 months. Finally, they did not receive complaints from the industry about the lowering of the initial threshold[314].

8.7. There are also **arguments against the enhanced transparency resulting from lower disclosure thresholds,** as already described by the Commission staff working document of 2008: there is a risk that enhanced disclosure requirements may result in immaterial disclosures that distract the attention of the market from the disclosures that reveal significant changes in the structure of voting control[315]; thresholds for disclosure may act as a brake for investors with a non-control taking strategy[316] or discourage those willing to discretely build a stake[317]. This may have an impact on

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310 Mazars (2009), section 3.4.1.

311 See European Commission (December 2008), §15 regarding the ownership structure of listed companies. At the same time, this paper was also explaining that the "median largest block" was different depending of the Member State considered and that those differences would justify, from an economic perspective, different regulation: i.e. not necessarily supporting maximum harmonisation.

312 Mazars (2009), section 3.4.1.

313 See Mazars (2009), sections 3.3.5; 3.5; 3.6.2 and Possible Improvement N°7.

314 Mazars (2009), section 3.4.1.

315 ESME (December 2007), p.5. See also footnote 311 of this paper.

316 ESME (December 2007), p.4; and European Commission (December 2008), §16.

317 ESME (December 2007), p.2; and European Commission (December 2008), §16.

the market for corporate control, facilitating the defensive strategies of entrenched managers[318].

8.8. **The external study concludes that lowering the initial threshold to 3% could be a possible improvement to the Directive**, to the extent that such measure permits maximum harmonisation without disrupting the market (see Box 8.1).

Box 8.1 - Possible improvement n°8 to the Transparency Directive. Cf. Mazars (2009), p. XIV and 77.

> ***8. Lowering the initial threshold to 3%:*** *without experiencing a disruption in the market, a number of Member States with significant financial markets have decided to lower the initial threshold during the process of national transposition to below 5%. This could be reflected in common EU law for the benefit of higher transparency but should not undermine the existing thresholds for exemptions. The lowering of the initial threshold to 3% appears to be a measure permitting maximum harmonisation.*

[318] European Commission (December 2008), §21 and ESME (December 2007), p.5.

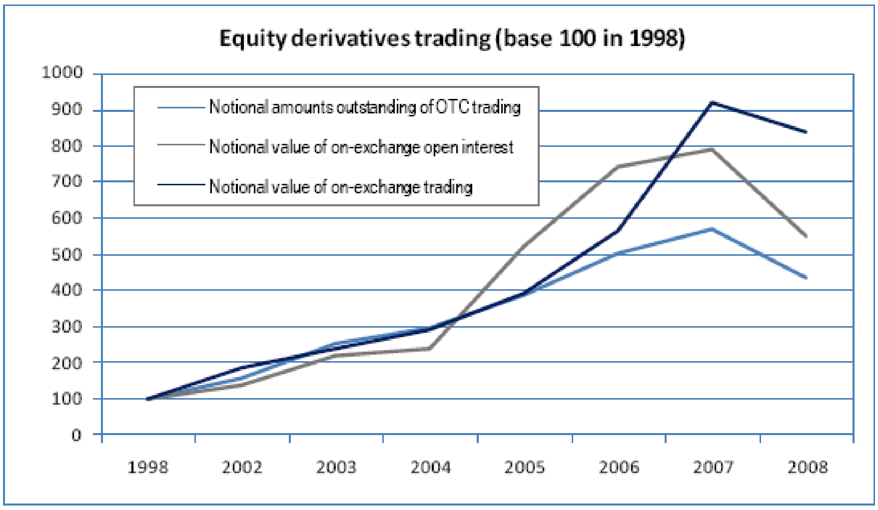
ANNEX 9 – DISCLOSURE OF HOLDINGS OF CASH-SETTLED DERIVATIVES

9.1. This Annex presents:

- A) Financial innovation and the increased use of cash-settled equity derivatives
- B) The existing disclosure requirements under the Transparency Directive
- C) The problems regarding market transparency
- D) Reaction of some Member States
- E) Need for action at EU level
- F) Content of possible disclosure regime
- G) Alternative approaches

A) Financial innovation and the increased use of cash-settled equity derivatives

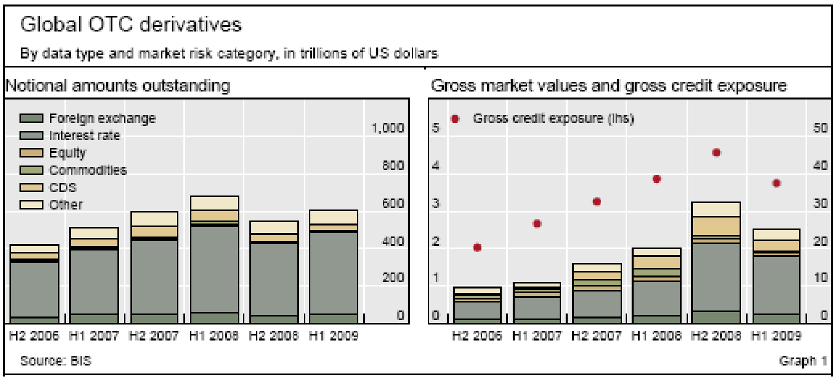
9.2. The equity derivatives market has grown considerably over the last decade, as shown in the table below[319].



9.3. According to BIS figures, even if in the context of the financial crisis market values remain 16% below the level of end-year 2008, notional amounts of OTC traded equity derivatives rose by 7% to $6,6 trillion at the end of June 2009[320].

319 IOMA (May 2009)

320 Bank of International Settlements (2009), p. 5. Given the financial crisis, these figures have gone down from a notional amount of $10,2 trillion at the end of June 2008. See Bank of International Settlements (2008), p.3.



9.4. Due to this rapid growth and innovation in the financial markets, a number of financial instruments are now extensively used to acquire economic interest in shares of public listed companies without acquiring direct control over or ownership in such shares.

9.5. Also, following the recent financial crisis, the increased regulatory capital requirements for banks may spur banks to use derivatives to fund acquisitions of strategic stakes. With greater focus on banks' core capital, banks may look for ways to use equity derivatives to help clients take stakes in troubled companies in Europe and Asia[321].

Cash-settled equity derivatives
Cash-settled equity derivatives refer to equity linked transactions settled by the payment of cash only without any physical delivery of the underlying equity. Such transactions can include options, futures and swaps over a single share, an index or a basket of shares. They are usually based on the difference between a pre-agreed settlement price and the then prevailing market price of the shares. Thus, without physically buying or selling the underlying shares, the contracting parties to a cash-settled equity derivative are able to acquire or dispose of an economic interest in the shares (i.e. acquire exposure to equity price movements).

9.6. This financial innovation has an impact on the notification of major holdings and could be seen, under certain circumstances, as unsatisfactory with regard to market transparency, as new market practices or financial products can be conceived in a manner that they are not covered by the notification requirements of Transparency Directive. In fact, new financial instruments are increasingly used by investors in order to escape from the traditional categories of securities (i.e. ordinary shares, depositary receipts, etc.) that trigger an obligation to disclose voting rights under the Transparency Directive. Some practices may even come close to market abuse, when such financial instruments are used to squeeze the free float of the underlying shares and thus increase their market price.

321 See, for instance, Crompton (2010).

B) The existing disclosure requirements under the Transparency Directive

Transparency Directive: relevant legal provisions

Article 9(1) of the Directive 2004/109/EC: *"The home Member State shall ensure that, where a shareholder acquires or disposes of shares of an issuer whose shares are admitted to trading on a regulated market and to which voting rights are attached, such shareholder notifies the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 50 % and 75%.*

Article 10 of the Directive 2004/109/EC: *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

(a) voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question;

(b) voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question;

(c) voting rights attaching to shares which are lodged as collateral with that person or entity, provided the person or entity controls the voting rights and declares its intention of exercising them;

(d) voting rights attaching to shares in which that person or entity has the life interest;

(e) voting rights which are held, or may be exercised within the meaning of points (a) to (d), by an undertaking controlled by that person or entity;

(f) voting rights attaching to shares deposited with that person or entity which the person or entity can exercise at its discretion in the absence of specific instructions from the shareholders;

(g) voting rights held by a third party in its own name on behalf of that person or entity;

(h) voting rights which that person or entity may exercise as a proxy where the person or entity can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders."

Article 13(1) of the Directive 2004/109/EC: *"The notification requirements laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly, financial instruments that result in an entitlement to acquire, on such holder's own initiative alone, under a formal agreement shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market."*

Article 11(1) of the Directive 2007/14/EC: *"Transferable securities, and options, futures, swaps, forward rate agreements and any other derivative contracts shall be considered to be financial instruments, provided that they result in an entitlement to acquire, on the holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market" and that "the instrument holder must enjoy, on maturity, either the unconditional right to acquire the underlying shares or the discretion as to his right to acquire such shares or not".*

Article 11(1) of the Directive 2007/14/EC: *"a formal agreement means an agreement which is binding under the applicable law".*

9.7. Under the Transparency Directive, there is currently no general disclosure requirement in respect of economic interests under cash-settled equity derivatives.

9.8. Article 9 of the Transparency Directive applies only to voting shares in the issuer. According to Article 10 of the Transparency Directive, the notification provisions also apply to any person who has the right under an agreement or collateral arrangements to exercise the relevant voting rights or to direct the holder of the shares as to how to exercise such rights. This provision would, therefore, only apply to cash-settled equity derivates if the counterparty has the right to direct voting rights over the shares or is granted collateral over the shares provided under the collateral arrangements. However, most cash-settled equity derivatives do not give the counterparty to the transaction the right to vote or influence the voting rights of the shares subject to them. These would therefore fall outside the scope of the Transparency Directive[322]. Article 13 of the Transparency Directive extends disclosure obligations to financial instruments conferring the right to acquire or sell shares[323]. However, this article does not cover cash-settled equity derivatives which do not grant a right to the holder to acquire or dispose of the underlying shares but are only settled in cash[324].

C) The problems regarding market transparency

9.9. Although cash-settled equity derivatives are an important source of liquidity to the market and are usually used for purely economic and hedging purposes, recent cases in different EU Member States and third countries suggest that cash-settled equity derivatives can also be used in order to acquire and exercise potential influence in a listed company or build a secret stake in such a company without any disclosure[325]. These cases have demonstrated the limits of the current disclosure obligations with respect to these financial instruments.

Recent cases in the European Union[326]

Continental versus Schaeffler[327]

July/August 2008: Schaeffler built an economic interest of 36% in Continental by entering equity swaps with some banks before it declared a public offering on the outstanding capital of Continental.

322 See, for instance, ESME (November 2009). In its opinion ESME states that Article 10 (g) "*was not introduced for large positions in cash settled derivatives, but for the market practice of custodians or for situations of "at arms length" investment management. The provision is rather narrowly framed to support a widening of disclosure rules to cash settled financial instruments*". *Ibid*. p. 13.
However, some scholars are of the view that a contractual scheme leads to the short party holding the underlying shares 'on behalf' of the long party if the latter bears the economic risk and is capable of influencing how voting rights are exercised. In those circumstances, they are of the view that Article 10(g) should be applicable. See Zetzsche (2009), p.133.

323 The main novelty of Article 13 has been to extend the notification requirement to "*financial instruments that result in an entitlement to acquire, on the holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market*".

324 ESME underlined in its opinion that there "*usually is no specific agreement on voting; it is not that often that there is actually a formal right to require the delivery of voting securities. Yet in reality there is often an expectation on the part of the acquirer that the counterparty to the trade would be able to deliver the underlying stock if asked to do so. The mere aspect of the commercial relation gives an incentive to the bank to listen to the opinion of the underlying client and, finally, to deliver voting securities in lieu of cash settlement*". See ESME (November 2009), p.11.

325 On the issue of cash-settled equity instruments and transparency, see generally Schouten (2009) and Hu & Black (2007).

326 For other cases in third countries, see Hu & Black (2008).

327 See generally Zetzsche (2009).

Schaeffler was exempted from the lunch of a mandatory bid, since it made a voluntary public offering and wanted to pay a fair price. However, this fair price was lower than would have been the case if the control position was built by normal share acquisitions instead of by equity swaps. The German regulator BaFin ruled that the build-up of an economic interest by cash settled financial instruments does not need to be notified under current German law. It should be noted that none of the banks involved held more than 3% of the shares to hedge the equity swaps so as to avoid having to notify themselves under the rules on holding of shares.

Porsche versus Volkswagen

October 2008: Porsche announces that it has built a direct share interest of 42,5% in its competitor Volkswagen. Porsche discloses an additional economic interest of 31,5% by cash settled options. There were discussions if the "free float' in shares of Volkswagen was effectively reduced to 5,8% since the land of Low Saxony held an interest of 20,1% in Volkswagen company. Market parties had not taken into account the existence of such a large economic interest with only one party. They had speculated on a share price fall and were short for about 13% of outstanding shares. The closing of these positions led to a price explosion of the Volkswagen shares. In order to improve liquidity, Porsche settled 5% of its position into cash and thereby apparently profited from the market disorder caused by itself.

SGL Carbon / Susanne Klatten / SKion GmbH

March 2009: according to an ad hoc announcement pursuant to § 15 WpHG dated 16 March 2009, SGL Carbon notified that the "Board of Management of SGL Carbon SE was informed that SKion, the investment company of Mrs. Susanne Klatten, has acquired an equity stake of 7.92% in SGL Carbon SE. According to their notification, SKion is interested in further purchases of additional SGL Carbon SE shares; will however remain below the threshold of 25% of voting rights. SKion has built positions within this percentage scope through derivative capital market instruments." Different business journals (e.g. Handelsblatt, Manager Magazin) reported that SKion had followed the example of Porsche by entering into cash settled equity swaps. On 8 April 2008, SKion notified SGL Carbon that the voting interest in SGL Carbon AG has exceeded the thresholds of 10% and 15%. At this time the stake of SKion amounted to 16.48%. All voting rights of SKion are to be attributed to Susanne Klatten.

Fiat[328]

April 2005: EXOR, a company controlled by the Agnelli family (controlling, through IFIL, FIAT at the time with around 30% of the voting rights, through a pyramid structure) enters into an equity swap agreement for around 7% of the shares, which remains undisclosed until executed. While the originally equity swap agreement would be settled in cash, the agreement was eventually modified in August 2005 to allow physical settlement in shares. Physical delivery of the shares to the Agnelli family took place on the date in which a group of banks were executing a convertible loan agreement not being repaid in cash by FIAT and therefore diluting the Agnelli's original stake to 23%. The equity swap allowed the Agnelli family to keep their shareholdings in FIAT constant at 30% and with it the attached control rights intact without having to launch a takeover bid for the remaining of the capital. For reporting obligations, Italian law takes into account the way financial derivatives may be settled: only in cash or possibly in underlying physical instruments.

9.10. Indeed, cash-settled equity derivatives do not trigger notification duties to the extent that they do not entitle the holder/the buyer to acquire the underlying shares. But in practice, cash-settled options may facilitate the localization of blocks of shares at a later point in time, even though a legal entitlement to purchase such shares does not exist. In fact, the seller of a long equity derivative, usually a bank, will have a strong economic incentive to acquire a matching number of physical securities at the beginning of the equity derivative period to hedge its position. When the holder of the derivative/the buyer closes its position, the seller has an economic incentive to sell the hedge shares simultaneously at the equity derivative settlement price. The holder of the derivative/the buyer will normally be aware of the identity of the seller

328 See also Kirchmaier et al. (2009), p.12.

and when the seller will be likely to dispose of the shares. The holder/the buyer is therefore in a privileged position to acquire the hedge shares when the contract ends[329].

9.11. This situation can also arise from the fact that the seller promises to the buyer of a cash-settled derivative via a side agreement to sell the shares it has purchased to hedge its exposure from the sale of the contract on to the buyer once the contract expires[330].

9.12. Also, the holder of long derivatives position/the buyer could influence the voting of the actual shares by exerting pressure on the holder of the corresponding short position/the seller who holds the underlying shares[331]. It is argued that the bank that holds the shares for hedging purposes and relating voting rights without any economic interest in the underlying company could use such "empty" voting rights in a way which suits the holder of the economic interest/the buyer, i.e. by following the voting instructions of the buyer, in order to attract future business.

D) Reaction of some Member States

9.13. Some EU Member States have decided to generally extend major notification requirements to cash settled derivatives or are planning to do so.

9.14. The United Kingdom[332] has introduced a new regime that requires the disclosure of (gross) long positions on cash settled derivatives from 1 June 2009 onwards[333]. It requires reporting once the threshold of 3% has been reached, aggregating both the derivative transactions and any actual holdings of the voting shares.

The UK FSA position on cash-settled derivatives

In its consultation paper of 2007[334], the UK regulator (Financial Services Authority, FSA) considered the question of whether the regime as set out in the Transparency Directive was open to abuse and whether specific rules should be introduced to legislate for the potential loopholes. The FSA considered that cash settled contracts for difference (CFD) and similar instruments were not disclosable under the terms of the Transparency Directive (as implemented by UK rules) given that they do not constitute a legal right to acquire the underlying share.

329 For example, in Continental/Schaeffler case, Schaeffler was a holder of a total return equity swap on Continental shares sold by Merrill Lynch (the writer of the total return equity swap), who, with other investment banks, held the underlying Continental shares to hedge its position. Although Schaeffler did not have any legal right to purchase the underlying shares, after the termination of the swap contract Merrill Lynch and other banks had to sell the underlying shares which they no longer needed. Schaeffler should be the likely buyer as the only commercially reasonable way for Merrill Lynch and other investment banks to dispose of the shares is to sell them to Schaeffler, because otherwise the sale of the block of the shares on the market in such a large amount would overwhelm the market and potentially depress the share price.

330 Depending on the content of the agreement this situation could be caught by Article 13 of the Transparency Directive.

331 See footnote 322 on the discussion on the applicability of Article 10(g) of the Transparency Directive.

332 In the United Kingdom, the UK Takeover Code already required the disclosure of economic interest during the offer periods: see Rule 8(3). In Ireland, similar rules were contained in the Irish Takeover Code.

