COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.12.2008
SEC(2008) 3033 final

COMMISSION STAFF WORKING DOCUMENT

Report on more stringent national measures concerning 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

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INTRODUCTION

1. This report aims at presenting the stricter national measures pursuant to 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"), as well as their main impact[2]. This Directive requires issuers of securities in regulated markets within the EU to ensure appropriate transparency for investors through the disclosure of periodic and on-going regulated information and the dissemination of such information to the public throughout the Community (see Annex 1 for further detail). Regulated information consists of financial reports, information on major holdings of voting rights and information disclosed pursuant to Article 6 of the Market Abuse Directive.

2. Under Article 31(2)[3] of the Transparency Directive, Member States have to inform the Commission of any national measures they adopt which go beyond the requirements of the Directive. Stakeholders regularly report to the Commission services, for example, that, as regards listed companies, Member States often impose (or maintain existing) more stringent national rules on top of the European legislation, and thus do not pass on to companies the potential for simplification which the harmonisation brought by EU law offers. In this context, a recent resolution of the European Parliament[4] asked the Commission to examine whether the transposition of this Directive has led to 'gold plating' by Member States. Against this background, the Commission services undertook a limited survey on this issue in 2008 (see Annex 2 for further detail).

3. This paper presents the results of this survey. It (1) presents the more stringent national rules in relation to the Transparency Directive; (2) describes their main impact; (3) outlines the initiatives being taken to address them and (4) draws a number of conclusions. This paper is also a preparatory step towards the report on the operation of the Directive that the Commission has to submit pursuant to Article 33 of the Directive.

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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 report does not reflect the views of the Commission as such, but rather those of its staff only.

3 "[…] *2. Where Member States adopt measures pursuant to Articles 3(1) […], they shall immediately communicate those measures to the Commission and to the other Member States*"

4 European Parliament (May 2008), *Resolution on a simplified business environment for companies in the areas of company law, accounting and auditing* (Rapporteur: Klaus-Heine Lehne, Committee on legal affairs), 21.5.2008, Reference A6-0101/2008, in particular point 6.

1. THE TRANSPARENCY DIRECTIVE AND THE MORE STRINGENT NATIONAL MEASURES

1.1. The minimum harmonisation nature of the Directive

4. Harmonisation of national requirements is generally considered to be a useful tool for removing barriers to the building of the Community internal market. According to the Transparency Directive itself (emphasis added), *"[g]reater harmonisation of provisions of national law on periodic and ongoing information requirements for security issuers should lead to a high level of investor protection throughout the Community. […]"*[5]. At the same time *"[a] high level of investor protection throughout the Community would enable barriers to the admission of securities to regulated markets situated or operating within a Member State to be removed. […]"*[6].

5. The Transparency Directive, however, only imposes minimum harmonisation requirements[7]. This allows Member States, when transposing this Directive into their respective national legislation, to adopt more stringent measures[8] over and above the requirements of the Directive if they deem it necessary[9]. These more stringent national measures are often referred to as "gold plating". This expression, however, has negative connotations[10] and it will not be further used in this report.

6. The result is, however, an uneven level of harmonisation, which renders more difficult for persons or entities to simultaneously conform to the laws of several Member States (see section 1.3 below).

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5 See Recital 5 of the Transparency Directive.

6 See Recital 7 of the Transparency Directive.

7 By way of contrast, there are also examples of (attempted) maximum harmonisation in EU securities law, such as the Prospectus Directive (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 of 31.12.2003, p.64). On this issue, see Enriques & Gatti (April 2007). See also ESME (September 2007), p.5.

8 Regulation issued by national supervisors is also included in the concept of national measures. However, not all additional requirements to which companies may be subject at national level are the results of "national measures". See Annex 3 for further information on the notion of more stringent national measure.

9 Interestingly, some scholars claim that Member States would not have an incentive to adopt more stringent measures in the financial services area covered by the Lamfalussy approach. Their interest would be to reach higher harmonisation levels beyond the minimum ones rather than to enter into regulatory competition. See Hertig and Lee (2003), p.11. At the same time, other scholars state that full harmonisation in the corporate governance area (understood broadly and including securities law) is possibly not desirable. They are rather in favour of regulatory competition. See Enriques & Gatti (2008) and Enriques (2005). Hertig & McCahery (2006) are also in favour of some kind of regulatory competition, though they concede that disclosure rules may need to be mandatory.

10 It should be noted in this context that the negotiations of a minimum harmonisation directive are inevitably influenced by the (anticipated) transposition leeway. The understanding that applying more stringent requirements is possible plays a role in the Member States' willingness to accept a given (minimum) level of harmonisation, possibly having failed to convince other Member States to subscribe to their (stricter) levels, because they know that they will able to maintain those requirements. The later criticism of the adoption of stricter national measures in those circumstances is relatively unfair: if the negotiations for a given directive had been of maximum harmonisation nature from the start, the results of such negotiations could and possibly would have been different.

1.2. The limits: the Home Member State Rule

7. Member States' leeway is limited in this Directive by the so-called "Home Member State Rule". According to this rule, the Home Member State may impose requirements more stringent than those laid down in the Directive, but not the Host Member State[11] (see Annex 4 for further detail on the Home Member State Rule).

1.3. The different consequences for issuers and for investors[12]

8. *(i) Issuers: avoiding duplication (or multiplication) of rules.* The "home Member State" rule of the Transparency Directive is a major step forward in simplifying the life of issuers, who are only subject to the rules of their home Member State and cannot be requested to comply with the rules of their host Member State[13]. It has therefore solved, by a large degree, the previous multiple jurisdiction problem for issuers with dual listing. Nevertheless, the "home Member State" rule does not prevent Member States from imposing more stringent requirements on their own issuers. Thus, the vast majority of issuers may still be subject to more stringent national requirements, albeit only in their own familiar national regulatory environment[14].

   It appears from the survey that more stringent national measures under the Transparency Directive in relation to issuers will typically relate to, for example, shorter deadlines for disclosure of regulated information and to more stringent obligations concerning the disclosures about trading with own shares or concerning the content of financial reports (see Annex 5 for more details on this issue).

9. *(ii) Investors: scope for convergence?* The situation is different for investors, especially large investors (i.e. those that are likely to be caught by the Directive obligations). They are likely to operate in more than one Member State. Given the minimum harmonisation nature of the Directive, those investors are particularly affected, more than issuers, by the stricter requirements in a different regulatory environment from their own and/or by the different (and also stricter in some cases) national requirements they need to comply with. From an investor's perspective, there is scope for convergence between national rules.

   The following box describes a selection of the more stringent national measures affecting investors (see Annex 5 for more details on this issue).

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11 See Article 3 and recital 7 of the Directive. Further to Article 3, Article 20 also limits the host Member State possibility to request issuers to disclose regulated information also in an official language of the host Member State. Enriques & Gatti (April 2007), refer to this situation as minimum harmonisation for home Member States and maximum for host Member States (p. 24).

12 National authorities may also be affected by stricter and additional national measures, but this will not be considered in this paper.