333 See UK FSA (March 2009).

334 UK FSA (2007).

The FSA noted the 2 main problems with this position being:

1) The issuer of the CFD will almost always seek to hedge its position on the derivative by acquiring the underlying share; and

2) Those with a pure economic interest in the shares of a company may still seek to influence its management.

This resulted in the following potential problems[335] for market transparency:

• The situation where a CFD, although intended to be cash settled, is in fact physically settled. By this route the person taking the derivative could instantly take ownership of a substantial percentage of the shares in the company with no disclosures having been made during the building of the stake.

• The majority of issuers of CFDs claim that they do not exercise the votes attaching to the shares they hold for hedging purposes and, specifically, do not follow the instructions of those holding the relevant CFDs. However, there is widespread recognition that, where issuers have no real interest in the affairs of the company whose shares they hold, they can easily be influenced by the holder of the CFD.

• Even if the issuer of the CFD does not vote its hedged shares, this can take a large proportion of the votes out of the voting pool, effectively increasing the significance of other holders.

• The cost in management time of investigating enquiries and demands from those who claim to hold an interest in the company to verify their equity with little information.

In its consultation paper, the FSA also put the arguments for the opposing view, that the rules should remain unchanged. The principal points of this argument being:

• The majority of issuers state that they do not settle CFDs by physical delivery of the shares;

• The majority of issuers state that they do not vote shares which they hold in relation to hedge positions and do not allow themselves to be influenced in this regard by the holders of CFDs;

• Too much disclosure can cause problems for market participants in their understanding of the true position in relation to control of companies and can, therefore, harm transparency. Specifically the disclosure could lead to:

- confusion of the investor community as to who holds underlying interests and the motives behind acquisitions and disposals;

- complex situations where the community tries to second guess potential shareholdings creating a false feeling of interest/disinterest in the market;

- increasing volatility in the market; and

- the additional costs associated with the extra disclosure burden.

The FSA clearly saw the merit in many of these arguments. However, it was ultimately convinced by the view in the market that, whatever CFD issuers may imply about their practices, taking positions in CFDs is an effective and widespread method for building a stake in a company without the burden of disclosure. This was a clear loophole that the FSA sought to close. This resulted in the FSA revising the applicable rules to include CFDs and similar instruments in the obligation to notify interests.

[335] See also Schouten (2009), p. 40 and seq. for a summary assessment of why hidden ownership is problematic.

9.15. In France, new rules came into force on 1 November 2009. These rules require that once a threshold has been crossed by holdings of shares and options, gross long positions held through financial instruments of similar economic effect to holding shares also need to be reported. There is no separate threshold for financial instruments of similar economic effect to holding shares.

9.16. In Portugal, the supervisor (CMVM) has published draft rules for public consultation requiring the disclosure of all instruments of similar economic effect to the holding of shares[336]. According to the proposal, all instruments would need to be aggregated towards the existing thresholds. The introduction of additional thresholds is also under consideration.

9.17. In the Netherlands, the Ministry of Finance has published draft legislation for consultation in 2009. The draft law would create the presumption that the holder of an instrument which creates an economic long position but is not settled in shares, controls the underlying shares. Such instruments would have to be aggregated to with shares and entitlements to acquire shares.

9.18. In Italy, the national authority Consob issued a public consultation in October 2009 on the topic[337].

9.19. The Germany regulator (BaFin) has experienced a lot of public pressure to modify regulation. Finance directors of some large German listed companies have asked BaFin to change notification rules.

9.20. Outside the EU, Switzerland, Hong Kong and Australia have also taken action

- The Swiss regulator has extended the scope of notification rules at end of 2007. Disclosures on cash settled derivatives only are seldom, in many cases such disclosures are done in connection with disclosures on other participations (shares) in the respective companies. The disclosures have become more complex by expanding the disclosure requirements to cash settled derivatives, but the disclosures contain more information.

- In Hong Kong, all types of equity instruments of similar economic effect to the holdings of shares are in scope of the significant holdings regime. A person holding, writing or issuing instruments of similar economic effect is taken to be interested in the underlying shares. These interests must be aggregated with physical holdings on a gross basis.

- The Australian Treasury has started a consultation to determine whether equity instruments of similar economic effect should be included in the definition of substantial holding, and, if so, on what basis they should be included. It considers that while equity instruments of similar economic effect give economic interests but not voting rights, they may give a degree of effective control over the referenced shares.

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336 http://www.cmvm.pt/NR/exeres/9ADECEA9-1A6C-47FD-9526-5A9E9664D7F8.htm

337 http://www.consob.it/main/documenti/Regolamentazione/lavori_preparatori/position_paper_derivati_20091008.htm?hkeywords=&docid=2&page=0&hits=10

9.21. China and India do not require specific disclosure, which is mostly due to the lack of general regulation regarding cash-settled derivatives. Japan does not require disclosure either. Canada, has also been considering amending the existing rules, but has not done so yet.

The US, which traditionally did not require disclosure, is now in an intermediate position, as a court ruled that cash-settled derivatives could not be used to avoid notification requirements (see below Section G of this Annex).

E) Need for action at EU level?

9.22. In its opinion on cash settled derivatives, ESME stressed the importance of having a fully harmonized and regulated regime for disclosure of cash-settled equity derivatives on a European level, based on the experience related to the operation of the current disclosure regime of major holdings and its implementation by Member States[338]. The same conclusion results from the External Study which says that "*based on the magnitude of the loophole, which clearly goes against the very principles of the Directive and has permitted the development of improper conduct in several highly visible cases involving major companies, and in consideration of the position taken by the respondents to our questionnaire, we believe the loophole should be closed*".[339]

9.23. In its Consultation paper to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares[340], CESR argues that the scope of major shareholding disclosure should include all instruments that give similar economic effect to holding shares or entitlements to acquire shares, irrespective of whether such an instrument is settled in cash or physically. Consequently, CESR considers that the scope of the Transparency Directive should be extended to instruments of similar economic effect to holdings of shares and entitlements to acquire shares because it is likely that an investor with a significant economic long interest will seek to influence the issuer. CESR also argues that a pan-European approach would limit the required systems changes and thereby reduce the associated costs compared to diverging national approaches. A pan-European approach would also improve legal certainty as to which instruments need to be included across the EU.

9.24. However, it is also argued that systematic disclosure of economic interest could be problematic and cumbersome in practice and result in an overflow of extraneous information to the public that could have an adverse impact on the efficient functioning of the markets. Because the information could appear duplicative or even contradictory, this would hinder transparency rather than promote it and therefore damage the liquidity of cash settled derivatives. It could also be seen as an

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338 Given that the notification requirements of major holdings of the Transparency Directive are minimum harmonisation rules and that the present differences in implementation of the Transparency Directive in all member states lead to administrative costs for asset management companies operating on a cross border scale, ESME pleads for a reporting obligation that is general and harmonized at EU level and therefore separate from reporting of normal shares. See ESME (November 2009), p.11.

339 Mazars (2009), section 3.6.3.2 *in fine*.

340 See CESR (January 2010).

unnecessary intrusion into the privacy of market participants and overprotective of the issuer at the expense of a dynamic market for corporate control[341].

9.25. According to the External Study[342], the final decision on whether cash-settled derivatives should fall within the disclosure requirements should depend on an assessment of the following criteria :

– whether it is acceptable to keep such a significant loophole in the notification regime provided by the Transparency Directive, in particular in view of Recital 18 which states that "*The public should be informed of changes to major holdings in issuers whose shares are traded on a regulated market situated in or operating within the Community. This information should enable investors to acquire or dispose of shares in full knowledge of the changes in voting structure; it should also enhance effective control of share issuers and overall market transparency of important capital movements*".

– whether imposing disclosure would have an adverse impact on contestability of control and would outweigh the benefit of an increased transparency. It has been argued, for instance, that during a takeover bid, the obligation to disclose interests in derivatives at an early stage could detrimentally increase the price of shares in the target company, rendering it unviable, and that if the target company is on notice, it may wish to defend the bid.

F) Content of possible disclosure regime

9.26. According to the External Study[343] and to CESR[344], if a disclosure regime for cash-settled equity derivatives were to be adopted[345], the following five issues should be considered:

9.27. The first issue relates to <u>the scope of the disclosure.</u> Notification requirements could be extended to all instruments of similar economic effect to holding shares and entitlements to acquire shares, or it may be limited to include only instruments that do not contractually preclude access to voting rights. An extension to all instruments would mean a holder needs to include all instruments that give him, in effect, a long economic exposure to an issuer. At the same time this raises the issue of the need for exemptions as it is likely to yield a large number of disclosures.

9.28. An alternative to a general approach combined with exemptions, is to prescribe a limitative approach. Such an approach would be based on contractual terms that

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341 See, for instance, ISDA's response to the UK FSA consultation paper CP06/4 on the Implementation of the Transparency Directive, 29 June 2006: Available at: https://www.isdadocs.org/conf/agm2006/index_agm2006agenda.html. See also ESME (November 2009), p.10.

342 Mazars (2009), section 3.6.3.2 *in fine*.

343 *Ibid*.

344 CESR (January 2010), pp. 10 and seq.

345 The analysis conducted in Schouten (2009) concludes that the Transparency Directive in its present form does not effectively prevent hidden ownership, and that hidden ownership severely undermines the mechanisms through which ownership disclosure improves market efficiency and corporate governance. For this scholar, "*this strongly suggests that the Commission should consider expanding the scope of the disclosure rules*". See Schouten (2009), p.52.

preclude the possibility of the holder obtaining the voting rights or influencing their exercise.

9.29. However, even if robust contractual agreements were created regarding explicit influence over voting rights and disposal of shares, it would be possible to circumvent the purposes of the disclosure obligation[346] simply by changing the contract terms of the instrument immediately prior to the contract being closed[347]. Also, such a regime would be partly based on the intention of the holder of the instrument. This means that even if holders might comply strictly with the terms of contractual arrangements, it would not with certainty prevent the building up of stakes on an undisclosed basis.

9.30. CESR and ESME consider in their respective analyses that such an approach that creates a 'safe harbour' for certain types of contractual agreements would be unworkable in practice.

9.31. The second issue relates to aggregation of shares with derivatives: The most transparent system would be to provide for full aggregation: the number of shares corresponding to the derivatives is aggregated with the number of shares held by the same investor, as in the UK system. However, this means that a full harmonisation of notification requirements will not be possible, as the existing rules for notification of holdings of shares under the Transparency Directive are minimum harmonisation rules[348]. A less transparent system would be to provide for a separation of the two notification requirements: when a threshold is crossed in shares or in derivatives, a notification is required. The least transparent system would provide for information on cash-settled derivatives only when a threshold in shares is crossed, as in the French system. This would allow a full harmonisation of notification of derivative instruments. However, it could be misleading, as any further acquisition or disposal of derivatives would not be notified. If no update is required, the market would remain with outdated information.

9.32. The third issue is whether specific thresholds should be applied to cash-settled derivatives. As there are many transactions on derivatives (for instance, it is estimated that up to 40% of trading in the UK regulated market has been carried out through similar derivatives), a significant number of which may have little interest for the market, it may make sense to provide for a safe harbour using specific thresholds. The regime could be such that, below a certain threshold, no notification

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346 Concerning the limitations of securities laws on this issue and the risk of circumvention, see Schouten (2009), p. 54.

347 This was, for instance, the experience in the Fiat case described above. See Kirchmaier et al. (2009), p. 14.

348 For example, ESME pleads for a uniform reporting obligation of large positive and negative positions in synthetic instruments, separate from the reporting of positions in the underlying shares, because the reporting arrangements for those positions is diffuse and continues to be not harmonized. Although the ultimate goal could be aggregation of share and derivatives positions into one reporting requirement, ESME concludes that it cannot be implemented in a fully harmonized way within the foreseeable future. See ESME (November 2009), p. 13.

is required, provided appropriate rules are laid down to avoid any fraudulent use of the safe harbour[349].

9.33. The fourth issue is how the equivalence between the cash-settled derivatives and the number of underlying shares should be established. In the United Kingdom, the computation is made on a "delta-adjusted" basis, which takes into account the potential variations in the hedging position and allows for a netting of long and short positions. In France, the notional amount of the referenced number of shares is used, which is simpler but leads to disclosure of a higher number of shares[350]. The netting of long and short positions is also an issue with regard to the calculation of thresholds[351].

9.34. The last issue relates to derivatives using a basket of securities. When the basket is a standard, well-diversified one, there is no issue: no notification should be required. However, if the basket includes only a limited number of securities, specific rules should be applicable. Technical provisions have been implemented in this respect in France and the United Kingdom.

G) Alternative approaches

9.35. The External Study[352] argues that there is also another way to address cash-settled derivatives.

In the US, in a case involving the use of cash-settled derivatives to avoid a notification requirement, it has been held that this conduct was fraudulent (CSX/TCI case[353]). A way to address the issue would be to have a broad anti-fraud provision stating, in substance, that cash settled derivatives may not be used when the purpose or effect of such use is to avoid the applicable notification requirements. Under such provision, the courts would be left with the task to decide, on a case by case basis, which conduct is acceptable or not. This may act as a potentially strong deterrent against sophisticated fraudulent practices but may not serve best the transparency requirements of the market.

9.36. It should however be noted that Member States that have not introduced specific legislation regarding cash-settled derivatives have not been able to rely on general principles or fraud theories to curb practices such as described above. This is particularly the case in Germany where the BaFin, after investigating, did not find that Porsche or Schaeffler were in violation of their disclosure requirements[354].

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349 For example, according to ESME, the disclosure obligation threshold for cash settled derivatives should not be set too low (at least 5% or 10%), because in the majority of cases positions in these instruments are never intended to hide ownership and/or make unethical price gains and are mostly used for risk management purposes and to improve liquidity. See ESME (November 2009), pp. 9 and 12.

350 CESR in its consultation paper also discusses this problem and notes that calculation of thresholds based on a nominal amount is in line with the current wording of Article 13 instrument of the Transparency Directive. CESR (January 2010), p. 10.

351 ESME recommends to notify large positive and large negative positions separately and not on a net basis in order to achieve true transparency on the potential of hidden ownership and in order to avoid double-counting of positions. See ESME (November 2009), p. 13.

352 Mazars (2009), section 3.6.3.2.

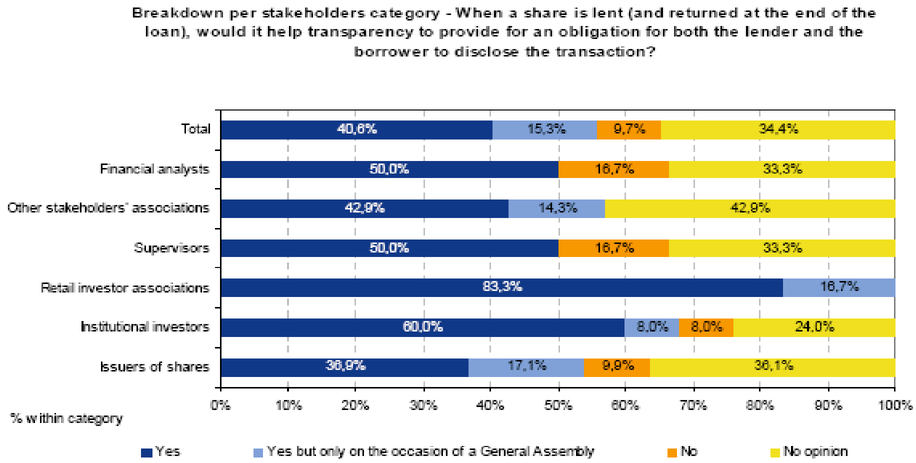
353 For a description of this case, see Schouten (2009), p. 35.

354 See press release from BaFin of 21 August 2008.

10.1. Another issue linked to the disclosure of major holdings has been recently identified as leading to difficulties for market transparency and shareholder identification. This issue concerns (i) stock lending carried out by banks and investment firms; and (ii) the possibility granted to intermediaries under MiFID[355], to use clients' instruments for their own account or for the account of other clients (Article 19 of the MiFID Implementing Directive[356]). Though the usefulness of such practices for the efficient functioning of markets is recognised[357], they may create difficulties – especially in the case of intermediaries' chains – in reconstructing in a timely manner the identity of shareholders or in locating voting rights correctly. For instance, at the time of annual shareholders' meetings, specific parties may borrow specific securities for the primary purpose of participating and voting at an annual general meeting. Also, in some cases lenders and borrowers may both report major holdings in respect of the same shares and there are occasions when the total number of shareholders that consider that they are eligible to vote at a general meeting would exceed 100% of the total outstanding capital of the issuer. Since these issues are not MiFID-specific, they have not been addressed under this directive, which focuses on the safeguarding of clients rights when the use of their financial instruments is allowed (clients consent, information requirement and record-keeping obligations).

A) Stock lending and the Transparency Directive

10.2. The External Study on the application of the Transparency Directive shows that a majority of stakeholders (55.9%) believe that the lending of shares should be made transparent and consider that voting rights obtained through the borrowing of shares should be included in the calculation of the notification threshold[358].



355 Directive 2004/39/EC
356 Directive 2006/73/EC.
357 See, for instance, ESME (December 2007).
358 See generally Mazars (2009), Section 3.6.1.

10.3. The way the Transparency Directive addresses stock lending is, however, not fully clear to all parties. According to the External Study, in all 14 Member States covered by the review, typical stock lending agreements lead to a transfer of ownership of the lent shares from the lender to the borrower[359]. This principle is applicable to shares in bearer form and to nominative shares. Therefore, it would appear that, *prima facie*, Article 9 of the Transparency Directive should be applicable. This would lead to a notification obligation imposed on both the lender and the borrower when relevant thresholds are reached or crossed. Alternatively, as advanced by the External Study[360], stock lending would be caught by Article 10(b) of the Directive:

> Article 10: "The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:
>
> … (b) voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question."

10.4. However, the Directive has not been implemented in the same manner in all Member States. For instance, according to the External Study[361]:

– In the United Kingdom, the position has been that only the borrower has to disclose the transaction. The logic is that, under a standard stock lending arrangement, whereby the lender maintains a right to call for redelivery of the shares, there is a simultaneous disposal of rights in the shares and acquisition of a corresponding right to reacquire them. The lender under such an arrangement is permitted to "net off" the disposal and acquisition and, therefore, not consider the transaction as triggering disclosure obligations. On the other hand, as the right to call back the shares on notice is at the lender's initiative, there is no immediate corresponding disposal by the borrower and therefore the two positions cannot be netted off, triggering the obligation for the borrower to notify the transaction.