13 Unless Article 8(2) of Directive 2001/34/EC would be applicable. See Annex 4 of this paper.

14 Only in a few cases, however, would the issuer be subject to odd situations. For instance, it is conceivable that a company is only listed in its host Member State but not in its home Member State, which applies stricter rules. Under the Directive, the issuer would be subject to the home Member State's rules, except for the rules on dissemination of information and storage (cf. Article 21(3) where the host Member State rules would apply. In such a situation, the issuer would presumably have different compliance cost for some obligations (essentially the financial reporting obligations in Articles 3 to 7) than other companies listed in the host Member States.

Box 1 – Selection of more stringent measure affecting investors

Deadlines for reporting major holdings of voting rights by investors

Under Article 12 of TD, investors should report as soon as possible after crossing the threshold, but no later than 4 days. Several Member States have reduced the deadlines:

-without delay: FI
-1 day: CY, DK, SE
-2 days: AT, HU, IE, UK
-3 days: EL, RO
-The directive deadline: BE, BG, CZ, DE, EE, ES, FR, IT, LT, LU, LV, MT, PT, SI, SK

Initial threshold for disclosure of major holdings of voting rights by investors

Under Article 9 of TD, investors should declare when the 5% threshold is crossed upwards (or downwards). Then there are further disclosures when other higher thresholds are crossed. For the purposes of this example we take only the initial disclosure threshold, namely 5%. Several Member States have imposed lower thresholds:

-2%: IT, PT
-3%: DE, IE, ES, UK, CZ (if authorised capital >100000 CZK)
-the directive threshold (5%): AT, BE, BG, CY, CZ, DK, EE, EL, FI, FR, HU, LT, LU, LV, MT, RO, SE, SI, SK

It should also be noted that in several countries (AT, BE, CY, CZ, DK, EE, FI, FR, HU, IT, LU, LV and PT) issuers can set lower thresholds in their own articles of association, either on the basis of an explicit authorisation or in the absence of an express prohibition. In BG, DE, ES, IE, LT, MT, SE, SI and UK issuers are not allowed to require such notification.

Disclosure of share capital, not just voting rights

Under Articles 9 and 10 of TD, investors disclose major holdings of voting rights, but the Directive is silent on the issue of disclosure of share capital. Several Member States have imposed disclosure of the percentage of share capital:

-yes: BG, DK, EL, FI, FR, HU, IE, IT, LT, LV, PT, RO, SE
-no: AT, BE, CY, CZ, DE, EE, ES, LU, MT, SI, SK, UK

Disclosures of investors' objectives.

DE and FR request holders of voting rights (holding at least 10%) to disclose what the objectives of the investment are (e.g. whether they intend to obtain control etc.).

*N.B. This box does not include the situation regarding PL and NL because these two countries are in the process of changing their legislation.

2. IMPACT OF THE MORE STRINGENT NATIONAL MEASURES

2.1. Negative perception of more stringent national measures

10. More stringent national rules are generally perceived as negative for the creation of a Community internal market in the financial services area. For instance, in a communication regarding the Lamfalussy process[15] (of which the Transparency Directive was part), the Commission underlined that it was highly important that

[15] European Commission (November 2007), *Communication from the Commission, Review of the Lamfalussy process – Strengthening supervisory convergence*, COM(2007)727final, 20.11.2007, p. 5 and Annex III. See also European Commission (December 2005), *White Paper – Financial Services Policy 2005-2010*, COM(2005)629, 1.12.2005, p.6.

Member States "*refrain as much as possible from adding national rules to the ones agreed at EU level*". It also announced that it would "*continue to follow a robust policy as initiated with Article 4 of the MiFID implementing Directive (2006/73/EC) whereby Member States should justify rigorously any regulatory additions or add-ons to the Commission in cases where such latitude is possible*"[16]. This negative perception seems to be also implicit in the European Parliament resolution of May 2008 (see §2 above).

2.2. The question of the increased costs

11. It is also generally assumed that more stringent national measures result in higher costs and administrative burden for those subject to the obligations[17]. This assumption, however, might not always be true. This is the case in particular where more stringent measures were already rooted in the national legislation prior to the Directive. In such a case, there is no incremental cost resulting from the transposition of the Community measures. From this perspective, continuity of obligations may be less costly than adapting to a new legal, albeit less stringent, environment, at least as regards the initial compliance costs[18]. This partially explains the support in some Member States for maintaining the more stringent national measures that pre-dated the Directive[19].

12. In this context, as also recently underlined by the European Parliament[20], the cost of divergent transposition of the Directive seems to be at the heart of the higher costs. Parallel compliance with different national requirements as faced by investors[21], whether resulting from more stringent national measures or from other measures that have a similar impact (notably the different way in which the obligations of the

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16 Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 241, 2.9.2006, p.26. Article 4 (quoted in Annex 6 to this paper) of that Directive provides that it should be possible for Member States to impose requirements on investment firms additional to those laid down in the implementing rules only in exceptional circumstances. Moreover, such intervention should be restricted to those cases where specific risks to investor protection or market integrity including those related to the stability of the financial system have not been adequately addressed by the Community legislation and it should be proportionate.

17 There are obviously benefits too (such as increased transparency), generally for other stakeholders than those facing the costs. The intention of this paper is not, however, to provide a full analysis of those costs and benefits.

18 Initial (one-off) compliance costs to adjust to new legislation may be relatively high in this area if IT investment is required. Those initial costs would need to be compensated for by the lower on-going compliance costs that would presumably result from a new less stringent obligation. Such compensation is likely to materialise in the long term only.

19 By way of example, see the opinion of the London Stock Exchange in response to a consultation document of the UK Financial Services Authority, available at: http://www.londonstockexchange.com/en-gb/about/Newsroom/regulatorypolicy/responsecp0604.htm

20 European Parliament (September 2008), *Resolution with recommendations to the Commission on transparency of institutional investors* (rapporteur Klaus-Heiner Lehne, Committee on legal affairs), 23.9.2008, Reference A6-0296/2008, p.6: "*J. Whereas inconsistent implementation the Transparency Directive has led to divergent levels of transparency throughout the EU and to high costs for investors.*" (emphasis added).

21 On this issue, ESME indicates that "*a major complaint among investors is the cost to investigate and report according to 27 systems across Europe (and around 60 systems internationally) with different approaches to what holdings are required to be reported as well.*" ESME (December 2007) p.5, *in fine*.

directive are integrated into national law, see Annex 3), seems to be a more important source of costs and burden[22] than the mere individual compliance with more stringent national measures (which is the situation faced by issuers, see section 1.3 above). Indeed, the preliminary findings of a study being conducted for the Commission in the neighbouring area of company law show that stricter national disclosure requirements for companies, taken in isolation, did not make up a significant proportion of their cost[23].

13. The costs and burden resulting from either more stringent national measures or divergent transposition are not readily accepted by stakeholders as they judge such costs and burden to be unnecessary: e.g. they could have been avoided as compliance with the Directive rules could (and possibly should) have been enough.