– In France, the law used to be interpreted in a way that made notification compulsory for lenders. However, it seems that the French transposition of the Transparency Directive has introduced some confusion in this respect, and the current interpretation of applicable rules tends now to be the reverse.

– Recent case law in Germany provides that the duty to notify is imposed on the lender only if it has transferred the voting rights to the borrower. In this case, both the lender and the borrower need to disclose the transaction. If control over the voting right is retained by the lender, then only the borrower needs to notify.

– Luxembourg has a similar system to Germany, where the transfer of the voting rights to the borrower triggers a notification requirement for both the lender and the borrower.

359 See Mazars (2009), Section 3.6.1.4.

360 *Ibid*.

361 *Ibid*. See also CESR (September 2008), replies to questions 21 to 25.

10.5. The rationale behind a non-notification by the lender is a concern that disclosure on both sides of the transaction would lead to confusing and conflicting disclosures which may harm the market information[362]. In particular, due to the number of stock lending transactions, systematic notification by lenders may swamp the market with useless information, making material information less easy to identify. In addition, when stock lending is used by banks to hedge positions of activist shareholders in the setting of influence-seeking transactions, imposing notification requirements to such banks may result in both providing an advance warning to the target issuer and creating business issues for the bank in its relationship with the target issuer. Finally, there is a risk that placing a disclosure obligation on all stock lenders may affect liquidity in the lending arena[363].

10.6. The reverse position, in favour of transparency for the both the lender and the borrower, is supported by the need to have a full picture of the situation at any time. The only way to provide complete and consistent information to the market is to have the transaction declared both by the lender (who would disclose his move from full owner to holder of a right to re-acquire the shares) and the borrower (who would declare his status of owner and his obligation to return the shares). There would be no risk of confusion in such a case. On the contrary, it would eliminate the risk of double counting the shares (a first time for the lender and a second time for the borrower, which is misleading). The system would also be simple, as the same rule would apply to all stock lending transactions, irrespective of specific contractual terms (whose complexity may always lead to diverging interpretations)[364].

10.7. According to the External Study, the correct application of article 9 of the Directive leads to a notification requirement by the lender and the borrower. Consequently, the External Study recommends that the application of this principle should be enforced; subject however to specific exemptions, such as the exemptions for very short term transactions applicable in some Member States (borrowed shares which are on loan by close of business the next day) (see Box 10.1). A specific exemption for transactions below a certain percentage could also be provided for.

Box 10.1 – Possible improvement n°9 to the Transparency Directive. Cf. Mazars (2009), p. XIV.

9. Making the lending and borrowing of voting rights more transparent: *in our view, the correct application of article 9 of the Directive leads to a notification requirement by the lender and the borrower. As a result, application of this principle should be enforced. To extent that, there is a real desire to amend the Directive, the general rule regarding disclosure by borrowers may make room for specific exemptions, such as the exemptions applicable in the UK, Italy or Luxembourg for very short term transactions (such borrowed shares which are on loan by close of business the next day), to the extent that such exemptions do not jeopardize the efficiency of the overall disclosure regime. If need be, based on quantitative data supplied by independent and reliable sources, and an impact assessment, a specific exemption for transactions below a certain percentage could be provided for.*

[362] See Mazars (2009), Section 3.6.1.4.
[363] See ESME (December 2007).
[364] See Mazars (2009), Section 3.6.1.4.

B) Empty voting

10.8. “Empty voting”, i.e. voting without the economic exposure usually attached to shares, such as voting with borrowed shares, is a subject which has received much attention in recent years[365].

10.9. It is usually considered that company law confers voting power to the shareholders in view of the fact that they will bear the positive and negative consequences of their decisions. On the contrary, “empty voting” includes the possibility to exert influence on companies without financial consequences for the investors. In other words, the person who exercises the voting rights is not the one who bears the consequences of the decision. As a result, decisions detrimental to other investors and to the issuer could be taken, in particular in a situation where the holder of the voting rights finds himself in a conflict of interest, e.g. because he has an economic interest in a competing company[366].

10.10. A number of high profile cases have shown the potential for abuse resulting from empty voting. Among the most famous are the Laxey case in the UK, the OMV / MOL case in Hungary, the Perry/Mylan case[367] in the US and the Henderson Land case in Hong Kong.

10.11. As described in the External Study, the position taken by a number of financial industry representatives shows that the concern regarding empty voting is widely shared. For instance:

– In the United Kingdom, the Shareholder Voting Working Group stated in 2004 that "*borrowing of shares for the purpose of voting is not appropriate*".[368]

– In July 2005, the International Securities Lending Association stated that "*the practice of borrowing shares specifically to vote is unacceptable*".[369]

– The International Corporate Governance Network (ICGN) also stated that "*the exercise of a vote by a borrower, who has, by private contract, only a temporary interest in the shares, can distort the result of general meetings, bring the governance process into disrepute and ultimately undermine confidence in the market*"[370]. As a result, according to the ICGN, "*the borrowing of shares for the primary purpose of exerting influence or gaining control of a company without sharing the risks of ownership is a violation of best practice*" and *"the borrowing of shares for the purpose of exercising the right of the shareholder's vote is to be discouraged by all lenders*".

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365 See generally Schouten (2009), Hu & Black (2006), Hu & Black (2007) and European Parliament (December 2009).

366 See also Schouten (2009), p. 50 and seq. for a summary assessment of why empty voting is problematic.

367 See a summary description in Schouten (2009), p.46.

368 "Review of impediment to voting UK shares", the "Myners Report", January 2004.

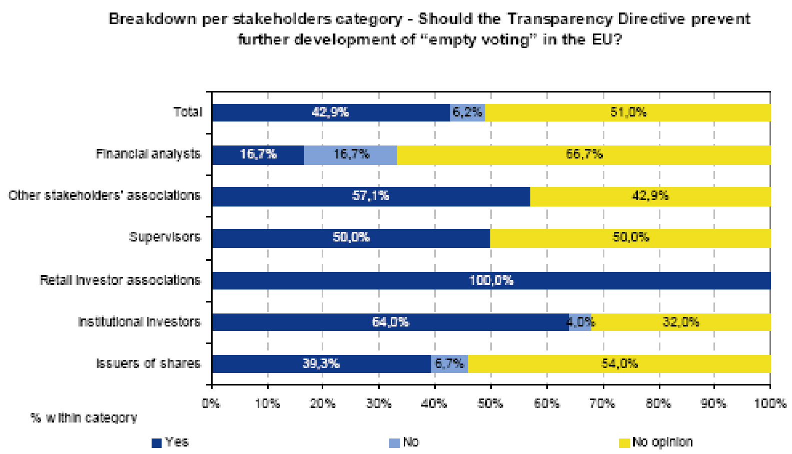
369 ISLA (2005).

370 International Corporate Governance Network (2007), pp. 5 and 9.

10.12. The French financial supervisor (*Autorité des Marchés Financiers*) set up in 2007 a working group whose report (the "Mansion Report") proposed improved disclosure of empty voting and suggested the need of an outright ban[371].

10.13. In 2007, the European Commission therefore consulted interested parties on the need to deal with stock lending and empty voting. A majority of respondents considered at the time that the EU should address these issues in order to prevent an abuse. In particular measures enhancing transparency met with general support. However, many respondents highlighted the importance of stock lending in ensuring market liquidity and warned of measures that could reduce the attractiveness of stock lending altogether. Respondents were furthermore opposed to the suggestion that borrowers of stock should only vote if they obtain voting instructions from the lenders of stock[372]. At the same time, the empirical evidence that stock lending abuse was taking place on a wide scale could not be gathered through the consultation and subsequent inquiries. The main findings were rather that borrowers of shares refrained from voting altogether thus contributing to low general meeting participation rates.

10.14. Although it is not possible to have statistical data to quantify precisely the use of empty voting as empty voting is not disclosed, there is still significant anecdotal evidence and a general feeling that this practice is regularly used[373]. Also the External Study has shown that a clear majority among the stakeholders is in favour of preventing further development of "empty voting" practices by the Transparency Directive.



371 AMF (2008).

372 See European Commission (September 2007), p. 6-10. See also Schouten (2009), p. 47.

373 See generally Mazars (2009), Section 3.6.2.

10.15. Empty voting, and more in particular the phenomenon of "record date capture"[374] are one of the arguments in favour of shareholder identification (see Annex 11). However, shareholder identification is not the only way to deal with the problem. Thus, the External Study recommends to introduce a requirement that any sale of shares above a certain threshold (or other reduction in the net economic exposure of a shareholder of record) between the record date and the date of the general meeting should be immediately notified to the issuer and to the market in such a way that the relevant information is fully disclosed prior to the date of the general meeting (see Box 10.2).

Box 10.2 – Possible improvement n°10 to the Transparency Directive. Cf. Mazars (2009), p. XIV and 78.

10. Limiting 'empty voting' practices: *more transparency on empty voting could be contemplated (with a reservation on this option, as the creation of a disclosure regime would provide a legal framework comforting empty voting). The notification proposal would require the economic exposure of all shareholders (above a certain threshold) be notified on the day of the record date of each general meeting, to the extent such net economic exposure was not disclosed pursuant to a previous notification (no double notification would be required if it does not provide any new information). Any change in the net economic exposure between the record date and the date of the general meeting should be immediately notified. This system would be comprehensive and would not be very burdensome as only one extra notification would be required (subject to updates, which should be limited). This mechanism would also prevent hidden record date captures. A more straight-forward and radical response to "empty voting" practices could be to consider banning them entirely. To this effect, the appropriate legislative instruments could consider suspending voting rights for investors holding their shares, either directly or indirectly, on the basis of a stock loan or a similar temporary transfer.*

10.16. As advanced in the External Study, there are also arguments that are being voiced against the regulation of "empty voting" practice. Some argue that empty voting makes shareholder activism easier and thus promotes a stronger control by shareholders on the management of companies. Also, as empty voting is mostly based on stock lending, regulating the former should not result in an impediment for the latter. In particular, when stock lending is used for "tax optimization" purposes at the time dividends are paid, there is a fear voiced by banks promoting this optimization that any regulation in this area may jeopardize their interest. Generally speaking, there is also a view, mostly voiced by financial intermediaries, that more disclosure is not necessary better disclosure.

10.17. It should be noted that, in the United Kingdom, in 2009 the Takeover Panel issued a consultation paper in which it reached the conclusion that no further regulation was required, for the time being, on this issue[375].

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[374] "Record date capture" is a specific type of empty voting, which may be described as follows: an investor purchases shares on the record date of a general meeting of shareholders and sells them immediately thereafter; at the general meeting, this shareholder is legally entitled to vote although it has no longer any economic interest in the issuer; if the sale takes place shortly before the general meeting, the other shareholders will not be aware of the situation – this may be the case, for instance, if the shares are sold two days before the general meeting and notification is made the day after the meeting.
For a long time, the issue of the record date capture was mostly a concern in the United States, where the practice of the record date has been well established for a long time. The Shareholders' Rights Directive, which mandates the use of record dates and prohibits any blocking of shares between the record date and the date of the general meeting, makes it possible, at least in theory, to capture the record date of all EU companies listed on a regulated market. See Mazars (2009), section 3.6.2.3.

[375] UK Takeover Panel (2009).

10.18. According to the External Study, if "empty voting" practice were to be regulated, two different options seem to be possible: (i) an improved transparency system; and (ii) a ban on empty voting[376].

10.19. *(i) Improved transparency system*. The first option would be an improved transparency system, allowing for a clear identification of "empty voters" in general meetings. As shown above (§ 10.15), this could be done by amending the Transparency Directive[377]. It could, for instance, be required that the borrower specifies that it holds its shares as borrower (or, more generally, under a temporary transfer agreement). This would be simple but would not address all empty voting issues.

10.20. It could also be required that, within a certain period of time before and up to a general meeting of shareholders (for instance, during the 30 days preceding a general meeting), the shareholders notify immediately any change (above a certain threshold) in their net economic exposure. This requirement would provide a complete picture of the shareholder base at the time when the information is most meaningful. This system would be comprehensive but may be viewed as burdensome.

10.21. Another way to improve transparency would be to require – as proposed in the External Study (see above, box 10.2) - that the economic exposure of all shareholders (above a certain threshold) be notified on the day of the record date, to the extent such net economic exposure was not disclosed pursuant to a previous notification (no double notification should be required if it does not provide new information). This system would be comprehensive and would not be very burdensome as only one extra notification would be required (subject to updates, which should be limited).

10.22. Finally, the European Corporate Governance Forum proposes in its statement of February 2010[378] as a first step to deal with empty voting that the borrower of shares should notify the company prior to the general meeting that he does not have the full financial interest in the shares (only) if he intends to exercise the voting rights on the shares. According to the Forum, this duty to notify should apply to positions that correspond to a certain threshold, for example, 1 % or more of the outstanding shares with voting rights. Any false or omitted statement in this context should be dealt with under the national rules on misleading information. Furthermore, the Forum recommends the introduction of a rule that the company and its subsidiaries may only lend the company's own shares if the lending contract stipulates these shares will not be voted upon by the borrower. The company should disclose prior to the general meeting to what extent it and its subsidiaries have lent the company's own shares to third parties.

10.23. *(ii) Ban on empty voting*. However, disclosing empty voting would make it more apparent but, if it is considered an improper practice, would not provide an adequate

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376 Mazars (2009), section 3.6.2.3, *in fine*.

377 The analysis conducted in Schouten (2009) concludes that the "*Transparency Directive sheds virtually no light on empty voting*", and that empty voting severely undermines the mechanisms through which ownership disclosure improves market efficiency and corporate governance. For this scholar, "*this strongly suggests that the Commission should consider expanding the scope of the disclosure rules*". See Schouten (2009), p.54.

378 European Corporate Governance Forum (February 2010).

remedy. According to the External Study, the second option would therefore be to restrict or ban "empty voting", based on appropriate disclosure obligations, although the legislative instrument to achieve this result would not be the Transparency Directive[379].

10.24. There are two main ways to restrict or ban empty voting. A classical proposal would be to require shareholders who have lent their shares to recall them before any general meeting. However, it is generally considered burdensome, may go too far, as it would prevent stock lending at the time of the general meeting, whereas it is not the stock lending per se which is wrong but rather the use of borrowed shares to vote, and this option would only address empty voting based on stock lending and would thus be limited in scope.

10.25. A more radical system would be to prohibit voting with borrowed shares (or shares held under a temporary transfer agreement or pursuant to a scheme having a similar impact). According to the External Study[380], this would be the most simple and clear solution and also the one which could appear the most consistent in view of the principles at stake; but would raise considerable issues regarding the enforcement of any such rule.

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379 Mazars (2009), section 3.6.2.3, *in fine*.

380 *Ibid*.

ANNEX 11 – THE IDENTIFICATION OF SHAREHOLDERS BY ISSUERS

A) The problem

11.1. One of the objectives of the rules of the Transparency Directive on disclosure of major holdings is to provide transparency to the issuer and to the market about holdings relevant for some company law/corporate governance purposes: e.g. holdings resulting in possible blocking minorities on annual shareholders meetings; holdings allowing to presume a significant influence on the company etc[381].

11.2. In recent times, however, there have been demands for EU action to increase the level of investor transparency towards issuers of shares. In the field of corporate governance, the adoption of the Shareholders Rights Directive has modified the situation. It obliges Member States to provide that the rights of a shareholder to participate in a general meeting and to vote in respect of his shares shall be determined with respect to the shares held by him on a specified date prior to the general meeting (record date). The proof of qualification, however, shall be limited to requirements that are necessary and proportionate to ensure the identity of shareholders (cf. Article 7(4)).

11.3. Listed companies in particular argue in this context that they have an interest, for their corporate governance purposes, to know who ultimately owns the shares and who their "real" investors are.

Such identification is not always easy. Shareholders and issuer can be separated by a chain of intermediaries, which are sometimes recognised as shareholders by the applicable national law. On other occasions, intermediaries may act like or give the appearance of a shareholder. Due to the number of intermediaries in the chain, identification of the real shareholder can be burdensome if not impossible for issuers and questions arise as to who is ultimately entitled to control the voting right. Even companies using registered shares could not necessarily rely on the register as the ultimate investor does not in all cases have to be identical with the legal shareholder.

11.4. Considering this evolution in the corporate governance area, the question that arises is whether the Transparency Directive's rules on disclosure of holdings are adequate. The Commission services had already asked interested parties in an open consultation in 2007[382] whether more work was needed to create more transparency of the investors' side. In the past, a number of stakeholders had taken the view that the Transparency Directive puts in place a comprehensive framework, which should give issuers a fairly precise picture of the breakdown of voting rights. A majority of respondents had accordingly answered that the implementation of the Transparency Directive should be reviewed before any further action was to be envisaged[383].

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381 European Commission (March 2003), section 4.5.1; and European Commission (December 1985), section II.3.

382 European Commission (April 2007).

383 More than 70% of the interested parties who responded to this question (representing about 56% of the total number of respondents) agree that the implementation of the Transparency Directive should be

B) The existing rules in the Transparency Directive

11.5. The Transparency Directive, in its Articles 9 and 10, imposes on holders of voting rights the obligation to notify to the issuer whenever the share of the voting rights they hold reaches, exceeds or falls under certain thresholds. The lowest threshold is set at 5%. This obligation falls not only on shareholders, but also on depositary receipt holders that are entitled to direct the exercise of the voting right by the depositary and persons who otherwise control voting rights, e.g. as a result of a shareholders' agreement or by way of proxies, etc. These notifications are subsequently disclosed by issuers to the market.

It should be added that, by virtue of Article 3 of the Directive, Member States may impose on their issuers lower disclosure thresholds than that of 5% provided for in the Directive. Indeed, transposition of the Directive has resulted in a number of Member States establishing (or maintaining) lower (initial) thresholds for disclosure of major holdings than provided for in the Directive and some have done so[384]. This lower threshold has been set at either 2% or 3%.

Additionally, the Transparency Directive does not prevent issuers from setting their own thresholds in their articles of associations. 13 Member States allow for this possibility: for instance in FR, issuers may set that threshold at 0.5% and in Belgium at 1% (see Annex 8). It should be noted that this type of notifications are not disclosed to the market, only to the issuer.

11.6. The Transparency Directive rules have some limitations in this context: first, the lowest disclosure threshold, even at 2% or 3%, is generally considered too high for identifying shareholders in view of engaging into corporate governance related discussions between issuers and investors; and second, while the rules of the Directive will give a breakdown of holders of voting rights, issuers will only be informed where a shareholder crosses one of the thresholds for major holdings, but not of other movements without crossing the threshold (e.g. from 9% to 6% or 2,5% to 1%).

According to the external study on the application of the Transparency Directive, "*issuers' priority is to better identify their shareholders, in order to anticipate evolutions that may impact the general strategy of the company. The legal thresholds are an important source of information but the level of granularity resulting from the Directive is not considered sufficient. Issuers use specialised procedures or require external consultants to identify their shareholders below 5% (the services are often proposed by custodians and/or data disseminators). In Top Companies, this identification of shareholders is often done twice a year.*"[385]

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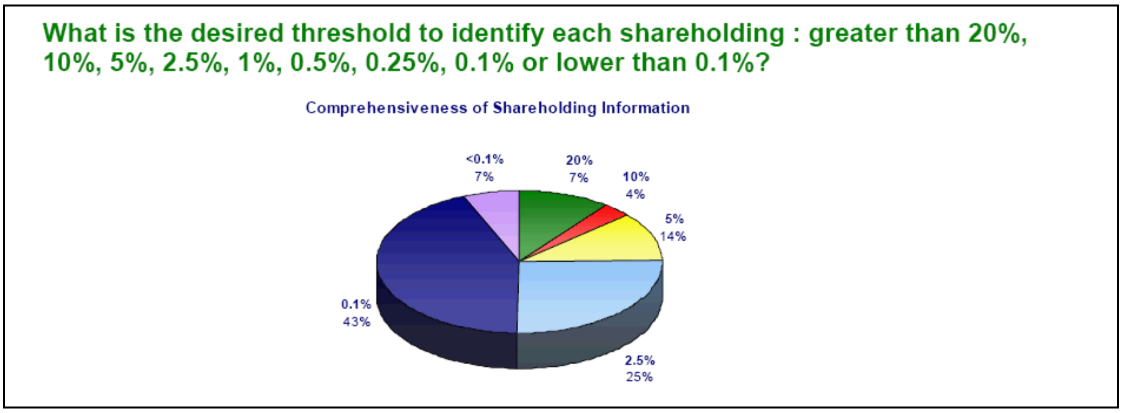
reviewed before any further action is undertaken at EU level. However, some of these respondents consider that this should not stop the Commission from exploring certain issues. This view is shared by a number of the respondents who consider that, precisely for that reason, further action is needed at EU level.

384 See Annex 8, §8.2 of this Report.

385 Mazars (2009), section 3.4.1.

Similar views are expressed in the 2005 global Survey on Shareholder Transparency[386], showing that the 5% threshold is perceived as too high for the purposes of identifying shareholders and that there is interest from companies to go as low as 0,1% of holdings or even below that (see Chart 8.1):

Chart 8.1: Source: International Investor Relations Federation (2005), p.13.



C) The requests for establishing a shareholder identification mechanism

11.7. Given the perceived limitations of the Transparency Directive rules for the objective of facilitating communication between issuers and shareholders for the purposes of improving corporate governance, issuers consider that they need different systems to identify their shareholders[387]. The existing British and French mechanisms are often cited as examples of functioning systems (see Box 11.1).

Box 11.1 – Existing national mechanisms[388] for identifying shareholders: France and the United Kingdom.

386 International Investor Relations Federation (2005), p. 13.

387 According to external surveys, there is demand by issuers for shareholder identification reports regardless of the fact whether the national law provides for a mandatory or voluntary identification system. This is illustrated by the Global Survey on Shareholder Transparency, commissioned by the International Investor Relations Federation (September 2005). The results were based on interviews with 346 companies worldwide. In Europe, companies carry out surveys on a regular basis. The frequency of these requests is closely interrelated with their average costs. In the EU, the frequency ranges from 12 (UK), 8 (FI), 4 (SE), 3 (ES), 2 (DK, NL, FR) to 1 (DE). This body of data is backed up by information provided by Euroclear on SE and FR for 2008. See also Mazars (2009), p.94.

388 In the Netherlands, following the May 2007 advice of the Monitoring Commission Corporate Governance Code (Commission Frijns) a legislative proposal amending the Financial Supervision Act was prepared to introduce (among others) a system for shareholder identification. The proposal was sent to Parliament on 24 July 2009, after delays during 2008 due to reactions on the consultation document. The proposal is being discussed in Parliament.
The proposed Dutch system is inspired by the existing French system and provides for a method of getting the information on the ultimate investor through Euroclear and the intermediaries lower in the chain. Different is that companies will have the opportunity to contact the intermediaries lower in the chain themselves (so not through Euroclear) and could also outsource this. The system will cover bearer shares and registered shares. Another difference in relation to the French system is that there will be a maximum number of identification rounds per year (although this could change in the future; the French system was also more limited when it started).
Finally, the proposed Dutch system will include the possibility for companies to send relevant information directly by mail to the identified shareholders and a possibility for shareholders to send information to the company, which then will distributed to the other shareholders, together with the information sent by the company.

In **France**, Article L 228-2 of the Code du Commerce provides for a method of getting a clear and detailed picture of the shareholder base through the central depository ("*dépositaire central*"), currently Euroclear.

The Identifiable Bearer Securities service ("*Titres au Porteur Identifiable*" - TPI) is a solution for bearer securities held in Euroclear France that allows issuers to receive detailed information on the identity of their shareholders. The TPI service was created under the Saving Law ("*Loi sur l'Epargne*") of 17 June 1987 in order to provide, upon request, the list of their shareholders to issuers. Euroclear processes around 500 requests annually.

Another law ("*Loi de nouvelles régulations économiques*" [Loi no. 2001-420 du 15 mai 2001]) allows issuers to ask for the identity of foreign shareholders. In order to comply with this regulatory requirement, Euroclear France has set up a dedicated service "TPI Loi NRE" which allows the identification of ultimate foreign shareholders.

In the **United Kingdom**, Section 793 of the Companies Act 2006 (formerly Section 212 of the Companies Act 1985) allows a public company to investigate who has an interest in its shares. Where a person fails to give the company the required information in response, the company can apply for a court order imposing restrictions on the shares in question[389].

A company has the right to enquire of any person whether they are interested in the shares of the company, the nature of that interest and if they hold the shares on behalf of someone else and to provide details of that other person. The information so requested must be given within a "reasonable period" and if no response is received, the company can apply to the Court (s794) for imposition of restrictions on the shares (restriction on transfer of shares, voting rights, payment of dividends) (s797). There are criminal sanctions (s795).

The whole section is very widely drafted, i.e. the inquiry of interests may go back three years, there just needs to be a reasonable cause for the issuer to believe the person asked has an interest in the company and that person does not need to be a shareholder.

11.8. However, these national systems are also limited. Issuers believe that EU regulation is needed because existing national systems cannot extend cross-border, so if there is a cross-border element in the chain, an identification request under existing national law will not produce any result unless the foreign intermediaries cooperate on a voluntarily basis.

In addition to the issuers' demand, institutional investors gathered in the European Sustainable Investment Forum (Eurosif)[390] recommend that the Commission proposes measures to allow issuers to know who their shareholders are at any moment so that they can communicate with them efficiently.

11.9. Issuers' views have been upheld by the European Parliament in a resolution of 23 September 2008, which suggested the introduction or implementation of a more horizontal system of EU-wide shareholder identification[391].

D) Arguments in favour of and against action in this area

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389 It should be noted that the UK system was copied by the majority of Commonwealth countries, which use the British Companies Act as their model with the important difference that the register is not available for public scrutiny as in the UK, only to the company or its appointed agent.

390 Eurosif regroups about 80 member affiliates including mainstream institutional investors such as pension funds and asset managers representing assets of over EUR 1 trillion. See Eurosif (2009).

391 European Parliament (September 2008). In this resolution, the European Parliament asked the Commission to establish rules that enhance the transparency of voting policies of hedge funds. The resolution was based on an own-initiative report by Mr Klaus-Heiner Lehne.

11.10. Several **arguments in favour of establishing an EU-wide shareholder identification mechanism** are advanced. The possibility to engage with investors throughout the year to keep them informed of activities and to receive their feedback is identified as a key advantage.

Other possible benefits outlined are the possibilities to:

– better analyse the type of investor who is interested in the company, which allows the company to adapt their strategies better to the needs and interests of that population ;

– detect, at an early stage, stake building including outside the general meeting and thus avoid surprises and contentious discussions during the general meeting;

– extend incentive arrangements for retail shareholders to those in omnibus accounts which currently cannot be identified;

– increase participation of shareholders in general meetings. Although the Shareholders' rights Directive has improved the conditions for shareholders to participate, issuers consider that establishing a direct contact with the shareholders would improve and accelerate the ways to provide them with information on the general meeting and allow issuers to encourage their shareholders actively to make use of their voting rights;

– testing whether there is likely to be shareholders' support for draft resolutions to be submitted to the general meeting;

– increase the transparency and integrity of the voting process (by avoiding double voting, loss of votes, record date capture, possibly empty voting)[392]; and

– facilitate engagement of shareholders in environmental and social governance (within a wider corporate social responsibility policy)[393].

11.11. Furthermore, current developments in securities markets infrastructures are advanced as a further argument supporting the development of an EU-wide shareholder identification mechanism. Thus, issuers are concerned that the T2S project[394] which will provide a common platform for settlement services to Central Securities Depositories could impact on the functioning of the current national systems for identification of shareholders and render the situation even more opaque[395].

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[392] On the problems related to empty voting and record date capture, see Annex 10.

[393] See Annex 14.

[394] The TARGET2-Securities (T2S) project steered by the European Central Bank seeks to contribute to deliver a single integrated securities market for financial services and to bring forward the Code of Conduct on Clearing and Settlement and the harmonisation efforts through the Giovannini process. T2S will provide a single, borderless pool of pan-European securities, as well as a neutral settlement process. Market users will be able to access these assets through Central Securities Depositories (CSDs) in a way which should accommodate national and regional differences.

[395] There is a concern that, by adding extra holding layers and introducing more omnibus accounts, identification would be encumbered even for issuers located in those Member States where an identification system currently exists under national law. There is a task force hosted by the ECB, which should propose measures to ensure that T2S does not negatively affect existing identification

11.12. At the same time, there are **arguments against the development of an EU-wide shareholder identification mechanism**. In the first place, some consider that existing rules may be enough for transparency purposes. For instance, the introduction of a "record date" system by the Shareholder Rights Directive already increases transparency and integrity of the voting process. Also, the means that the Directive offers to facilitates the participation in general meetings and the exercise of shareholder rights are considered sufficient (electronic means – if offered by the company, proxy voting, minimum convocation periods). Shareholders interested in making their voice heard should henceforth have the necessary tools at their disposal, also in a cross-border context[396].

Furthermore, if issuers want to inform shareholders, they can contact them through their websites and their investor relations departments. Listed companies are required to inform the public at large of their performance and strategy and not only their current shareholders[397]. Enhancing company communication with a selected group of existing shareholders could conflict with this principle. Also, it should be noted that any price-sensitive information would need to be disclosed to the public anyway (under the Market Abuse Directive). Moreover, contacts between issuers and shareholders should be enhance through the possibility to introduce a uniform shareholder certificate as proof of entitlement in the future proposal for a Directive on legal certainty of securities holding and transactions[398].

The possibility for listed companies to voluntarily introduce specific disclosure thresholds at company level in the company's articles of association should be highlighted as another existing possibility, at least in half of the Member States, for identifying shareholders beyond the Transparency Directive requirements (see Annex 8). In this context, an alternative solution to the mandatory (for the investor) shareholder identification mechanism of the type in place in France or the United Kingdom (see Box 11.1 above) could be that national law provides for voluntary disclosures to the issuers by investors holding voting rights above a predefined low threshold (e.g. 0,1%). Those voluntary disclosures could be structured along the Transparency Directive requirements.

11.13. Secondly, technical difficulties for the enacting of a shareholder identification mechanism of the type in place in France or the United Kingdom should not be underestimated. For instance, there is no wide agreement on a definition of the “ultimate investor”. Where does the chain end and which kind of investor is to be made more transparent?[399]

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practices (i.e. in particular for registered shares), but instead contributes to the identification of the end holders of bearer shares.

396 The deadline for the transposition of the Shareholders Rights Directive into national law was 3 August 2009.

397 It should be kept in mind in this regard that listed companies are open companies, so investors can join at any time as well as quit the company – market liquidity is a principle in regulated markets and investors also vote with their feet.

398 See http://ec.europa.eu/internal_market/financial-markets/securities-law/index_en.htm

399 At the same time they may not be insurmountable. In the meantime, the UNIDROIT Diplomatic Conference which had been working on the harmonisation of substantive rules regarding securities held with an intermediary has achieved considerable progress in this respect. The draft UNIDROIT Convention on Substantive Rules regarding Intermediated Securities adopted in Geneva on 9 October

11.14. Moreover, there are other possible drawbacks from a mandatory shareholder identification mechanism. Shareholder dialogue could be a pretext for management entrenchment. Early detection of stake building (see above, §11.10) allows in particular reinforcing takeover defences[400]. Also, shareholders are the owners of the listed companies. If anybody, it is the shareholders who should be entitled to a high level of transparency. Any obligation to disclose a financial position or the investor's intention interferes with the investor's investment strategy which may privilege anonymity/discretion (also for cost reasons), as well as with his/her privacy and also property rights. Any interference would need to be carefully justified.

11.15. Any new (mandatory) measure will entail costs[401]. Ultimately, shareholders will be required to pay for the system, either through intermediary fees or through a cut in their dividends. It has to be said, though, that issuers even today make use of all available resources to gather this kind of information and pay for the costs[402]. In Europe, the amount spent on a yearly basis ranges from an average EUR 9,000 (DK) to EUR 36,000 (ES). The total average amount spent comes down to EUR 26,000 per year[403].

2009 gives a definition of the "account holder" which could perhaps be used for the purposes of any initiative on shareholder identification.

400 For the impact of enhanced transparency of major holdings of voting rights on the market for corporate control, see European Commission (December 2008), §21.

401 The requests will have to be managed and processed, the data will have to be gathered and treated and reliable (multilingual) systems for the transfer of data will have to be established. The burden of cost will have to be attributed.

402 The Global Survey on Shareholder Transparency shows the different sources of information issuers use today to get a better picture of their shareholder base. There are considerable differences as to the means used which depend largely on the geographical origin of the companies. See International Investor Relations Federation (2005), p. 9.

403 Cf. International Investor Relations Federation (2005), based on figures gathered from UK, FI, DK, SE, ES, DE, NL and FR. The original figures mentioned in the study are based on USD, and they have been converted for this paper on the basis of the currency rates of 16 September 2005.

ANNEX 12 – ENHANCED DISCLOSURE REQUIREMENTS FOR SIGNIFICANT HOLDINGS

12.1. Debate has arisen in recent times regarding whether investors holding major interests in EU issuers of shares should be requested to provide to the issuer and the market qualitative information currently not requested by the Transparency Directive and, if so, under which circumstances. This applies in particular to the information on the intentions with holdings (and the financing of their acquisition) or to information regarding the voting policies of major investors.

A) Disclosures on intentions with holdings (and the financing of their acquisition)

12.2. While the Transparency Directive does not contain any obligation regarding disclosure on intentions with holdings, such an obligation is not unknown within the EU. Disclosure on intentions with holdings is already requested in France and Germany (see Box 12.1) and its possible application has been considered in other Member States[404]. However, the vast majority of Member States have not imposed such a requirement[405]. It should be noted that disclosure on intentions with holdings also bears some similarity with the US disclosure system, which requires filing of extensive information on Schedule 13 D when thresholds of 5% and each additional 1% are crossed. In China, information about investors' intentions may also be required[406].

Box 12.1 – Disclosure on intentions with holdings: France and Germany

In **France**, pursuant to a longstanding regime, which has been tightened in 2009, enhanced disclosure is required when certain thresholds are met, i.e. 10%, 15%, 20% and 25%. The information to be disclosed includes how the acquisition of the shareholding is being financed, guarantees given in this respect and the acquirer's planned strategy with regard to the issuer. The investor needs also to disclose whether the shares are held in full ownership or through stock lending. The declaration is made to the company and to the French competent authority within 10 working days. Then, it is made public.

Under the new regime, declaring investors are now allowed to file an updated version of their declaration if their intent has changed; this update is no longer subject to material changes in the economic environment, situation or ownership of the entities concerned, but simply to the filing of a new declaration that runs for another 6 months. This unconditional right to update the filing is the counterparty to the new requirement that more precise information be given.

In **Germany**, the Risk limitation Act of 2008 introduced similar requirements although they are only applicable since May 2009. Investors reaching or exceeding the 10% threshold (or a higher threshold) of voting rights in a listed company must disclose the intentions they pursue with this investment within 20 trading days following their reaching or exceeding such threshold (unless the threshold is only crossed temporarily for a short period). Investors are in particular requested to disclose whether: (1) the acquisition is for the purpose of implementing strategic objectives or achieving trading profits;

[404] For instance, in the NL.

[405] See also CESR (September 2008), Annex 2, replies to question 71. Interestingly, the former Belgian legislation provided for a requirement to disclose intentions when the investor reached or crossed the 20% threshold. This requirement has disappeared from the new legislation transposing the Transparency Directive.

[406] See Mazars (2009), section 6.3.1 and 6.3.2.