2.3. Enhanced transparency in relation to investors

14. More stringent national measures in relation to investors, such as described in box 1 above and similar measures (see also Annex 5), will often result in enhanced transparency in the marketplace for the benefit of investors and other stakeholders[24], beyond the minimum level of transparency regarding the acquisition and disposal of major holdings of voting rights established by the Directive. Such enhanced transparency is not, in itself, an undesirable objective rather the contrary[25]. In this context, it is reasonable to underline that more stringent national measures generally reply to the perception of the existence of particular market failure(s). It should be noted that this perception may also change over time. Nevertheless, any assessment of this kind also needs to carefully consider the (sometimes unintended) effects of

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22 This opinion is generally expressed to the Commission services by associations representing investors (in particular asset managers). In this context, a study recently commissioned by the Commission on the cost of compliance with selected FSAP measures (including the Transparency Directive) has exceptionally attempted to evaluate, from the asset managers perspective, the costs resulting from the uneven transposition of this Directive (according to the methodology in the terms of reference, the study was meant to measure the cost of compliance with the directive provisions, excluding the stricter national measures). Preliminary indications from this study suggest that, although it is not possible to quantify how much of the additional cost impact experience by asset managers active in more than one Member State has been driven by a minimum rather than maximum harmonisation approach, there has been some contribution to the level of costs experienced by transnational asset managers due to this effect. This study should be finalised soon and its results made available. See Europe Economics (2008), forthcoming.

23 This study measures the administrative costs of several company law directives (the 2nd, 3rd, 4th, 6th, 7th, 11th and 12th). Preliminary results estimates that the so-called Delta administrative costs (i.e. national information obligations that either (1) contain additional information requirements compared to the underlying EU requirement, (2) require an information provided for by EU legislation with a higher frequency than prescribed by EU law or (3) apply requirements stemming from EU rules to a broader population than required by the rules (i.e. not only public limited-liability companies but all limited-liability companies) at around 2-3% of the total administrative costs. This study should be finalised soon and its results made available. See Cap Gemini & Ramboll Management (2008/2009), forthcoming.

24 For instance, employees. The enhanced transparency provided by some measures (such as disclosure of investors' objectives, transactions in own shares etc.) can contribute to reducing employees' uncertainties about their jobs and future prospects, thereby contributing to their confidence and productivity.

25 According to recent studies, there is strong evidence that laws mandating disclosure (and also those facilitating private enforcement through liability rules) benefit stock markets. See La Porta, Lopez de Silanes & Schleifer (2006).

enhanced transparency measures – further to the cost and burden[26] component[27]. Some examples are provided in the following paragraphs.

15. *(i) Lower disclosure thresholds*. 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. On the one hand, these national rules may be the result of different economic considerations in the home market. For instance, a one-size-fits-all approach for the initial threshold for disclosure (e.g. 5%) may not accommodate all situations, nor provide a similar level of transparency. In the United Kingdom (UK), the "median largest block" in listed industrial companies was around 10% in 2001, while in France it was 20%, in Italy 55% and in Germany 57%[28]. Therefore, an initial threshold for major holdings disclosure set at 5% in the UK is not likely to capture important shareholders' movements of interest to the market. The UK, indeed, opted to maintain its pre-existing 3% initial threshold (followed by subsequent disclosures for every 1% increase). From this point of view, the lower 3% threshold in the UK aims to achieve a sufficient degree of transparency, which is the object of the Directive[29], given the particular ownership structure of its listed companies[30].

16. On the other hand, enhanced transparency resulting from lowered thresholds may be counterproductive. As explained by ESME[31]:

> A uniform threshold would therefore be desirable to both investors and issuers. However a move towards the lowering of the thresholds must be viewed against the consequences that will flow from it. The desire to provide the markets with all potentially relevant information should not result in immaterial disclosures that distract the attention of the market from the disclosures that reveal significant changes in the structure of voting control. More transparency does not necessarily result in more efficient markets while a too low initial disclosure threshold can render the market for corporate control less mobile. Therefore, the group would not support a lowering of the thresholds below 3%.

There is some indication that the thresholds for disclosure may be acting as a brake on investment. Large institutional investors with no control–taking strategy have a tendency to remain below the regulatory disclosure thresholds in listed companies[32], primarily to avoid the burden they associate with the notification of major holdings

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26 The cost/burden component is very clear, for instance, regarding the different and reduced deadlines for disclosure of major holdings. Compliance with shorter deadlines require large groups to install very efficient internal procedures to ensure that the parent company is in a position to notify the issuers concerned.

27 As expressed in the preceding sub-section, this paper does not intend to provide a full analysis of the burden and costs imposed by and/or the benefits arising from stricter national measures.

28 Enriques and Volpin (2007), p.119.

29 See recital 18 (emphasis added): "*[t]he public should be informed of changes to major holdings in issuers […]. This information should enable investors to acquire or dispose of shares in full knowledge of changes in the voting structure; it should also enhance effective control of share issuers and overall market transparency of important capital movements. […]*."

30 From this perspective, the need to have lower thresholds than 5% in DE and IT would *a priori* (and on average) be less justified – although there may be other justifications for the lower threshold.

31 ESME (December 2007), p.5.

32 Although enhanced transparency could lead to more efficient disclosure systems, which could in turn attract investment, according to ESME, "*[i]nternational institutional investors may be discouraged from investing in countries with very low threshold (e.g. Italy which has a threshold of 2%) in the primary as well as in the secondary market. Especially, raising capital for SMEs may become more difficult as institutional investors buy a share in the company during IPOs just below the reporting threshold*". ESME (December 2007), p.4.

but also for reasons of anonymity reasons. In the case of investors with a control-taking strategy, they normally try to build a stake in the target company as discreetly as possible[33]. For this type of investor, the higher the disclosure threshold, the better. This seems to be recognised, *a contrario*, in a recent European Parliament resolution on institutional investors which calls on the Commission to prepare legislation lowering the Transparency directive threshold for the disclosure of major holdings from 5% to 3% across Europe[34].

In this context, the impact of the lower disclosure thresholds directly established by the issuers in their articles of association (to the extent that this is allowed by national legislation) should not be underestimated[35]. Although such practices cannot, strictly speaking, be qualified as more stringent national measures (see Annex 3), they may lead to the similar or even worse effects. In the course of the survey, it was brought to the Commission services' attention that those requirements place an excessive burden on investors and create uncertainty[36], while also signifying a legal risk (e.g. suspension of voting rights for breach of the disclosure requirements imposed by the articles of association). The perceived goal of these disclosure requirements would be to protect management from shareholders rather than to create more transparency.

17. *(ii) Other enhanced transparency measures*. Further to the lower disclosure thresholds for major holdings of voting rights, as highlighted in the survey, some Member States seem to be towards favouring the adoption of measures aiming at enhancing transparency by investors, which although having the benefit of increasing transparency levels, may have certain drawbacks.