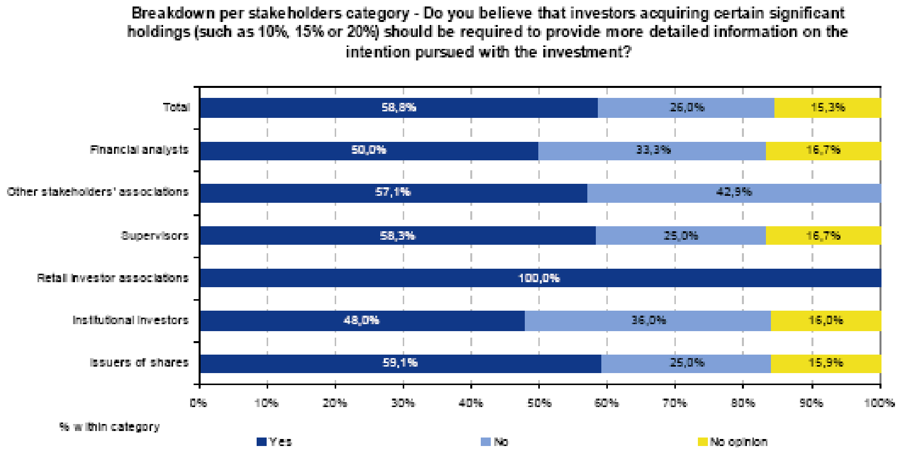
(2) they intend to acquire further voting rights in the following 12 months; (3) they intend to exercise any influence on the administrative, management or supervisory bodies of the issuer; (4) they seek a material change in the capital structure of the company, in particular in relation to the ration between debt financing and equity; and (5) they seek a major change in the dividend policy. In addition, investors will need to provide information on the origin of the funds used for acquiring such shares by indicating whether the funds used to acquire the voting rights are debt or equity.

If the objectives change, the investor in question is required to update its previous statement. The deadline is also 20 trading days. There are some exceptions to the notification for certain types of companies. Also, issuers may waive (in their articles of association) this notification obligation. Issuers should disclose the notifications received (or the failure to have done so).

12.3. Those in favour of requesting qualified investors to disclose their intentions with holdings (as well as other related information) generally underline the benefits of enhanced transparency for improving corporate governance: such enhanced transparency would help in building at better relationship between management and qualified shareholders as well as between shareholders.

12.4. The majority of stakeholders surveyed in the external study on the operation of the Directive[407] appear to be in favour of requesting qualified investors (those acquiring a significant holding of voting rights such as 10%, 15% or 20%) to provide more detailed information on the intention pursued with the investment (see Chart 12.1)[408], although views differed significantly depending on the geographical location[409]. In any event, views were also expressed that, if implemented, such requirement should be accompanied by a clear statement that declarations of intent should not be used by national authorities as a protectionist tool.

Chart 12.1 – Views on whether qualified investors should provide information on intentions with holdings. Cf. Mazars (2009), p.117.



12.5. Concerning the type of information that could be disclosed, this study[410] shows that stakeholders would favour the following information, by order of priority (see Chart 12.2): (1) intent to acquire control (20%); (2) intent to continue to buy shares

407 Mazars (2009), section 3.7.

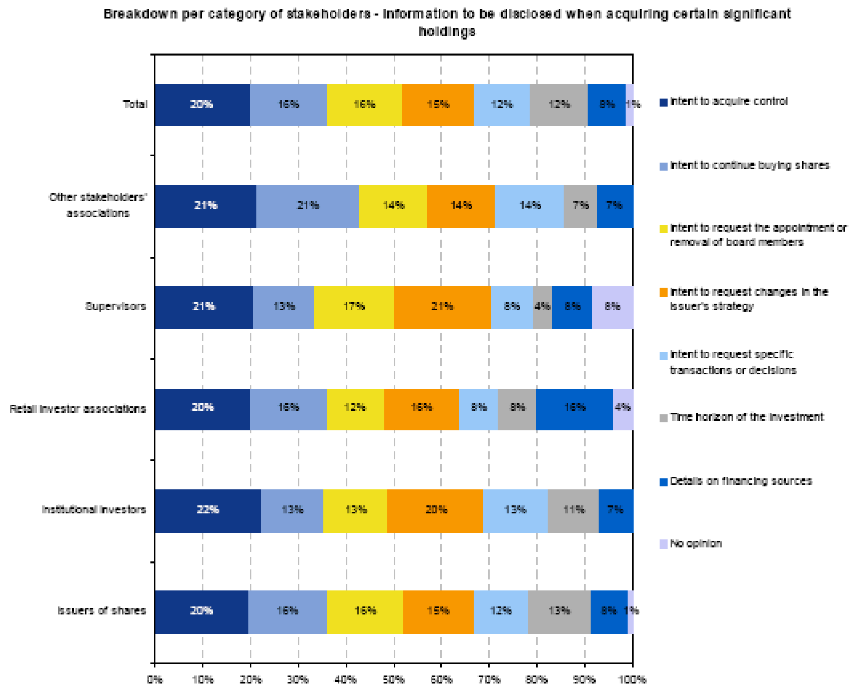
408 Nevertheless, industry associations have mixed views. *Ibid*. section 3.7.1.

409 The idea would be strongly supported by stakeholders from Ireland, Germany, France, Spain, Italy, Hungary, Slovakia, Poland, Romania and Austria. However, a majority of stakeholders would not support the idea in Luxembourg, Sweden and the UK. *Ibid*.

410 *Ibid*. section 3.7.2.

(16.4%); (3) intent to request the appointment or the removal of board members (15.8%); (4) intent to request changes in the issuers' strategy (15%); (5) time horizon of the investment (12.3%); (6) intent to request specific transactions or decisions (11.4%); and (7) details on the financing sources (8.2%). It can be noted that supervisors and, to a lesser extent, institutional investors consider the "intent to request change of strategy" and the "intent to acquire control" to be equally important. For retail investors associations, the information on the "source of financing" is considered of high importance.

Chart 12.1 – Information to be disclosed when acquiring certain significant holdings. Cf. Mazars (2009), p.118.



12.6. The study[411] outlines that stakeholders (in interviews) consider that declarations of intent are considered useful. Although these declarations may be worded in such a way as to preserve some flexibility for the declaring investor, it is generally acknowledged that they provide some valuable information. It is considered that the declaring investor must be reasonably serious in its declaration and consistent in its subsequent behaviour. This declaration is seen as important information for investment purposes, because they give an indication to existing shareholder on the likelihood of a take-overbid and, to potential shareholders, on the estimated future value of the company.

12.7. However, as explained by the Commission staff working document of 2008, enhanced transparency requirements may also have adverse consequences, in particular in the market for corporate control[412]. Indeed, the obligation to disclose information regarding the intention to acquire control in a company (i.e. anticipating on a forthcoming takeover bid) at an earlier stage may increase the price of the target

411 *Ibid.*

412 See European Commission (December 2008), §21.

company's shares and could therefore increase the price of a future bid (which could render it unattractive). Furthermore, such disclosure gives the management of the target company an "early warning signal" of a potential bid, which allows it to take defensive measures in an attempt to frustrate the bid. The surprise effect of the takeover is key, however, in terms of its success. The notification of intentions at a 10% level takes this surprise effect away. As a result, future bids are more difficult or costly. An additional effect of the declaration is that, when an investor declares he has no intention of acquiring control, he may be prevented from launching a bid in the immediate period (unless a new declaration is made), thereby significantly limiting the contestability of control. Finally, in order to avoid having to declare their intentions, potential bidders are discouraged from acquiring holdings above the set threshold (generally 10%) or from reaching a higher notification threshold as long as they are not prepared to launch a takeover bid.

12.8. ESME also outlines that requesting disclosure on intentions may not give the desired effect: recent cases show that the question whether a party wants to disclose significant holdings, depends on the intention behind the building of these positions. As a result, the investment community is somewhat sceptical about the effectiveness of declaration of intentions. Besides, ESME underlines that there is the fundamental concern that there are no objective criteria to judge investors' intentions (one cannot blame people on their intentions)[413].

12.9. The external study on the operation of the Transparency Directive concludes by recommending the introduction of enhanced disclosure requirements for significant holdings (see Box 12.2)

Box 12.2 - Possible improvement n°12 to the Transparency Directive. Cf. Mazars (2009), p. XV and 78.

12. Introduce enhanced disclosure requirements for significant holdings: *the applicable thresholds should be significant enough to be meaningful (for example 10% and 20%). Information could include a statement regarding the investor's intent (regarding the potential acquisition of control, the desire to continue to buy shares, the willingness to change the composition of the Board, the intention to modify the strategy of the company), if possible some information on the sources of finance and the time horizon of the investment, and the status of the investor (fully exposed to the economic risk of the shares or not).*

12.10. The European Parliament also called in 2006 and 2008 for enacting legislation in this area[414].

B) Information on major investors' voting policies

12.11. The European Commission Company Law and Corporate Governance Action Plan had already suggested as early as 2003 that institutional investors should be obliged to disclose their investment policy and their policy with respect to the exercise of voting rights in companies in which they invest and to disclose to their beneficial holders at their request how these rights have been used in a particular case. In the Action Plan, the Commission's intention was expressed to propose a Directive in the

413 ESME (November 2009), p.10.

414 European Parliament (June 2006), §43, in relation to institutional investors; and European Parliament (September 2008), annex to the Resolution.

mid-term period of 2006-2008[415]. Although the suggestion found large support as to its objective, the idea of dealing with it in a Directive was much more cautiously received by respondents[416].

12.12. When the Directorate General for Internal Market and Services on 20 December 2005 launched a public consultation on future priorities for the Action Plan on the Modernisation of Company Law and Corporate Governance to adapt it to the economic and societal changes, it came back on the question[417] and received similar reactions as in 2003[418].

12.13. More recently, the European Parliament in its Resolution on transparency of institutional investors[419] asked for an obligation to be imposed on hedge funds and private equity to disclose and explain vis-à-vis the companies whose shares they acquire or own, retail and institutional investors, prime brokers and supervisors their investment policy and associated risks.

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415 European Commission (May 2003), p.13.

416 European Commission (November 2003), p. 9-10.

417 European Commission (December 2005b), p.7-8.

418 European Commission (May 2006), p. 12-13.

419 European Parliament (September 2008). The European Parliament had previously recalled that "transparency is needed with regard to "*voting policy*" of institutional investors, see European Parliament (June 2006), §43.

ANNEX 13 – ALTERNATIVE SYSTEMS FOR THE NOTIFICATION OF MAJOR HOLDINGS OF VOTING RIGHTS

13.1. In the general context of a financial crisis related in part to insufficient transparency from investors and market players (see Annex 2), useful lessons may be drawn from international comparisons on disclosure of material shareholdings, in particular the existing regimes in US, China, Japan and Switzerland.

A) Thresholds

13.2. In case of acquisition or disposals of major holdings, notifications are usually required upon crossing thresholds in most jurisdictions. They are computed on the basis of both increases and decreases of shares and voting rights, except in Switzerland where only voting rights are taken into account. The initial threshold is set at 5% in all jurisdictions, except Switzerland (where it is set at 3%). It should be noted that it is often authorized for companies to impose lower thresholds (for instance in China), although doing so is not a market practice.

13.3. The subsequent notification thresholds may be either every 5% (China and Switzerland) or every 1% above 5% (Japan and US). In the US, notification may even be required for moves smaller than 1%, if it is otherwise significant.

B) The overall notification system

13.4. It is interesting to describe in particular the notification regimes in China and in the US which have sophisticated systems that take into account the relative position of the shareholder or its intent.

13.5. In the US, notification requirements are different for the initial reporting and for the subsequent amendment to the initial notification.

Notifications in the US

<u>Initial Reporting</u>

A person (or a group of persons) that acquires beneficial ownership of more than 5% of a class of voting equity securities must report such acquisition to (i) the SEC), (ii) any stock exchange on which the securities are listed, and (iii) the issuer.

A person is deemed to be a beneficial owner of any equity security of such person or group has or shares:

(i) *voting power* (including the power to vote, or to direct the voting of, the security) or

(ii) *investment power* (including the power to dispose, or to direct the disposition of, the security).

In addition, a person is deemed the beneficial owner of any equity security underlying other equity linked instruments if:

(a) such instruments were acquired with the purpose or effect of changing or influencing control of the issuer or

(b) their holder has the right to acquire the underlying equity security *within 60 days* through the exercise or conversion of such instruments; provided that the exercise or conversion of the equity-linked instruments is not subject to a material contingency outside the control of the holder of the instruments.

Any person acquiring beneficial ownership of more than 5% must report it by filing a form with the SEC under cover of **Schedule 13D**, with the exception of certain specified categories of investors who may instead file a simpler form under cover of **Schedule 13G**.

Any person acquiring beneficial ownership must notify, inter alia, the source and amount of funds used to acquire the securities, the purpose of the acquisition, including any plans or proposals of the acquirer for future purchases or sales of issuer's stock or for any changes in the issuer's management or board of directors or any major corporate transaction affecting control of the issuer and any arrangements to which the acquirer is a party relating to the issuer's securities (including debt securities and securities not registered under the Exchange Act).

Passive investors, i.e. any persons not seeking to acquire or influence control of the issuer who own less than 20% of a registered class of the issuer's securities are subject to simpler notification requirements.

<u>Amendments to previous filings</u>

Upon the occurrence of any material change in the information included in a previously filed report including the acquisition or disposition by such reporting person of 1% or more of the relevant class of equity securities, such information should be amended.

13.6. The Chinese notification system is worth mentioning because it provides for different requirements depending on the actual situation of the investor acquiring an interest in the issuer.

Notification in China

If an investor and its concerted parties are not the largest shareholder or actual controller of a listed company, and they together hold shares more than 5% but less than 20% of the issued shares of a listed company, they shall file a standard report on the change of equities. If the aforesaid investor and concerted parties (holding more than 5% but less than 20% of the shares) are the largest shareholder or actual controller of a listed company, they shall file a detailed report.

If the shares held by an investor and its concerted parties reach or exceed 20% but do not exceed 30% of the issued shares of a listed company, they shall also file a detailed report on the change of equities. If such investors are the largest shareholders or actual controllers of such listed company, they shall in addition provide independent third party verification.

The triggering event of the notification is an increase or decrease of 5% in the number of shares or voting rights within the two bands.

The system may thus be summarized as follows:

	Percentage above 5% and below 20%	Percentage at least 20% but below 30%
Investor is not largest nor controlling shareholder	Standard notification	Detailed notification
Investor is largest or controlling shareholder	Detailed notification	Detailed notification with independent third party verification

C) Content of the disclosure

13.7. In addition to the percentage of voting rights held and number of shares, the percentage of capital held, most of the jurisdictions require the description of chain of control, the date of the transaction and the identity of the shareholder.

13.8. In the US, the sources of funding of the investor for the acquisition must be disclosed, which, in some cases, may provide useful information about short term or long term investment strategy of the holder (short term active investors are often highly leveraged). The US system also requires the disclosure of the purpose of the acquisition[420], including any plans or proposals of the acquirer for future purchases or sales of issuer's stock or for any changes in the issuer's management or board of directors as well as the filing of supporting documents (such as contracts) which allow almost simultaneous verification of the accuracy of the statements made by investors.

13.9. In China, in the standard declaration the investor must notify purposes for shareholding, whether the investor and concerted parties intend to continuously increase their equities in the listed company within the next 12 months and brief information on the purchase and sale of the shares of the said company through the securities transactions at the stock exchange within the preceding 6 months of the change of equities. When investors become significant (holding of more than 20%), the identity of controlling shareholders and actual controllers of the investor and concerted parties, the structure chart on their equity control relationship should be disclosed, the prices, necessary capital, sources of capital or other payment arrangements for acquiring relevant shares, as well as other information. If the investor is the controlling shareholder, the information provided in the notification must be verified by an independent third party. In this case, the investor needs to hire a financial consultant to issue verification opinions concerning the contents disclosed in the report on the change of equities.

[420] It should be noted that some jurisdictions within the EU (such as Germany and France) also require disclosure of intent when certain thresholds are crossed.

ANNEX 14 – CORPORATE GOVERNANCE-RELATED AND NON-FINANCIAL DISCLOSURES

A) Corporate governance-related disclosures

14.1. In addition to the disclosure of financial reports required by the Transparency Directive, EU law also requires (or, as appropriate, recommends) listed companies to make some periodic non-financial (but corporate governance-related) disclosures, generally in connection with the annual financial report. This relates in particular to: (i) the Corporate Governance Statement; (ii) the Report under Article 10 of the Takeover Bids Directive (when not included into the Corporate Governance Statement); (iii) the disclosures related to the remuneration policy of the company; or (iv) the disclosures connected to the independence of directors.

14.2. The Corporate Governance Statement[421]: must contain:

- "(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 takeover 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."

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421 Article 46a of the 4th Company Law Directive.

Depending on national legislation, the Corporate Governance Statement may be included in the annual report or be a separate report (but published together with the annual report).

A recent external study conducted for the Commission provides an overview of the various monitoring and enforcement mechanisms in the Member States of the European Union concerning corporate governance rules that are laid down in codes of corporate governance. It assesses the level of compliance of companies with the provisions of corporate governance codes and examines the availability and quality of explanations for deviations from these codes for a sample of 270 listed companies from 18 Member States. Two surveys were conducted in the framework of this Study. They aimed at evaluating the perception of corporate governance codes by director institutes and business associations on the one side, and EU shareholders on the other side. On this basis, the Study evaluates the effectiveness of the different monitoring and enforcement systems and presents suggestions to improve their effectiveness[422].

14.3. Article 10 of the Takeover Bids Directive requires disclosure by issuers of shares of some corporate governance related information, such as: the structure of their capital, restrictions on the transfer of securities, significant direct and indirect shareholdings, agreements between shareholders, powers of board members, etc.

14.4. Concerning the remuneration policy of the company[423], the Commission Recommendation 2004/913/EC[424] recommends that listed companies disclose a statement of the remuneration policy of the company, as part of a remuneration report or the annual report, and publish the statement on its website. The statement should focus on the structure of directors´ remuneration policy for the following financial year and contain an overview of the implementation of the remuneration policy in the previous financial year. A number of elements, such as information on variable remuneration, performance criteria and termination payments, are recommended to be included in the statement. It is also recommended to disclose information on the decision making process as regards the remuneration policy, including information on the Remuneration Committee. Furthermore, listed companies should disclose the total remuneration and other benefits granted to individual directors in detail in the annual accounts or the remuneration report. In this respect, a number of possible remuneration elements, such as bonuses, termination payments or share based remuneration, are recommended to be disclosed. Commission Recommendation 2009/385/EC[425], which complements the abovementioned Recommendation, contains additional elements that should be included in the remuneration statement, such as information on long term performance criteria, methods applied to determine whether performance criteria

422 Riskmetrics (2009).

423 On this issue, see also European Corporate Governance Forum (March 2009b).

424 Commission Recommendation 2004/913/EC of 14 December 2004 *fostering an appropriate regime for the remuneration of directors of listed companies*, OJ L 385, 29.12.2004, p. 55. Available at: http://ec.europa.eu/internal_market/company/directors-remun/index_en.htm

425 Commission Recommendation 2009/385/EC of 30 April 2009 *complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies*, OJ L 120, 15.5.2009, p. 28. See also European Commission (April 2009).

have been fulfilled and deferment and vesting periods for variable and share-based remuneration.

14.5. Regarding the independence of directors, Commission Recommendation 2005/162/EC recommends that the board (of listed companies) makes public "*at least once a year (as part of the information disclosed by the company annually on its corporate governance structures and practices) adequate information about its internal organisation and the procedures applicable to its activities, including an indication of the extent to which the self-evaluation performed by the (supervisory) board has lead to any material change*". It also recommends that the (supervisory) board should ensure that shareholders are properly informed as regards the affairs of the company, its strategic approach, and the management of risks and conflicts of interest[426].

14.6. The issue has been raised as to whether these disclosure requirements should be integrated into the Transparency Directive regime.

14.7. Some of the possible consequences of such integration could, *inter alia*, be:

– (i) facilitating listed companies' compliance with all periodic disclosure obligations, including through the full application of the home Member State principle of the Transparency Directive; or

– (ii) providing more clarity on the relation between such disclosures and the annual financial report[427].

B) Other non-financial disclosures

14.8. Disclosures of non-financial character made by listed companies in connection to Environmental, Social and Governance (ESG) issues[428] also appear as an important area of debate.

14.9. There are some related provisions in EU law. For instance, Article 46(1)(b) of the 4th Company Law Directive requires since 1 January 2005 companies to include information relating to environmental and employee matters in their annual report to the extent necessary for an understanding of the company's development, performance or position. Considering the additional administrative burden such reporting may place on companies of certain size, Member States have the option to exempt small- and medium sized companies from those provisions. Similar non-

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426 Commission Recommendation 2005/162/EC of 15 February 2005 *on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board*, OJ L 52, 25.2.2005, p. 51. See in particular §§ 9.1 and 9.2. Available at: http://ec.europa.eu/internal_market/company/independence/index_en.htm

427 This could also facilitate some content harmonisation of these reports (see also §17) of this Paper.

428 There is neither a precise definition of ESG for regulatory purposes, nor a clear delineation of its scope. It appears nevertheless that ESG disclosures would fit within the larger debate on Corporate Social Responsibility (CSR). CSR has been defined by the Commission as "*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.*" For more information on CSR, see European Commission (March 2006).

financial reporting rules apply in relation to the consolidated annual reports[429]. The provisions concerning non-financial disclosures are consistent with Commission Recommendation 2001/453/EC[430] dealing with environmental issues in companies' financial reports. Some Member States have ESG disclosure requirements that go significantly beyond the requirements of the 4th Company Law Directive[431].

14.10. A number of stakeholders (non-governmental organisations, some investor organisations, some individual enterprises)[432], as well as the European Parliament[433] and some Member States governments, are regularly requesting to include further provisions regarding ESG disclosures in EU legislation applying, at least, to listed companies. They call for harmonisation and propose to put a European framework of non-financial reporting in place. Some would favour such a framework to become mandatory and/or being integrated into the financial reports of companies.

14.11. Better and more widespread disclosure of ESG information could potentially: help to improve the accountability of business; help enterprises themselves to better integrate sustainability issues into operations and strategy; and contribute to a more efficient allocation of capital and to the reduction of systemic risks.

14.12. The European Commission has recently hosted a series of multistakeholder workshops on ESG disclosure[434]. Stakeholders frequently state the need for ESG disclosure to be: comparable (between companies of the same sector and over time); material (relevant to the particular circumstances and strategy of the individual company); credible and accurate (so probably assured by a 3rd party or subject to scrutiny by stakeholders); forward-looking (so addressing future risks and opportunities); and cost effective (so avoiding unnecessary costs falling on enterprises). Much ESG disclosure is currently not perceived to correspond to these characteristics. Some non-governmental organisations also stress the need for a legal "right to know", allowing communities potentially affected by actual or future company activities to access relevant information on demand. Employers federations argue that a "one-size-fits-all" framework for ESG disclosure should not be imposed on enterprises.

14.13. There is on-going work regarding non-financial reporting at different levels, such as the Global Reporting Initiative (GRI), the draft ISO 26000 standard on social responsibility, the OECD guidelines for Multinational Enterprises, the UN Global Compact, the Association of Chartered Certified Accountants (ACCA) Guide to Best Practice in Environmental, Social and Sustainability Reporting, the European

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429 See Article 36 (1) of the 7th Company Law Directive.

430 European Commission Recommendation 2001/453 of 30 May 2001 *on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies*, OJ L 156, 13/06/2001, p.33.

431 The French *Loi sur les Nouvelles Régulations Economiques* (2001) requires public listed companies to report against a set of social and sustainability issues. In December 2008 Denmark passed a law making it mandatory, on a comply or explain basis, for the 1000 largest Danish enterprises, listed companies and state-owned enterprises to report on corporate social responsibility in their annual reports.

432 E.g. European Coalition for Corporate Justice (ECCJ), European Sustainable Investment Forum (Eurosif), European Federation of Financial Analysts Societies (EFFAS).

433 European Parliament (March 2007), §27.

434 See summaries of discussions here: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/swedish-presidency/index_en.htm

Federation of Financial Analysts Societies (EFFAS), and the EU Eco-Management and Audit Scheme (EMAS) in addition to country-level guidelines and obligations in place.

14.14. There is growing interest in the concept of integrated reporting financial and non-financial reporting[435]. An International Connected Reporting Committee (ICRC) is due to be established by the end of 2010, to oversee the development of a connected and integrated reporting model that covers financial and sustainability information.

14.15. TheTransparency Directive could be an appropriate vehicle to address, with regard to listed companies, some of the perceived short-comings of current ESG disclosure rules and practice.

14.16. A specific issue concerns Recital 14 of the Transparency Directive, which contains an indirect reference to this type of disclosure. This recital states that the "*home Member State should encourage issuers whose shares are admitted to trading on a regulated market and whose principal activities lie in the extractive industry to disclose payments to governments in their annual financial report. The home Member State should also encourage an increase in the transparency of such payments within the framework established at various international financial fora*." The main objective of such disclosure is to contribute to the transparency of budgetary resources in developing countries which depend on the exploitation of natural resources.

14.17. So far, none of the EU Member State has transposed the recommendation of recital 14 into national binding legislation. Some of the issuers concerned by recital 14 are voluntarily reporting on payments to governments under certain circumstances. Cooperation between issuers and governments is taking place in some international fora such as the Extractive Industries Transparency Initiative[436].

[435] See Eccles & Krzus (2010)

[436] www.eiti.org

ANNEX 15 – ACCESS TO AND STORAGE OF INFORMATION ON LISTED COMPANIES

15.1. This Annex:

- A) introduces the EU legislative framework concerning the information about listed companies which should remain available or disclosed to the public;
- B) explains the vision of the Transparency Directive regarding access to regulated information and how such vision has been implemented;
- C) describes the first steps taken towards the interconnection of Officially Appointed Storage Mechanisms (OASMs);
- D) provides a comparison with the third country systems;
- E) presents the issues for further reflection in terms of enhanced interconnection (E1) and common input formats (E2); and
- F) explains the parallel process on the interconnection of business registries.

A) Relevant information about listed companies available or disclosed to the public

15.2. Companies whose securities are listed in EU regulated markets are subject to several disclosure requirements under EU law (as well as under national law not necessarily connected to EU law). These obligations usually require that disclosed information remain available to the public or to interested parties. However, the way in which the information should remain available is not fully harmonised:

– The 1st and 11th Company Law Directives (which apply also to non-listed limited companies) require companies to file certain documents and particulars (such as annual accounts, statutes/articles of associations etc.) with the business (or commercial) registries;

– The Shareholders Rights Directive (which applies only to listed companies) requires listed companies to communicate certain information (essentially in relation to the organisation of general meetings) to shareholders and to keep such information available in their websites. This directive is partially linked to Articles 17 and 18 in the Transparency Directive;

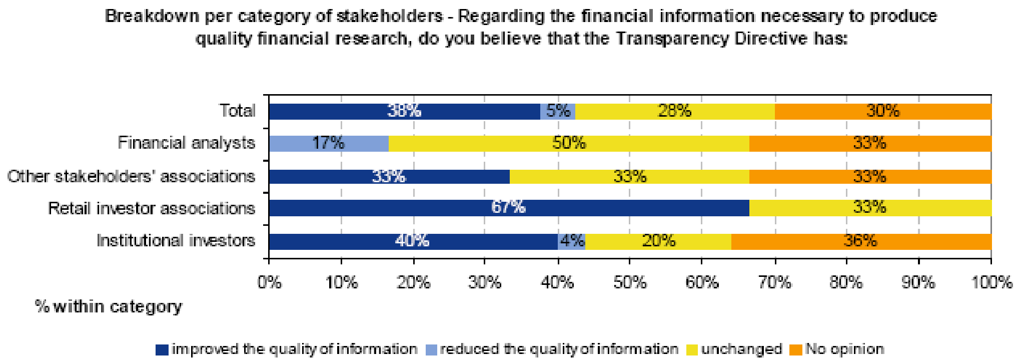
– The Directive on Takeover Bids foresees (Article 8) that the bid documents should be "available" to shareholders but it is silent on the means;

– The Prospectus Directive requires that the prospectuses are available to the public. Different means are foreseen (as alternatives): newspapers, printed form available at the premises of the issuer or the regulated market; issuer's website (and financial intermediaries' websites); website of the regulated market; or website of the competent authority;

– The Market Abuse Directive (Article 6(2)) requires issuers to, without prejudice to the measures taken to comply with the obligation to inform the public of inside information, post on their Internet sites all inside information that they are required to disclose publicly.

– The Transparency Directive (Article 21) requires that 'regulated information' (essentially, disclosures on major holdings, on financial reporting and certain disclosures pursuant to the Market Abuse Directive) is filed with a registry (so-called "storage mechanism") where it would remain available to market participants.

15.3. The resulting situation is not attractive for users of financial information which need to produce quality financial research. The Transparency Directive has been a step in facilitating access to financial information, and recognised as such. Users of financial information surveyed in the External Study believe that the Directive has improved or not changed the quality of information necessary to produce quality financial research (although some financial analysts are of the opinion that the quality of this research has declined[437].



15.4. However, easing access for users of information would require additional steps, such as establishing (at a minimum) a single action access point to disclosed information, comprehensive databases, electronic filing with straight through processing facilities and harmonisation of input standards so as to make information comparable. This is not yet achieved today.

B) The vision of the Directive on access to regulated information and its implementation

B1) Immediate access to regulated information: dissemination

15.5. Concerning immediate access to regulated information, Article 21(1) of the Directive requires issuers to disclose regulated information in a manner ensuring fast access to such information on a non-discriminatory basis and without charging investors any specific cost for providing such information. According to the Directive, the home Member State shall require the issuer to use such media[438] as may reasonably be

437 Mazars (2009), section 4.3.2.4.

438 Recital 8 of the Directive clarifies that the Home Member State has the right to request the issuer to publish parts of or all regulated information through newspapers.

relied upon for the effective dissemination of information to the public throughout the EU, but may not impose an obligation to use only media whose operators are established in its territory. Article 12 of Directive 2007/14/EC set out some minimum technical standards in this regard.

15.6. The external survey conducted for the Commission shows that the dissemination rules of the Directive requiring the pushing of regulated information to media are positively perceived[439].

Interestingly, this external study outlines that even if practices are very diverse in Member States, the way companies comply with the obligation to disseminate their Regulated information has not radically changed with the Directive[440]: 70% of stakeholders using the information believe that issuers use the appropriate media to disseminate the financial information that they produce[441]; 45% do not believe that the Directive has changed the way financial information is made public[442] and 50% of users of financial information feel that the information easily reaches the investor[443].

15.7. The study outlines nevertheless that no enforcement by supervisors of the obligation to publish on an "EU wide" basis is happening[444].

15.8. The poor cross-border dissemination of regulated information by smaller listed companies and the low interest shown by analysts and investors in such information (and *a fortiori* in those companies) remains, however, an issue (the so-called "black hole" problem[445]).

While large investors seem to believe that the Directive has facilitated access to information disclosed by smaller listed companies, many smaller listed companies generally complaint about the lack of interest by foreign investors: investors and analysts are considered to concentrate on major companies and the cross-border

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439 See generally Mazars (2009), section 4.3.

440 According to Mazars, in practice, issuers continue to use data disseminators to ensure a wide dissemination of the regulated information. Some Member States have introduced a formal procedure to approve data disseminators and check their efficiency and integrity: (UK, DE). Others have put in place electronic systems allowing issuers, with only one “click”, to send regulated information simultaneously to the Supervisor, the Exchange and a data disseminator that will spread it to the press: (PL, PT and ES). In PT and ES the Supervisor acts as a disseminator. In PL, the information is also automatically stored. But all in all, for the dissemination of regulated information, the means put in place for issuers to comply with the requirement of the Directive have not changed and have no induced new costs. See Mazars (2009), section 4.3.1.3.

441 *Ibid*., section 4.3.1.2.

442 *Ibid*., section 4.3.1.1.

443 *Ibid*., section 4.3.2.1.

444 *Ibid*., section 4.3.1.3. It should be noted that in some countries (such as PT or ES) supervisors have an active role in disseminating regulated information. According to this study, in general supervisors in the EU confirmed their reticence to play a role in disseminating Regulated Information: they considered themselves not to be ill equipped to spread information. Exchanges have expressed the same view but they are more prepared to play a role in giving access, or even storing, Regulated Information. However major exchanges have recently sold their specialised subsidiaries offering dissemination storing and “added value” information services (NYSE Euronext and Deutsche Börse). Both categories of stakeholders would clearly prefer that the dissemination of Regulated Information be left to market forces.

445 Mazars (2009), sections 4.3.2.5 and 4.3.2.6.

visibility of smaller listed companies is poor. The external study outlines that "*market players seem to be in a "catch 22" situation: SMEs regret the low level of cross-border interest of Analysts and Investors and therefore are reluctant to spend money to ensure wider dissemination (translation into English in particular). On their side, analysts and investors believe that they do not receive sufficient information from non domestic SMEs, and therefore are reluctant to invest in those companies*."[446]

The solution for the so-called "black hole" problem is not necessarily legislative, but improvements on the mechanisms to access regulated information over time could perhaps be explored as a gateway to get interest into smaller listed companies (see below, section E of this Annex)

15.9. It has also been outlined that some Member States still require a paper-based publication of some regulated information in newspapers, which would go against the modernisation spirit of the Directive[447]. The cost of publication of regulated information in printed press is also invoked as a particular problem for smaller listed companies. They expressed the view that posting information on their website should be sufficient to comply with the dissemination obligation of the Directive[448].

B2) Access to regulated information over time: storage

15.10. Concerning access to regulated information over time, the Transparency Directive has established a **specific regime providing for a publicly accessible database on disclosed information**. Article 21(2) of the Transparency Directive requires each Member State to officially appoint at least one "*mechanism for the central storage of regulated information*"[449]. Unlike the US model (see sub-section D1 of this Annex) the Directive tries to establish some centralisation at Member State level not at European level. A certain centralisation is also recommended by IOSCO[450]. The Directive is, however, not prescriptive as to the practical solutions.

- Designation of OASMs. OASMs storing regulated financial information are to be appointed nationally by Member States. There should be at least one OASM storing this information at the Member State level. Legally speaking, this does not preclude different Member States from appointing a common OASM.

- How is the storage to be organised in practice? The Directive is not prescriptive on this issue. It simply states that the OASM should comply with minimum quality standards of security, certainty as to the information source, time recording and easy access by end users. The Directive foresees as well the possibility for the

446 *Ibid,* section 4.3.2.5.
447 Mazars (2009), section 4.3.1.1. However, see also recital 8 of the Transparency Directive.
448 Mazars (2009), section 4.3.1.1.
449 Before the enactment of the Directive, regulated financial information was already (usually partially) stored in many Member States and made available to the public, either by the Competent Authorities themselves, by Stock Exchanges, by business registries (e.g. annual accounts) or by others (issuers or private service providers).
450 IOSCO (February 2010), p.25.

Commission to adopt implementing measures specifying the minimum standards for the central storage of regulated information[451].

– Who should be in charge of operating the OASM? The Directive is silent on this. It is a national decision. It can be a public authority (such as supervisors) or a private party (such as the stock exchange), provided it has been officially appointed. In their daily work, OASMs will be supervised by the national Competent Authorities described in Article 24 of the Directive.

– Who should pay for the cost of the OASM? There is no prescription in the Directive as to the cost model, but recital 25 points out that "*information which has been disseminated should be available in the home Member State in a centralised way allowing a European network to be built up, accessible at affordable prices for retail investors […]*" [emphasis added]

15.11. One **advantage** of the Directive model is that if the development of OASMs is successful, it would allow investors to have better access to information (to be disclosed under the Directive obligations) on issuers, including on small issuers. It would also allow for further centralisation of the storage obligations, so as to find all information on one company in a single place.

15.12. Among the **disadvantages** of the Directive model is the risk that the OASMs adopt divergent incompatible standards and formats that would make further integration cumbersome and lengthy, preventing the users from:

– accessing business information in a timely fashion, in the language of choice;

– processing business information automatically, in a computer readable format;

– effective use of the European regulated information for cross-border purposes, either of regulatory or business nature.