18. Hence, some Member States have widened the definition of "acting in concert" which triggers the notification duty in accordance with Article 10 a) of the Directive[37] (see Annex 5). As a result, national law in some countries may cover coordinated conduct beyond the execution of voting rights or with the aim to implement a policy vis-à-vis the issuer (but not necessarily addressing the management of the issuer).

These broader definitions have a negative impact on the promotion of corporate governance (including corporate social responsibility) by investors, which is also a

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33 ESME states [emphasis added] that "*[i]t is clear that the [Transparency Directive] has other acceptable effects, such as providing information to the market as a whole when major holdings are being acquired, preventing market abuse, or even acting as a warning to the management of listed companies when someone is building up a hostile position. However, these effects are secondary and must not condition the shape and scope of the disclosures requirements under the [Transparency Directive] […]*." ESME (December 2007), p.2.

34 European Parliament (September 2008), *Resolution with recommendations to the Commission on transparency of institutional investors* (rapporteur Klaus-Heine Lehne, Committee on legal affairs), 23.9.2008, Reference A6-0296/2008, p. 9.

35 In FR, for instance, the threshold could be as low as 0,5%. In BE, it can be set at 1% (see Annex 5)

36 There is no central list of issuers containing their respective thresholds in any of the 13 Member States authorising this practice, except in the case of Belgium, where such a list has only recently been established (in September 2008).

37 "*The notification requirements […] 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;*" (emphasis added).

desirable objective in Community legislation[38]. Given the size of holdings, investors normally need to cooperate among them in order to engage in this kind of promotion of corporate governance. However, this cooperation will largely be hindered because of the uncertainty created by the broad definitions of acting in concert: the dividing line between shareholder activism and acting in concert is not fully clear. In order not to take the risk of infringing the legislation, investors are likely to refrain from cooperating with other shareholders.

19. In the same vein, the level of transparency regarding investors is enhanced in France which has maintained an additional disclosure obligation for qualified investors (e.g. holding 10%, 20% etc.) in relation to the objectives pursued by the investment: i.e. whether they intend to obtain control, influence the company etc. An investor declaring that he has no intention of acquiring control at the moment of making the declaration is prevented from launching a takeover bid for the subsequent 12 months. Similar legislation has recently been adopted in Germany[39] and is being considered in the Netherlands. The European Parliament has also recently made a similar proposal[40].

20. Similarly, Member States are also reflecting on new legislation to counter the increased use of financial instruments by investors to escape from the traditional categories that trigger disclosure obligations on voting rights[41]. Recent cases in Germany[42] and Italy[43] showed the limits of the current disclosure obligations with

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38 Cf. Recital 3 of 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: *"[…] effective shareholder control is a prerequisite to sound corporate governance and should, therefore, be facilitated and encouraged. […]*" In the same vein, principle II.G of the OECD Principles of Corporate Governance which recommends that "*shareholders, including institutional shareholders should be allowed to consult with each other on issues concerning their basic shareholder rights as defined in the Principles, subject to the exceptions to prevent abuse*."
On this issue, see also ESME (November 2008).

39 The so-called Risk Limitation Act, published on 18 August 2008. This particular obligation will apply as of 31 May 2009.

40 European Parliament (September 2008), *Resolution with recommendations to the Commission on transparency of institutional investors* (rapporteur Klaus-Heiner Lehne, Committee on legal affairs), 23.9.2008, Reference A6-0296/2008. p. 9.

41 On the question of hidden (morphable) ownership, see generally Hu and Black (2007).

42 In summer 2008, the privately owned *Schaeffler Group* launched a take-over bid for *Continental AG*, a listed company in Germany. Prior to the bid, the *Schaeffler Group* held below 3% of the voting rights in Continental, but concluded equity swap agreements with banks for around 28% of the capital. The agreements were never disclosed. The German supervisor (BaFIN) investigated the case and came to the conclusion that such non-disclosure was not in breach of the law. Indeed, cash-settled instruments do not trigger notification duties to the extent that they do not entitle the holder 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.
See press release from BaFIN of 21 August 2008 at www.bafin.de
See also Zetsche (2008). This author considers that Article 10(g) of the Transparency Directive could have been applied to the case in questions, provided that some conditions are met.
Also, international press reported end October 2008 about *Porsche* having discreetly built a large position (31,5%) in *Volkswagen* through cash-settled derivatives. The sudden disclosure of this position by Porsche meant that the free float in Volkswagen was reduced to less than 6%. This provoked a high increase in the share price, allegedly because of hedge funds rushing to cover their short positions.

43 In April 2005 the Agnelli family (controlling FIAT at the time with around 30% of the voting rights, through a pyramid structure) entered into an equity swap agreement for around 7% of the shares, which remained undisclosed until executed. While the originally equity swap agreement would be settled in

respect to some financial instruments. In the UK, current discussions concern the use of contracts for differences for access to voting rights. The FSA has recently issued a policy update paper[44], following a consultation period, indicating its intention to set up a general disclosure regime for long positions in contracts for differences and similar derivative instruments, as the most effective way of addressing concerns regarding voting rights and corporate control and influence. Indeed, it is estimated that, in recent times, up to 40% of daily trading in UK regulated markets was done through derivatives of some kind. This would suggest that 'real' positions on their own no longer give a true picture of where the power lies. This new requirement would go beyond the requirements of Article 13 of the Directive[45].

21. *(iii) Impact on the market for corporate control*. The impact of enhanced transparency of the type described above regarding corporate control should not be underestimated. On the one hand, the disclosure of holdings of voting rights at low levels makes it difficult to build up "hostile" positions in possible target companies[46]. On the other hand, the obligation to disclose information regarding the intention to acquire control in a company (i.e. a forthcoming takeover bid) at an earlier stage may increase the price of the target 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 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 is prevented from launching a bid in the immediate period, 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

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cash, the agreement was eventually modified in September 2005 to physical settlement. 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 familiy to keep their shareholings 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.
The Italian law did not require the disclosure of cash settled transactions, but only those settled physically. However, this transaction was investigated by Consob (the Italian regulator). Initially, Consob fined the two parties in the equity swap agreement: the investment bank for failure to disclose the stake cornered by the equity swap transaction (Consob decision of 5 December 2007); the legal entity (Exor) used by the Agnelli family for the equity swap agreement for failure to disclose in due time that such agreement would be settled physically (Consob decision of 1 August 2007) and other entities and persons in the Agnelli family group for disclosing wrong information to the market (Consob decision of 9 February 2007). Three decisions of the Court of Appeals of Torino (23 January 2008) subsequently annulled part of the Consob decisions.
See also Kirchmaier & Grant (2008).

44 http://www.fsa.gov.uk/pubs/cp/cp07_20_update.pdf
The consultation document can be found at:
http://www.fsa.gov.uk/pages/Library/Policy/CP/2007/07_20.shtml

45 In the UK, the Takeover Code already requires the disclose of purely economic exposures to shares under cash-settled derivatives (such as contracts for differences) when an issuer is in an offer period.

46 See §16 above. See also Enriques & Gatti (June 2006) and Ferrarini (2001).

not prepared to launch a takeover bid[47]. At the same time, disclosures on hidden positions gained through the use of financial instruments not subject to the Directive disclosure requirements today (see §20 above) are likely to have positive effects on the market for corporate control.

3. ADDRESSING THE MORE STRINGENT NATIONAL MEASURES

3.1. Voluntary regulatory convergence

22. As suggested above, the negative effects of more stringent national measures essentially affects investors. The effects stem from the stricter nature of the measures combined to the lack of harmonisation which is associated with it. This leads to numerous different regimes that investors need to comply with. In the absence of maximum harmonisation measures at EU level in relation to the Transparency Directive, any reduction and, to the extent possible, offsetting of these negative effects (should this be deemed necessary)[48] depends by and large on the convergence of national rules voluntarily undertaken by the Member States[49].

23. The Commission has already encouraged this process of voluntary convergence, considering that it could have positive effects for the financial markets[50]. Similarly, ESME[51] is also indirectly promoting such convergence in so far as it suggests that "*CESR [sic] seeks as a matter of priority to harmonise reporting requirements at the EU level*". By reporting requirements, ESME refers to timeframes, mechanics and thresholds for notification of major holdings of voting rights[52].

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47 The recent *Sacyr/Eiffage* case could be an example where enhanced transparency measures (including those imposed in the articles of association of *Eiffage*) contributed to making more difficult the assault to *Eiffage* by *Sacyr*, by limiting the surprise effect: i.e. *Eiffage* management discovered the movements and set up a defence strategy. In any event, the ultimate failure of the assault was mainly caused by other factors (including irregular conduct by *Sacyr*, as declared by the French supervisor - AMF). See the AMF decision of 26 June 2007, the decision of the *Tribunal de Commerce de Nanterre* of 26 May 2008 and the decision of the *Cour d'appel de Paris*, of 2 April 2008.

48 For instance, as stated in §15, a one-size fits all approach may not be suitable to provide a similar level of transparency across Member States.

49 Avoiding excessively strict national disclosure rules by moving to the non-regulated markets (also known as alternative markets or exchange-regulated markets) is not always a practical option for issuers (see Annex 7).

50 Cf. European Commission (November 2007), *Communication from the Commission, Review of the Lamfalussy process – Strengthening supervisory convergence*, COM(2007)727final, 20.11.2007, p.5. Indeed, a more harmonised legal environment for issuers and investors regarding their regular and on-going disclosure obligations is likely to reduce costs and to facilitate cross-border listing and investment. This should indirectly benefit the competitiveness of the EU financial markets.

51 ESME (December 2007), p.2 *et seq*.

52 Interestingly, stricter national measures could be a driver of possible future convergence. For instance, as regards the initial threshold for disclosure of major holdings in the Directive (5%), several large Member States have opted for a lower initial disclosure threshold: 3% (Germany, Ireland, Spain, UK), 2% (Italy, Portugal). The regulated markets in these four Member States account for a significant proportion of the market capitalisation (issuers of shares) in the EU: approximately 58% (cf. source FESE, data: August 2008). As a result, the 3% level is likely to become a benchmark for any possible future convergence. ESME has also suggested, partly for corporate governance considerations, converging towards the 3% level (ESME (December 2007), p. 5). The European Parliament has also made this suggestion: *Resolution with recommendations to the Commission on transparency of*

24. Market players, when consulted on this issue, have generally expressed preference for having a level playing field in the Europe market. In a consultation exercise conducted by the French supervisory authority (AMF) on better regulation in 2006, for example, respondents made it plain that the AMF should avoid "gold plating" European requirements[53]. As a result, the AMF committed itself to "*transposing European legislation faithfully to deliver maximum harmonisation across Europe*", unless additional national measures are "*necessary for investor protection purposes*."[54]

3.2. Facilitation of cross-border compliance with different national rules

25. Independently of whether voluntary regulatory convergence takes place, further facilitation (in particular for investors) of cross-border compliance with the different national obligations is generally welcome by market participants. This may mean clarifying the legal obligations and supervisory convergence, providing guidance or providing common tools to comply with certain obligations.

26. *(i) Clarification of obligations & supervisory convergence*. In reply to CESR's call for evidence of July 2007 regarding possible level 3 work in relation to the Transparency Directive, a key concern raised by market participants was the lack of centralised and accurate information on how the Directive has been implemented across the EU. It was underlined that the problem of not knowing what the different requirements are in the Member States arises partly because of the Directive's minimum harmonisation status and the implied possibility of prescribing additional transparency measures and the right of the Member States to choose between different options allowed by the Directive. In response to this concern, CESR undertook a mapping exercise with the aim of publishing factual comparative information on implementation across Member States[55]. The result of this mapping exercise was published on the CESR website in October 2008[56]. Additionally, CESR is also working on supervisory convergence, with a view to ensuring uniform application of the rules resulting from the transposition of the Transparency Directive.

27. *(ii) Guidance*. There is guidance on national obligations in many Member States, but no initiative has been undertaken in this field at EU level. In this context, ESME has called for clarification of reporting requirements for investors and has requested that CESR "*considers the guidance published by the regulatory authorities of Member*

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institutional investors (rapporteur Klaus-Heine Lehne, Committee on legal affairs), 23.9.2008, Reference A6-0296/2008.

53 According to the replies to that consultation, "*gold-plating should only be done if it:*
- clarifies a rule or regulation in cases where direct enforcement creates too much uncertainty or inconsistency
- does not affect competitiveness
- is vital for the AMF to discharge its duties
- adds requirements that serve a genuine purpose and can be proven effective for the stated goal."
See AMF (November 2006) p.10.

54 AMF (November 2006), p.10. Interestingly, in the consultation document, the AMF had already indicated that "*[i]t also tries to avoid "goldplating" – adding extra domestic provisions- unless special circumstances arise, […]*" (emphasis added). See AMF (May 2006), p.10.

55 CESR (February 2008).

56 CESR (September 2008), available at www.cesr.eu

States and publishes one set of EU guidance on such matters"[57]. ESME is of the view that an approach of this kind will also help the EU to deal with technical developments in the financial markets and to ensure consistency of disclosures.

28. *(iii) Common tools*. Cross-border compliance by investors would also largely be facilitated, especially when they need to make notifications to several issuers located in different Member States, if a standard form for notification of major holdings were used across the EU. 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. The Commissioner responsible for internal market called on CESR members in 2007 to make a standard form prepared by the Commission services available to market participants for a trial period ending in June 2008[58]. The impact of the use of this standard form is currently being studied, with the cooperation of CESR[59].

4. CONCLUSION

29. This report highlights the different regulatory approaches of the Member States to the Transparency Directive as regards adopting and/or maintaining more stringent national rules. It also shows that the limits imposed by the Home Member State Rule of the Directive already result in positive effects for issuers. However, evidence collected so far shows that the flexibility offered by the Directive results, certainly on more transparency in the market, but also in practical difficulties for investors' complying with their obligations and may have adverse effects on the market for corporate control. The report has also shown that, while national regulatory convergence in this regard could be an option to address possible negative effects caused by the lack of harmonisation, such a process would need to be voluntary at this stage. At the same time, facilitation of cross-border compliance with different existing national obligations has already been undertaken, in particular by CESR, with positive results.