15.13. **Member States have implemented Article 21(2) in different manners**. In most of the Member States either the competent authority (BE, BG, DK, EE, ES, HU, LV, NL, PL, PT, RO, SE, UK) or the stock exchange[452] (CY, EL, FI, IE, IT, LT, LU, MT) has been appointed to the national OASM. In three Member States, some other body has been appointed as OASM: AT (Oesterreichische Kontrollbank AG); DE (Business register); and FR (Official Journal). Member States have not appointed common OASMs but the Finnish, Icelandic and Lithuanian OASMs are in practice operated in the same database[453]. In some Member States, the appointed OASM is an interim solution.

Table 18.1 – Links to national OASMs	
Country	**Link to OASM**

451 Cf. Article 21(4). The Commission addressed the content standards in its Recommendation on the network (see section C of this Annex).

452 Also in Iceland and Norway.

453 This is due to the fact that the local stock exchanges belonging to the NasdaqOMX group have been appointed as national OASMs. Even though the legal responsibility lies within each national stock exchange, the OASM system is operated at the group level.

Austria	OeKB (central securities depository) http://issuerinfo.oekb.at/startpage.html
Belgium	Interim solution http://www.cbfa.be/eng/gv/info/links/dBeginFrmLinksWebsite.asp
Bulgaria	Competent authority http://www3.fsc.bg/eregnews/index.jsp?action
Cyprus	Stock exchange http://www.cse.com.cy/en/Announcements/Announce_Index.asp
Czech Republic	Competent authority
Denmark	Competent authority http://oasm.dfsa.dk/
Estonia	Competent authority http://www.baltic.omxnordicexchange.com
Finland	Stock exchange http://www.oam.fi
France	Official Journal http://www.info-financiere.fr
Germany	Company Register http://www.unternehmensregister.de
Greece	Stock exchange http://www.athex.gr
Hungary	Competent authority http://www.kozzetetelek.hu
Ireland	Stock exchange http://www.ise.ie/app/announcementList.asp
Italy	Stock exchange http://www.borsaitaliana.it
Latvia	Competent authority http://www.oricgs.lv
Lithuania	Stock exchange http://www.crib.lt
Luxembourg	Stock exchange http://www.bourse.lu
Malta	Stock exchange http://www.borzamalta.com.mt/announcements/default.aspx
The Netherlands	Competent authority http://www.afm.nl/publicdatabase
Poland	Competent authority http://www.knf.gov.pl/rynek_kapitalowy/OAM/index.html
Portugal	Competent authority http://web3.cmvm.pt/english/sdi2004/emitentes/index.cfm
Romania	Competent authority http://www.cnvmr.ro/InfoUtile/en/RapoarteEmitenti/RapoarteEmitenti.html
Slovak Republic	Competent authority
Slovenia	Stock exchange www.oam.si
Spain	Competent authority http://www.cnmv.es/english/consultas/reg_ofi_ent_emisoras/reg_ofi_ent_emi_e.htm
Sweden	Competent authority https://fiappl.fi.se/FinansCentralen/search/Search.aspx
United Kingdom	Interim solution http://www.fsa.gov.uk/Pages/Doing/UKLA/RIS/FAQ/index.shtml#sip

Source: CESR

15.14. The Directive also provides for implementing powers on issues closely connected to the storage of regulated information: (i) the technical conditions under which a published (annual or half-yearly) financial report is to remain available to the public for 5 years, (including the possible adaptation of the five-year period)[454] and (ii) filing of disclosed regulated information with the competent authority in the home Member State by electronic means[455]. In both cases, an advanced storage mechanism could be a working reply to the problem.

C) The interconnection of OASM

C1) The Commission Recommendation as a first step

15.15. In addition to the creation of national OASMs, the Directive encourages the establishment of some kind of networking across Member States[456]: (i) electronic networks at national level linking OASMs to existing national business registers and (ii) the linkage of those national electronic networks at European level. However, the Directive is neutral as regards the architecture of OASMs and it does not directly make those networks compulsory.

The aim of such an interlinked network(s) would be to provide a single action point (or a one stop shop) for investors (and other interested parties) when looking for regulated financial information on listed companies. The existence of such network(s) would also facilitate the provision of added value services to investors (e.g. processed information, comparative information etc.).

15.16. Implementing powers are also foreseen for the Commission in this regard, after having reviewed the guidelines prepared by CESR on this issue[457].

15.17. Upon request of the Commission, **CESR** prepared in 2005 a **Progress Report**[458] on this issue. This Progress Report was followed by a **Report on cost issues**[459] in 2006 which provides estimates in relation to the cost of setting a national OASM and the cost of setting a European network of national OASMs. Finally, CESR delivered in later in 2006 a **formal Advice on possible implementing measures on storage of regulated information and filing with the competent authority**[460]. In its advice, CESR (i) presents 4 alternative models (A to D) for the European network with a varying degree of centralisation; (ii) suggests the minimum standards to be respected by each national OASM; (iii) describes the funding implications of setting an operating national OASM; (iv) evaluates the role of the Competent Authority in the supervision of the OASM and in adapting the standards; and (v) provides an opinion in relation to the filing of regulated information by electronic means with the Competent Authorities. In its advice, CESR expressed a preference for the so-called

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454 Cf. Articles 4(6) and 5(6). In addition to the OASMs required by Article 21(2) of the Directive, Articles 4(1) and 5(1) require issuers to ensure that the annual financial report and half-yearly financial report remain available to the public for at least 5 years. In practice, issuers comply with this requirement by making such reports available through their website. It should be noted that other directives also require issuers to make some information available through their websites (see §15.2 of this Annex).

455 Cf. Article 19(4). According to CESR (September 2008), in most Member States filing with the OASM is aligned with filing with the competent authority. See replies to questions 155-156.

456 Cf. Article 22.

457 Cf. Article 22(2).

458 CESR (March 2005).

459 CESR (April 2006).

460 CESR (June 2006).

Model C, a simple network model. Model C would consist of a single interface for end users (e.g. a website) containing a central list of all issuers Under Model C, the pan-European network would consist of a common single interface for end users (e.g. a website) containing a central list of all EU listed companies with, for each issuer, a hyperlink to the relevant storage system on which regulated information can be found. By clicking on the name of the relevant company, the user would be directed to the site of the relevant storage mechanism. The data would remain at national level and the only common element would be the list of listed companies. CESR pushed for defining the possible network as early as possible. The main argument was that it did not make sense to create isolated national storage mechanisms that would not be in a position to later interlink to each other.

15.18. Building on CESR advice, **DG Internal Market and Services consulted the public on this issue in March 2007.** The consultation document[461] contained: (i) draft minimum quality standards for the central storage and (ii) draft minimum conditions for a pan-European network of national central storage mechanisms. Preliminary discussions with Member States within the European Securities Committee were also held: preference was expressed for continuing the work toward the development of a pan-European network of central storage mechanisms without limiting the flexibility of the national mechanism in this process through the enactment of Commission's implementing measures on minimum quality standards. The issues of governance of a pan-European network and the question of Information and Communication Technology convergence appeared as priority issues compared to the quality standards.

15.19. As a result **the Commission adopted on 11 October 2007 a non-binding Recommendation**[462] **on the network of national mechanisms** storing regulated information. The main aim of the Recommendation was to give support to work undertaken by CESR regarding the pan-European network and to its suggested way forward: the so-called Model C. Hence, this recommendation suggests that Member States should take steps to set up the network model proposed by CESR.

15.20. A key role for CESR in the development of the network is also foreseen in the Commission Recommendation. **CESR has set up an initial network** by using CESR MiFID database[463] on shares admitted to trading on EU regulated markets. In essence, by clicking on the shares' name displayed on that database, users are linked to corresponding OASM. This initial network only includes the list of issuers of shares, but not of other securities. While this is a practical solution in the interim phase, it does not meeting the expectations that both CESR's original advice and the Commission's recommendations created.

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461 See http://ec.europa.eu/internal_market/securities/transparency/index_en.htm#storage

462 Commission Recommendation 2007/657/EC of 11 October 2007 on the electronic network of officially appointed mechanisms for the central storage of regulated information referred to in Directive 2004/109/EC of the European Parliament and of the Council, OJ L267, 12.10.2007, p.16. The text of the recommendation is available at: www.ec.europa.eu/internal_market/securities/transparency/index_en.htm

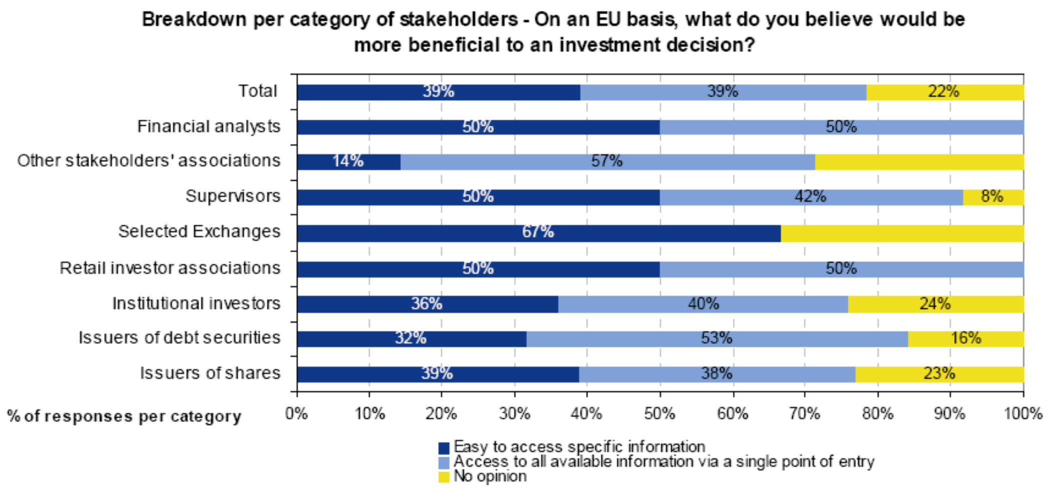
463 http://mifiddatabase.cesr.eu.

15.21. The Commission Recommendation also contains suggestions[464] on **minimum quality standards** applicable to the national storage mechanisms that would form part of the network[465].

C2) The limited results so far and the need for an evolution

15.22. Despite this Recommendation, **the impact of the Directive rules on storage of regulated information is however not encouraging**. Access to historical information on listed companies on a pan-European scale has not been simplified: interested parties need to go through 27 different OASMs[466] and the electronic network interconnecting them is only at an initial stage with rather modest results so far.

According to the External Study stakeholders do not see real changes in the storage of regulated information resulting from the application of the Directive[467] and would use the companies' websites as primary source of information rather than the storage mechanism, although they would trust more the latter[468]. However, there is a certain (but not conclusive) support for having access to all available information via a single point of entry[469].



15.23. These **limited results** raise the question as to whether the Directive storage mechanisms, as currently designed, are able to fulfil the role of "gate" to historical financial information on listed companies at pan-European level.

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464 Under Article 21 of the Directive, the Commission is legally empowered to adopt formal implementing measures regarding the minimum quality standards. However, it was decided to link such minimum standards to the development of the network. As a result, it was preferred not to impose legally binding measures on the national storage mechanisms that would constrain the development of the network.

465 According to CESR (September 2008), most of those Member States have implemented the European Commission's recommendation either as mandatory or as recommendation. See replies to question 154.

466 According to Mazars (2009), stakeholders complaint about the lack of harmonisation on the practical functioning of these databases (see section 1.8.1 of that Study).

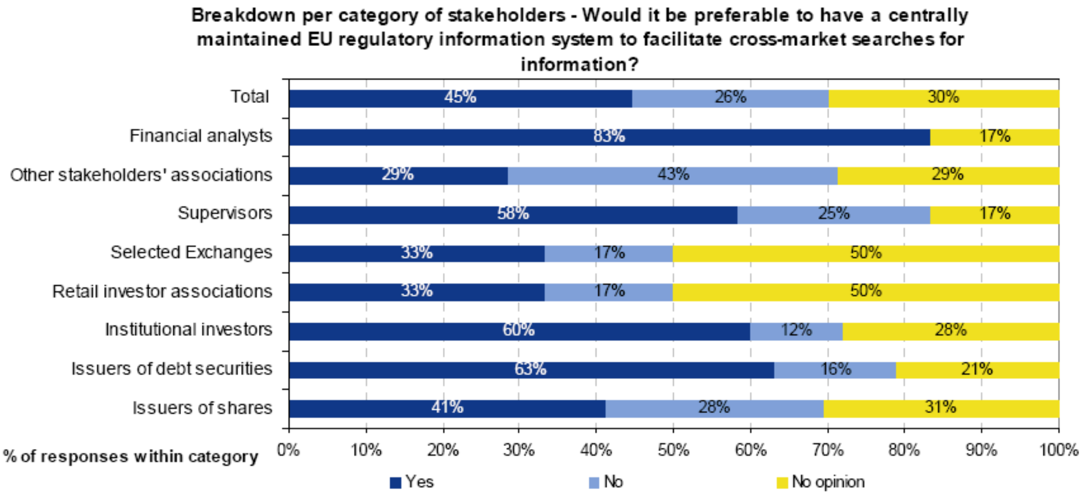
467 Mazars (2009), section 4.4.2.

468 *Ibid.*, section 4.4.3.1. At the same time, stakeholders would not be unhappy with the national independent storage mechanisms. *Ibid.*, section 4.4.2.2.

469 *Ibid.*, section 4.4.3.2.

15.24. **It appears that there is need for an evolution.** Indeed, the Commission Recommendation, and its implementation by CESR (Model C), was seen by the Commission as a first step in achieving at least a single point of access to regulated information. The Commission envisaged in the Recommendation that the network of national storage mechanisms should be further developed and invited CESR to reflect on this (see below, section E of this Annex).

15.25. **Positions are, however, diverse.** The External Study[470] outlines that, generally speaking, stakeholders believe that it would be preferable to have a centrally maintained EU system to store regulated information (63% of those who have expressed an opinion). Only industry associations are against it. The most supportive of this idea are the users of financial information (Financial Analysts, Supervisors, Retail and Institutional Investors). A majority of issuers (41%) of shares are in favour of an EU central storage mechanism, in particular recently listed companies (48%).



15.26. The support, however, is not equal depending on the category of stakeholder or its geographical origin[471]. During interviews, stakeholders commented on detail on the relevance of a central storage mechanism. Some even argue against a central system indicating that Retail Investors prefer to access to regulated information through the Internet Home page of listed companies and that Institutional Investors focus more on "added value" data vendors. This being said, Financial Analysts, Supervisors and Issuers favour an official central place for storage that would be a central access point for stored information. Whether this central point should be the regulator or a commercial entity is much debated[472].

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470 *Ibid.*, section 4.4.3.6.

471 An EU storage mechanism is particularly supported by stakeholders in Slovakia, Romania, Spain, France, Luxembourg, Poland, Hungary, Germany, Austria and Italy. Views to the contrary are expressed in Ireland, Sweden and the UK.

472 An often mentioned point is that the business case of an OASM is not obvious (in some Member States there are no applicants to become an OASM) and even Exchanges hesitate to apply. Exchanges operating on several member States also criticise the lack of harmonisation in the setting up of an OASM.

Finally, whether the central storage mechanism should be at national or at EU level is much discussed and the views are mixed. Even for a central EU access point, the underlying architecture of the system is a matter for debate (Interconnection of national OASM? Centralisation? Central access only?).

15.27. Confronted with all these complexities and believing that technological development with the Internet call for different solutions, some stakeholders propose a simpler and more straightforward idea: imposing minimum standards for issuers to store Regulated Information on their website and inviting the users of financial information to use Internet search facilities to access the stored information[473]. This decentralisation would eliminate the storage mechanisms as such.

15.28. The External Study is favourable towards the enactment of a single action point for stored information, which remains close to the existing situation (Model C): a single EU access point at CESR level with a direct Internet link to a compulsory and harmonised section of the issuers' website where the information would be stored[474].

14. A single EU access to Regulated Information: *The time has come for the EU to set up a single access point for stored information based on a serious cost benefit analysis while taking into account recent advances in technology. One option is to create a single EU access point at CESR level with a direct internet link to a compulsory and harmonised section of the issuers' website where the information would be stored.*

D) For a comparison: how is information stored and made accessible in third countries?

D1) United States

15.29. In the US, all financial information filed with the Securities and Exchanges Commission (SEC) remains available via the SEC's dedicated storage website (EDGAR) for an indefinite period[475].

15.30. In May 2008, after successfully implementing the XBRL Voluntary Filing Program the US SEC published a proposed ruling in which it phases-in mandatory use of XBRL (interactive data) for all publicly traded companies filing corporate financial statements. SEC eventually decided in December 2008 to require public companies and mutual funds to use interactive data for financial information. For public companies, interactive data financial reporting will occur on a phased-in schedule beginning next year. The largest companies who file using U.S. GAAP with a public float above $5 billion will be required to provide interactive data reports starting with their first quarterly report for fiscal periods ending on or after 15 June 2009. This will cover approximately 500 companies. The remaining companies who file using U.S. GAAP will be required to file with interactive data on a phased-in schedule over the next two years. Companies reporting in IFRS issued by the International Accounting Standards Board will be required to provide their interactive data reports starting with fiscal years ending on or after 15 June 2011.Companies will be able to

473 Storage of Regulated Information on the website of the issuer is already compulsory in several Member States. See also §15.2 of this Annex. In any event, stakeholders would already be using the companies' websites as primary source of information. See Mazars (2009), section 4.4.3.1.

474 Mazars (2009), Possible Improvement n°14.

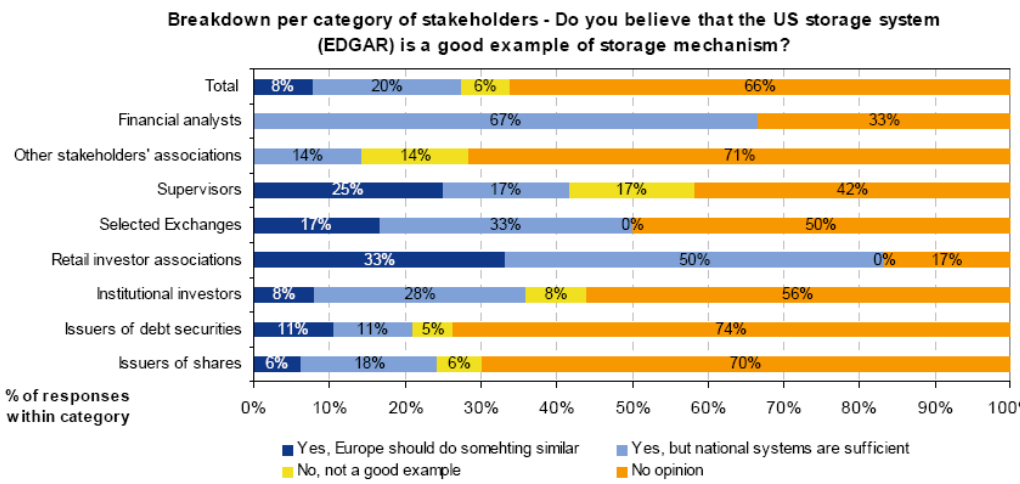
475 www.sec.gov/edgar.shtml

adopt interactive data earlier than their required start date. All U.S. public companies will have filed interactive data financial information by December 2011 for use by investors.

15.31. In June 2008, US SEC announced the "21st Century Disclosure" Initiative[476] to fundamentally rethink the way companies report and investors acquire information. This initiative has 3 phases: (1) the staff of SEC, led by Prof. Lutz, will prepare by end 2008 a high-level plan to help SEC to make the transition to an interactive company file system based on XBRL; (2) a Federal Advisory Committee will be established in early 2009. This Committee should review the high-level plan and make recommendations to SEC for implementing it; and (3) SEC would consider and begin acting on the Committee's recommendations.

In August 2008 the Securities and Exchange Commission Chairman unveiled the successor to the agency's 1980s-era EDGAR database. IDEA[477]– the new system will give investors far faster and easier interactive access to key financial information about public companies and mutual funds.

15.32. According to the External Study[478], the US storage mechanism (EDGAR) does not seem to be well known in Europe. Users of financial information (Financial Analysts, Retail and Institutional Investors) are most familiar withEDGAR and, when they expressed an opinion, they favour the creation of a similar system in the EU. A majority of Supervisors having expressed an opinion believe that the national storage mechanism is sufficient. Within Issuers of shares, Top and Recently listed companies are the most supportive of the creation of a system similar to EDGAR in the EU.



D2) Other third countries

15.33. The issue as to whether a compulsory system of central storage of regulated information is required is addressed differently in the other third countries. Durations

476 www.sec.gov/disclosureinitiative

477 http://idea.sec.gov/

478 Mazars (2009), section 4.4.3.5.

of storage may differ according to the type of required storage (for instance, with the issuer, the regulator or a regulator designated entity) and the type of document[479].

> In China, all the disclosed regulated information should be registered at the stock exchange and reported to the local counterparts of CSRC. The investors may search for the information on the website of the stock exchange, designated newspapers. Issuers must provide access to the documents on the premises of the companies and on websites designated by CSRC for public review indefinitely.
>
> In Hong Kong, any document published on the issuer's website pursuant to the listing rulesof the exchange remains available on the issuer's website on a continuous basis for at least 5 years from the date of first publication.
>
> In India, all companies having securities listed on a recognised stock exchange, must file regulated information with EDIFAR in addition to the physical filing with the said exchanges or any other platform as may be mandated by the securities and exchange board of India (SEBI) from time to time (EDIFAR has been launched by SEBI in collaboration with the National Informatics Centre). In addition, on January 1, 2007, National Stock Exchange, Mumbai (NSE) and Bombay Stock Exchange, Mumbai (BSE) jointly launched a common portal for filing and dissemination of information, which is jointly owned, managed and maintained by these two exchanges. Since its launch, the portal has become a single source to view information filed by companies listed with NSE and / or BSE. A listed company would be required to file its submissions through this portal irrespective of the stock exchange(s) on which it is listed and the information so filed can be viewed at this portal.
>
> In Japan, disclosed information is physically made accessible at the head office of the issuer and is available via the EDINET system (accessible through the internet). The duration of availability depends on the type of documents.
>
> In Switzerland, the SIX Swiss Exchange provides a central storage system. The information is available to the public for one or two years.

15.34. Concerning XBRL, there have been also interesting developments in other jurisdictions than the USA. Financial institutions have been reporting monthly data in XBRL format to the Bank of Japan since February 2006. The Japanese FSA successfully completed migration of its regulated information to an XBRL-based system (EDINET) in March 2008 and is already requiring XBRL-based reports.

A number of Asian stock exchanges (Tokyo, Korea, Shanghai) are introducing XBRL-based reporting by their listed companies during the course of 2008. Singapore has a comprehensive XBRL project to allow all companies to file only one set of financial statements that can be used by several government agencies, including the tax authorities. Also the government of Australia have taken a broader approach by creating national XBRL infrastructure to use common information formats for a number of administrations and organisations in this country.

E) Issues for further reflection: future scenarios for the interconnection of storage mechanisms

15.35. Considering the limitations of Model C described above, the Commission invited CESR to draw up, by 30 September 2010 appropriate guidelines for the future development of the electronic network beyond Model C. According to the

479 See Mazars (2009), section 6.4.1.

Commission Recommendation 2007/656/EC[480], those guidelines should in particular examine the feasibility, including a cost/benefit analysis to require:

– *"(a) the use, in all the access points to the electronic network, of harmonised searching facilities based on a set of common search keys and reference data items, thus harmonising the methods of classifying and identifying the information to store;*

– *(b) the use of common input formats and standards for the submission of regulated information to the storage mechanisms;*

– *(c) the use by the storage mechanism of a common list of types of regulated information;*

– *(d) the technical interconnection with the electronic network developed by the national company registries covered by the Directive 68/151/EEC; and*

– *(e) entrusting the supervision of the services provided by any legal entity operating the common elements of the electronic network to a single body composed of representatives of the competent authorities referred to in Article 24 of Directive 2004/109/EC."*

15.36. Indeed, the main limitations of the Model C network is that it does not allow interested parties to search in the different OASMs with a single research engine (see below, sub-section E1) and does not harmonise the methodology to store information, e.g. by using common input formats (see below, sub-section E2). Also, the problem of governance remains: who will take care of the developing the network (see bellow, sub-section E3). Finally the question of the link to the business registries is still unsolved (see below, sub-section F).

15.37. In this context, there seems to be demand for **better access to reference data[481] on securities.** For instance, the European Central Bank runs a "centralised securities database" which could have the potential to integrate regulated information on issues[482]. Interlinking existing (or future) databases on securities reference data to the OASMs[483] would increase transparency in the market.

E1) The harmonised searching facilities

15.38. The Commission Recommendation expects CESR to examine the feasibility of establishing, in all the access points to the electronic network, harmonised searching facilities based on a set of common search keys and reference data items. These harmonised searching facilities should at least provide for the possibility of making:

– searches using common category labels attached to the regulated financial information when filed with the storage mechanisms, such as: issuer name; date of

480 Cf. §22 of the Commission Recommendation 2007/657/EC.
481 Reference data should be understood as data describing the properties and behaviour of a security.
482 See European Central Bank (February 2010).
483 For instance, in a similar manner to the link between national OASMs and CESR Mifid database.

filing; country of issuer; title of document; industry/branch of trade and type of regulated information;

– dynamic or chain searches;

– multiple-country searches with a single request.

15.39. The harmonised searching facilities would require harmonising the methods of classifying and identifying the information to storage. In particular, common lists with regard to industry/branch of trade and type of regulated information would be needed. Interlinking databases on securities reference data with OASMs searching facilities would increase transparency in the market (see §15.37 above).

The common list of types of regulated information would facilitate uniform classification of filed information and EU-wide searches of information on the basis of type of information. While the list would need to be common, this, in itself, would not require full harmonisation of the definition of regulated information in the different Member States. The list would rather be a collection of anything which is considered to be regulated information under national law.

E2) Common input format: XBRL and standard forms

15.40. The operation of the network and the future use of the information stored would largely be facilitated if common input formats and standards are requested at the time of filing[484] information. This would also facilitate "straight-through" processing by the OASMs.

The following formats and standards deserve particular attention: (i) the possible use of the XBRL (eXtensible Business Reporting Language[485]) language; and (ii) the possible use of electronic standard forms for the notification of major holdings of voting rights.

15.41. Concerning **XBRL**, there have been **recent calls by EU institutions for a wider use of this reporting language**. The **Competitiveness Council** conclusions of 22-23 November 2007 agreed to the Commission Communication of 10 July 2007 on the simplification of company law, accounting and auditing, but at the same time called

[484] See also point 20.4 of the Commission Recommendation on storage.

[485] See www.xbrl.org/eu. XBRL (or Interactive data as it is called in the US) is a language for the electronic communication of business and financial data similar in function to bar codes. The idea behind XBRL is simple. Instead of treating financial information as a block of text - as in a standard internet page or a printed document - it provides an identifying tag for each individual item of data. With every number on an income statement or balance sheet individually labelled, information about thousands of companies contained on thousands of forms could be easily searched on the Internet, downloaded into spreadsheets, reorganized in databases, and put to any number of other comparative and analytical uses by investors, analysts, journalists, and financial intermediaries. The introduction of XBRL tags enables automated processing of business information by computer software, cutting out laborious and costly processes of manual re-entry and comparison. XBRL is one of a family of "XML" languages which is becoming a standard means of communicating information between businesses and on the internet. XBRL is being developed by an international non-profit consortium of more than 550 major companies, organisations and government agencies. It is an open standard, free of licence fees. It is already being put to practical use in a number of countries and implementations of XBRL are growing rapidly around the world.

for the optimisation of the use of electronic means taking into account the possibilities offered by "*available technological instruments and business reporting computer languages*".

The European Parliament's Resolution of 21 May 2008 on a simplified business environment for companies in the areas of company law, accounting and auditing[486], notes the advantages of XBRL and urges the Commission to actively promote the use of electronic means in relations between undertakings and public administrations. Also the European Parliament Resolution of 9 October 2008 on Lamfalussy follow-up: future structure of supervision[487], calls on the L3 Committees to design common reporting standards, preferably in a multi purpose format such as XBRL and calls upon the Commission to submit adequate legislative proposals.

15.42. The possible use of XBRL for financial reporting purposes has appeared as a new issue. This use is strongly supported by the European Parliament and its used is already required by some European banking supervisors. CEBS has developed XBRL taxonomies for the prudential reporting framework COREP (COmmon REPorting) for the new solvency ratio of credit institutions and investment firms, and for the standardised financial reporting framework (FINREP) for credit institutions operating in the EU. Central banks[488] have active XBRL projects, some of them either allow or require XBRL-compliant reporting[489], following the recommendation of the CEBS. At the same time, there may be alternative ways other than XBRL to structure data. Banking supervisors in six Member States[490] have however decided not to use XBRL. Outside the EU, the US SEC and certain other securities regulators are promoting the use of XBRL.

15.43. The External Study is, however, more cautious on the possible use of XBRL. It believes that "*more experience from countries where XBRL is used would appear necessary before an EU decision or recommendation on the use of XBRL be made*".[491]

15.44. Concerning the **electronic standard form for the notification of major holdings of voting rights** (and of financial instruments), cross-border compliance by investors would be facilitated, especially when they need to make notifications to several issuers located in different Member States, if such a form was available and used across the EU[492]. Equally, a form of this kind would simplify the notification process for those issuers who may receive notifications from several voting rights or financial instrument holders located in different Member States[493]. Finally, filing of notifications in a structured format would also facilitate further processing of the information: e.g. allowing to extract consolidated data of holdings by issuer or by investor.

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486 European Parliament (May 2008), §12.

487 European Parliament (October 2008), Recommendation 3.2(e).

488 In Belgium, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherland, Poland and Spain.

489 In particular this is the case of Belgium, Germany and Spain.

490 Czech Republic, Estonia, Slovakia, Slovenia, Sweden and the UK.

491 Mazars (2009), Possible improvement n°6.

492 See European Commission (December 2008), §§25-27.

493 It should be noted that an electronic form of this kind would be able to take into account national legislative differences and offer different options to the users when filling the form.

The External Study is also favourable to the creation of such a standard form[494].

*13. **Create a single e-notification form:** Considerable simplification can be obtained by making a common electronic notification form for the EU mandatory especially if additional harmonisation is successfully introduced in the Directive. Specificities in national company law could be taken into account in subsections on the common form. The electronic form could be conceived in such a way that basic error would be signalled prior to validation, and the form routed to the relevant issuer and competent authority.*

For more information on the development of an EU standard form for the notification of major holdings of voting rights, see Annex 4 (§§4.8 and seq.).

E3) The problem of governance: who will take care of the developing the network.

15.45. Enhancing the network of national storage mechanisms (or the *ex novo* creation of a centralised storage system) is desirable. This step, however, would require solving governance issues, in particular who should take responsibility for enhancing such network: actors such as the European Securities Market Authorities[495], the network of European business registries[496], the European Central Bank[497] or the Office for the Harmonisation of the Internal Market[498] could *a priori* be concerned.

15.46. Decisions on costs, notably regarding the initial[499] investment, would also need to be taken. In this context, a recent EU financing programme allows for EU (partial) financing of, *inter alia*, certain CESR activities, including information technology projects of EU dimension.[500]. Another recent EU programme also allows for EU funding and support of interoperability solutions for European public administrations (the ISA programme)[501].

15.47. The Commission will be launching in 2010 a feasibility study on the development of a pan-European storage system for regulated information, which should be addressing those issues.

F) The parallel process on the interconnection of business registries

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494 Mazars (2009), Possible Improvement n°13.

495 ESMA will be CESR successor. CESR should prepare guidelines in 2010 regarding the future development of the electronic network of storage mechanisms (cf. Recommendation 2007/657 of the European Commission, §§21 and 22). CESR is also running the so-called Mifid database and is currently providing a temporary initial network of storage mechanism.

496 See www.ebr.org

497 The European Central Bank runs a "centralised securities database" which could have the potential to integrate regulated information on issues. See European Central Bank (February 2010).

498 OHIM is an EU agency that manages the EU trademark registry. As such, it has the know-how to keep registries and could potentially be an alternative to develop a pan-European storage system. See: http://oami.europa.eu

499 Understood as one-off costs as opposed to regular on-going costs.

500 See in this regard Decision No 716/2009/EC of the European Parliament and of the Council of 16 September 2009 establishing a Community programme to support specific activities in the field of financial services, financial reporting and auditing, OJ L253, 25.9.2009, p.8.

501 See also Decision No 922/2009/EC of the European Parliament and of the Council of 16 September 2009 on interoperability solutions for European public administrations (ISA), OJ L 206, 3.10.2009, p.20.

15.48. The question of the interconnection between the OASMs and the national business registries also needs further reflection. In this context, the interconnection of the national business registries among themselves almost appears as a pre-requisite.

15.49. Company/business registries store company related information under some European company law directives and national law, such as: statutes/articles of association, annual accounts, persons authorised to represent the company etc. A company file is kept on each company created, irrespective of whether it is listed or not. The first company law directive requires the business registries to accept on-line filings and to provide business information on-line.

15.50. European business registries of 24 European jurisdictions (18 of which a Member State of the EU) set up a network to link them: so-called EBR (*European Business Registries*)[502]. Through the EBR network it is already possible to obtain comparable, official company information from the countries connected to the network.

15.51. EBR, together with other partners, also launched a research project called BRITE[503] . The main objective of the project as to carry out the research necessary to enable complete cross-border interoperability (technical, semantic and organisational) between the Business Registers at European level. BRITE partners are currently working on the implementation of the results of the BRITE project after March 2009.

For instance, BRITE partners explored the possibility to develop this platform to interlink the OASMs between them and to the business registries. BRITE imagined reaching a level of integration so as to enable for use and aggregation of individual data: end-users would be able to match data and easily make further searches at the level of the stored data fields[504]. Such a level of integration would have require that data are stored in a predetermined format (and possibly filed in that format too)[505]. Eventually, the BRITE project did not pursue this avenue.

15.52. It should be noted that the European Parliament, in its resolution of 21 May 2008 on a simplified business environment for companies in the areas of company law,

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502 www.ebr.org

503 BRITE was a 36-month project co-financed by the European Commission (DG Information Society, under the IST programme, eGovernment Actions) between March 2006 and February 2009. It was led by EBR (the European grouping of Business Registries). The Commission partially funded this project.

504 For example, a search for the major shareholders of a specific issuer would not merely return a list of files with the text of uploaded notifications, but would produce one single overview of all (current) major shareholders together with their respective percentages of voting rights/shares in the issuer. Clicking on a major shareholder's name could then initiate a new search with that shareholder as search entry into an appropriate OASM, returning new data stored in OASMs (e.g. a overview of the major shareholders of that shareholder, when listed; a overview of the other listed companies in which that shareholder holds a significant holding etc.).
A further dimension of integration could be achieved within BRITE, if the OASM network is connected to the network of business registers. This interconnection and integration of relevant data could enable users of the OASM system to obtain even more company data, as stored in the relevant company registers, and to gather data at the level of non-listed companies (for instance, an unlisted company which is a shareholder of a listed company).

505 For instance, BRITE has been working on a unique company identifier at world level (REID) in order to be able to automate processes within registries. The company identifier could possibly follow the IBAN structure. REID is being developed with a view to conform to ISO standard 6523. BRITE has also identified XBRL as a suitable standard for the statutory reporting.

accounting and auditing, called on the Commission to encourage the MS to harmonize the classification of financial information reporting requirements, and to leverage new technologies with a view to reducing the cost of information obligations while preserving the benefits to market participants, policy-makers and public administrations[506].

15.53. In November 2009, the Commission issued a Green Paper on the Interconnection of business registries[507] launching a public consultation on possible ways forward to improve access to information on businesses across the EU and more effective application of the company law directives[508]. At the same time, the Commission published a Progress Report on the interconnection of European business registers describing the current legal and factual situation of the access to information and co-operation between business registers[509].

506 European Parliament (May 2008), §20. See also §§12 and 13 on XBRL and inter-operable business registries.

507 European Commission (November 2009a).

508 The public consultation ended on 31 January 2010. See: http://ec.europa.eu/internal_market/consultations/2009/interconnection_of_business_registers_en.htm

509 European Commission (November 2009b).

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