30. The question of whether legislative changes should be made to the Transparency Directive is not addressed in this report. Whether there is scope for legislative changes from a longer time perspective will be reviewed in the context of the report

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57 ESME (December 2007), p.6.

58 The letter from the Commissioner to CESR is available at: http://www.ec.europa.eu/internal_market/securities/transparency/index_en.htm

59 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.

that the Commission has to draw up on the operation of the Directive, pursuant to Article 33.

ANNEX 1 – THE TRANSPARENCY DIRECTIVE

Directive 2004/109/EC[60] (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.

The Transparency Directive is an important instrument for the modernisation of the EU financial markets[61]. It upgraded the transparency requirements that were previously established in Directive 2001/34/EC[62]. 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.

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 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.

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);

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60 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

61 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

62 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.

– 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).

The Transparency Directive is completed by Commission Directive 2007/14/EC[63]. This Directive 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). Hereinafter, the expression "TD legal framework" will refer to the combination of the Transparency Directive and Directive 2007/14/EC.

The TD legal framework is further supplemented by soft-law. This notably includes: the Commission recommendation on storage of regulated information[64], the standard form[65] developed by the Commission services for the notification of major holdings and the interpretative work undertaken by CESR with regard to the alignment of the exercise of supervisory powers by the national competent authorities[66].

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[67] or the accounting rules[68]. Secondly, other EU instruments, such as the Prospectus Directive[69],

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63 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

64 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

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

66 www.cesr.eu

67 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

68 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[68]); 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

the latest modification to the accounting directives[70] or the Takeover Bids Directive[71] may also include disclosure requirements which form part of the core area of the Transparency Directive obligations. Thirdly, the Transparency Directive will become the instrument for implementing disclosure obligations under other directives, such as the Market Abuse Directive[72]. Finally, the Transparency Directive is also a "distant cousin" of the 1st Company Law Directive[73] which also contains disclosure obligations, although not limited to listed companies.

The transposition deadline of the Transparency Directive was 20 January 2007. As of 20 November 2008, all Member States have formally communicated to the Commission the enactment of national measures transposing the Directive, though some of them have done this partially or late[74].

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69 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

70 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.

71 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

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

73 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

74 See IP/08/692 of 6.5.2008 and IP/08/1519 of 16.10.2008. In any case, it should be recalled that there was national law in place pursuant to Directive 2001/34/EC (and to the previous directives).

ANNEX 2 – THE SURVEY ON THE MORE STRINGENT NATIONAL MEASURES

According to Article 31(2)[75] of the Transparency Directive, Member States should communicate to the Commission the national measures adopted which go beyond the Directive requirements. Indeed, it is regularly reported by stakeholders to the Commission services that, regarding listed companies, Member States often impose (or maintain existing) stricter national rules on top of the existing European legislation (so-called "gold plating"), thus not passing on to companies the opportunities for simplification which the harmonisation brought by EU law offers. In this context, a recent resolution[76], the European Parliament asked the Commission to examine whether the transposition of this Directive has led to 'gold plating' by Member States.

Against this background, the Commission services undertook a limited survey on this issue in 2008. This survey included an information-gathering exercise involving selected stakeholders. The following associations or institutions have provided comments[77]: 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).

ESME[78] and CESR[79] were also consulted on this issue. CESR's mapping exercise has been of particular importance for the preparation of this report[80].

The Commission services also used other available information for the preparation of this document, including: communications made by Member States pursuant to Article 31(2) of the Transparency Directive[81], the intermediate results of two studies commissioned by DG Internal Market and Services in relation to the 1999 Financial Services Action Plan (FSAP) implementation and the cost of compliance with selected FSAP measures[82]; as well as academic research[83].

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75 "[…] *2. Where Member States adopt measures pursuant to Articles 3(1) […], they shall immediately communicate those measures to the Commission and to the other Member States*".

76 European Parliament (May 2008), *Resolution on a simplified business environment for companies in the areas of company law, accounting and auditing* (Rapporteur: Klaus-Heine Lehne, Committee on legal affairs), 21.5.2008, Reference A6-0101/2008, in particular point 6.

77 The following associations were also contacted: CEA (Association of European insurance companies), EFRP (Federation of European pension funds), European Financial Markets Federation.

78 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

79 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

80 CESR (September 2008).

81 Seven Member States (AT, BG, CY, FI, LV, RO and SE) have formally communicated to the Commission their adoption of more stringent requirements in accordance with Article 31(2) of the Directive. Four other Member States (LT, LU, SK and SI) also sent notifications to the Commission in accordance with Article 31(2) of the Directive but in relation to other obligations.

82 www.ec.europa.eu/internal_market/finances/actionplan/index_en.htm

83 See References for a selection of academic papers.

ANNEX 3 – NOTION OF MORE STRINGENT NATIONAL MEASURES

The more stringent national measures for the purposes of this report will normally include measures of general nature adopted by the national parliaments, governments or supervisory authorities which impose stricter requirements in the same area[84] on persons or entities already covered by the Community legislation[85].

Some situations under the Transparency Directive, however, would not fall under that definition (even if they could lead to similar impacts and effects for market participants). These situations are essentially:

- (i) options built in the Directive allowing for Member States choices. For instance, regarding issuers, Article 6 allows Member States to impose the disclosure of quarterly financial reports or, alternatively, a lighter interim management statement. Regarding voting rights holders, Article 9(3) allows Member States to set a 66,6% threshold instead of a 75% threshold;

- (ii) supervisory expectations in the absence of enforceable measures which are *de facto* respected (this situation is starting to be referred to as "silver plating" by stakeholders). This relates to voluntary disclosures by issuers pursuant to supervisory expectations (e.g. voluntary codes of conduct, guidance issued by regulators encouraging a more stringent interpretation of the rules than its literal content). For instance, in **IT** a Consob (Italian supervisor) recommendation of 1997 invited listed issuers to conduct an auditors' review of the half-yearly financial statement.

- (iii) more stringent rules imposed by regulated markets in the absence of national legal obligation to do so[86] (for instance, in **SE**, the regulated market imposes quarterly financial disclosures); and

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84 It should be noted that, what *prima facie* could appear to be stricter national requirements pursuant to the Transparency Directive may also be related to obligations under other Community rules in the securities or corporate governance fields (see Annex 1), under which Member States are not necessarily limited in their transposition powers (e.g. no Home Member State Rule etc).

85 It is disputable whether the application by national law of Community legislation measures to other persons or entities than that proposed in the Community legislation should also be included in this notion.
The Davidson Review in the United Kingdom considers that gold plating "*is when implementation goes beyond the minimum necessary to comply with the requirements of European legislation by:*
- extending the scope, adding in some way to the substantive requirement, or substituting wider [national] legal terms for those used in the directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed (e.g. as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive."
See Davidson Review (November 2006), p. 17.
See also Thomas & Lynch-Wood (2008).

86 In several Members States (**CY, DK, EE, FI, LV, SE, SI, SK** and **UK**), the regulated markets are explicitly allowed to impose more stringent/additional requirements regarding disclosure of regulated information, or are not prevented from doing so (**AT, BE, BG, CZ, DE, EL, ES, HU, IT, LT, LU, MT, NL, PL, PT** and **RO**). Only in **IE**, the regulated market is prevented from doing so. See replies to questions 135 and 136 in CESR (September 2008), Annex 2.

- (iv) more stringent obligations resulting from market practice, in the absence of national legal obligations to do so. For instance, in some countries (see Annex 5), issuers are not prevented from including in their articles of associations specific disclosure obligations for holders of voting rights reaching or crossing thresholds lower than the 5% threshold foreseen in the Directive: usually 1%. In some cases the national law explicitly allows for issuers to impose this kind of obligations with regard the lower threshold disclosure: for instance Article L233-7 III of the French *Code de Commerce* allows issuers to impose disclosure requirements as from 0,5%. However, in the absence of such explicit authorisation and to the extent that it is not explicitly prohibited, the freedom of contract principle would normally allow issuers to apply this type of obligations.

It should also be noted that Member States may interpret the provisions of the directive differently when transposing them, leading to different national results. This situation would not automatically amount to considering that the national measures in some Member States are more stringent than those in the Directive. For instance, for the purpose of calculating the threshold that triggers the notification of major holdings of voting rights, some Member States require the holders to aggregate their holdings of voting rights pursuant to Articles 9 and 10 of the Directive with the holdings of financial instruments pursuant to Article 13[87]. They consider that this requirement would not be more stringent than the obligation contained in the Directive. Other Member States, however, have taken an opposite view. For them, the obligations contained in Articles 9 and 10, on the one hand, and Article 13, on the other hand, should be applied in parallel. In the absence of a decision from the European Court of Justice on this issue, it is difficult to consider that national measures of this kind are more stringent that those of the Directive.

In the course of the survey, it has been brought to the Commission services attention that the timing of adoption of the national measures should be considered when evaluating them. Some are of the view that only the more stringent measures adopted following the directive in question should be considered in this context. Thus the pre-existing national measures would be excluded from the definition. It should be noted that these measures are usually the bulk of the more stringent requirements, since continuity of the national legal framework plays an important role when transposing the directive[88]. For others, the timing of adoption would be of little importance. What would matter is the lack of harmonisation resulting from the entry into force of the directive.

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

88 See for instance, UK Listing Authority (December 2006), in particular § 1.5 and 1.8.

ANNEX 4 – THE HOME MEMBER STATE RULE IN THE TRANSPARENCY DIRECTIVE

According to Article 3 of the Transparency Directive (below), Member States other than the home Member State of the issuer should no longer be allowed to restrict admission of securities to their regulated markets by imposing more stringent requirements on periodic and ongoing information about issuers whose securities are admitted to trading on a regulated market than the requirements set out in the Directive[89]. Further to Article 3, Article 20 also limits the host Member State possibility to request issuers to disclose regulated information also in an official language of the host Member State.

Article 3

Integration of securities markets

1. The home Member State may make an issuer subject to requirements more stringent than those laid down in this Directive.

The home Member State may also make a holder of shares, or a natural person or legal entity referred to in Articles 10 or 13, subject to requirements more stringent than those laid down in this Directive.

2. A host Member State may not:

(a) as regards the admission of securities to a regulated market in its territory, impose disclosure requirements more stringent than those laid down in this Directive or in Article 6 of Directive 2003/6/EC;

(b) as regards the notification of information, make a holder of shares, or a natural person or legal entity referred to in Articles 10 or 13, subject to requirements more stringent than those laid down in this Directive.

It should be underlined that Article 3 of the Transparency Directive only refers to "more stringent" requirements. At the same time, Article 32(4) of the Transparency Directive modified Article 8(2) of Directive 2001/34/EC (the directive that previously contained the transparency disclosure obligations), by deleting the references it contained concerning the "more stringent obligations" while leaving untouched the reference to the "additional obligations". This article now reads: "*Member States may make the issuers of securities admitted to official listing subject to additional obligations, provided that those additional obligations apply generally for all issuers or for individual classes of issuers.*" Hence, it would appear that Directive 2001/34/EC allows Member States to impose additional obligations on issuers (to the extent that issuers are admitted to listing within the sense of Directive 2001/34/EC).

89 See also Recital 7: "*[…] Member States other than the home Member State should no longer be allowed to restrict admission of securities to their regulated markets by imposing more stringent requirements on periodic and ongoing information about issuers whose securities are admitted to trading on a regulated market.*"

On the contrary, the Transparency Directive repealed Article 88 of Directive 2001/34/EC which contained a similar empowerment for Member States as regards investors.

The different between "more stringent" and "additional" requirements is unclear because no definitions are provided in any of the two Directives. A possible interpretation is that Article 8(2) of Directive 2001/34/EC would allow for imposing additional obligations on issuers irrespective of the Home Member State Rule of the Transparency Directive[90].

[90] For some stakeholders, Article 8(2) of Directive 2001/34/EC was modified by the Transparency Directive to secure that some Member States could continue to apply some additional requirements on foreign issuers. For instance, prior to the Transparency Directive, issuers of securities in UK regulated markets, whether British or from other countries, were requested to explain whether they were complying with the British corporate governance code (so-called Combined code). See the FSA (March 2006), consultation document 06/4, *Implementation of the Transparency Directive: Investment Entities, Listing Review*, in particular § 2.34 to 2.38. Document available at: http://www.fsa.gov.uk/pubs/cp/cp06_04.pdf The current listing rules still maintain that an overseas issuer with a primary listing must disclose in its annual report and accounts whether or not it complies with the corporate governance regime of its country of incorporation and the significant ways in which its actual corporate governance practices differ from those set out in the Combined Code (cf. listing rule LR 9.8.7.R). The UK listing rules are available at: http://www.fsa.gov.uk/Pages/Doing/UKLA/index.shtml
Some scholars see Article 8(2) of Directive 2001/34/EC as giving the possibility to Member States to by-pass the maximum harmonisation approach of the Prospectus Directive. Additional requirements for public offers would therefore be introduced as requirements for listing on a stock exchange. See Enriques & Gatti (2008), p. 24, citing Ferran, *Building an EU Securities Market* (2004), p.145.

ANNEX 5 – THE MORE STRINGENT NATIONAL RULES UNDER THE TRANSPARENCY DIRECTIVE

This Annex presents a selection of the more stringent national rules pursuant to Article 3(1) of the Transparency Directive[91]. The information in this Annex is provided to the best of the Commission services' knowledge[92]. It is largely based on information provided to the Commission services by Member States authorities pursuant to Article 31(2) of the Directive, on information on the implementation of the Directive by the Member States disclosed by CESR[93] and on information provided to the Commission services by stakeholders during the survey referred to in Annex 2.

A) More stringent rules affecting investors in relation to notification of major holdings of voting rights

– Additional thresholds for the notification of major holdings of voting rights[94]. According to Article 9(1) of the Directive, investors are required to make the notification of major holdings of voting right if the proportion of voting rights reaches or crosses the following thresholds: 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. Some Member States have, however, established other thresholds: see table below.

Table 1 – Thresholds for the notification of major holdings (the additional thresholds are highlighted) – Article 9(1) of the Directive [cf. questions 8 to 10 in CESR questionnaire]

Threshold **MS**	**Lower**	**5**	**10**	**15**	**20**	**25**	**30 (1/3)**	**35**	**40**	**45**	**50**	**55**	**60**	**65**	**70**	**75 (2/3)**	**80**	**85**	**90**	**95**
AT		x	x	x	x	x	x	**x**	**x**	**x**	x					x			**x**	
BE		x	x	x	x	x	x	**x**	**x**	**x**	x	**x**	**x**	**x**	**x**	x	**x**	**x**	**x**	**x**
BG*		x	x	x	x	x	x	**x**	**x**	**x**	x	**x**	**x**	**x**	**x**	x	**x**	**x**	**x**	**x**
CY		x	x	x	x	x	x				x					x				
CZ**	**3%**	x	x	x	x	x	x		**x**		x					x				
DE***	**3%**	x	x	x	x	x	x				x					x				**x**
DK		x	x	x	x	x	1/3				x					2/3			**x**	
EE		x	x	x	x	x	1/3				x					2/3				
EL****		x	x	x	x	x	1/3				x					2/3				
ES*****	**3%**	x	x	x	x	x	x	**x**	**x**	**x**	x		**x**		**x**	x	**x**		**x**	
FI		x	x	x	x	x	x				x					2/3				
FR		x	x	x	x	x	1/3				x					2/3			**x**	**x**
HU		x	x	x	x	x	x				x					x				
IE	**3%**	**+1% above the initial threshold**																		
IT	**2%**	x	x	x	x	x	x	**x**	**x**	**x**	x			**2/3**		x			**x**	**x**
LT		x	x	x	x	x	x				x					x				**x**
LU		x	x	x	x	x	1/3				x					2/3				
LV		x	x	x	x	x					x					x				
MT		x	x	x	x	x	x				x					x			**x**	
NL		x	x	x	x	x	x		**x**		x		**x**			x				**x**
PL******		x	x		x	x	1/3				x					x				
PT	**2%**	x	x	x	x	x	1/3				x					x			**x**	
RO		x	x	x	x	x	1/3				x					x			**x**	
SE		x	x	x	x	x	x				x					2/3			**x**	
SI		x	x	x	x	x	1/3				x					x				
SK		x	x	x	x	x	x				x					x				
UK	**3%**	**+1% above the initial threshold**																		

* In BG, for the purposes of calculating whether the thresholds are reached or crossed, the percentages of the total number of voting rights exercised at the annual general meeting are also taken into consideration. As a result, additional notifications may be done.

91 See also Annex 4.

92 This Annex is provided for information purposes and the Commission services are not responsible for any possible factual inaccuracies.

93 CESR (September 2008).

94 Cf. CESR (September 2008), Annex 2, replies to questions 8 to 10..

** 3% in CZ if authorised capital >100000 CZK
*** In DE, the thresholds of 80% and 85% apply regarding REITS (real estate investment trusts) admitted to trading on a regulated market.
**** In EL, also all changes greater than 3% (if already over 10%)
***** In ES, for residents in tax havens, every 1%
****** In PL there is legislation in preparation that will introduce disclosure obligations at 15% and 90%.

Regarding the disclosure on reaching or crossing the 90% and 95% thresholds, the above information is provided for information purposes only and should not be understood as implying that Member States are applying stricter requirements[95]. It should be noted that these thresholds are related to the exercise of the sell-out and squeeze-out rights under the Directive on takeover bids. Although that Directive does not explicitly require it, such disclosure is implicit for the functioning of the rules. It should be further noted that not all Member States requiring disclosure at 90% and 95% thresholds apply the Transparency Directive disclosure rules. In some cases, different rules are applied.

In this context, although strictly speaking they are not national stricter measures, it should also be noted that in several countries (**AT, BE, CY, CZ, DK, EE, FI, FR, HU, IT, LU, LV** and **PT**) issuers can set lower thresholds for notification 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)[96]. The law may specify which is the lowest threshold: for instance, in FR it can be set at 0,5%, in BE at 1%. In some of these countries, issuers are allowed to require investors confirmation that they hold no interest, although in investors are not necessarily obliged to answer. On the contrary, in BG, DE, ES, IE, LT, MT, NL, PL, SE, SI, and UK issuers are not allowed to require such notification[97].

– Disclosure of share capital in major holding notifications[98]. According to Article 12 of the Directive, investors notify of the resulting situation in terms of "voting rights". Some Member States, however, also require investors to disclose the percentage of share capital of the issuer held[99]: **BG, DK, EL, FI, FR, HU, IE, IT, LT, LV, NL, PT, RO** and **SE**. It should be noted that this disclosure is, however, related to the implementation of Directive 88/627/EEC[100], which foresaw in its Article 4(1) that Member States could also require the disclosure of the information in relation to the percentage of capital held.

– Shorter deadlines for investors' notifications on major holdings[101]. According to Article 12 of the Directive, investors should report as soon as possible after crossing the threshold, but no later than 4 days). Several Member States have reduced the deadlines: see table below.

Table 2 – Shorter deadlines for investors' notifications on major holdings(Article 12(2)) - [cf. replies to question 48 in CESR questionnaire]	
Disclosure to be done without delay	**FI, NL**
Disclosure to be done no later than 1 trading day	**CY, DK, SE**

95 In this connection, see the comment made in Annex 3, footnote 84.
96 Cf. CESR (September 2008), Annex 2, replies to questions 13 and 14.
97 From the replies to question 13 in CESR (September 2008), Annex 2, the situation is unclear as regards the following MS: EL, RO and SK.
98 Cf. CESR (September 2008), Annex 2, replies to question 41.
99 The following MS have not imposed such disclosure: AT, BE, CY, CZ, DE, EE, ES, LU, MT, SI, SK and UK.
100 Council Directive 88/627/EEC of 12 December 1988 on information to be published when a major holding in a listed company is acquired or disposed of, OJ L 348, 17.12.1988, p.62.
101 Cf. CESR (September 2008), Annex 2, replies to question 48.

Disclosure to be done no later than 2 trading days	**AT, HU, IE, UK**
Disclosure to be done no later than 3 trading days	**EL, RO**
The following MS stick to the Directive deadlines: BE, BG, CZ, DE, EE, ES, FR, IT, LT, LU, LV, MT, PT, SI, SK	

– Disclosure of shareholders' agreements/acting in concert[102]. According to Article 10(a) of the Directive, the requirements to notify major holdings of voting rights "*[…] 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*;" (emphasis added).

Some Member States, however, have widened the "acting in concert" situation which triggers the notification duty in accordance with Article 10 a) of the Directive. Such wider definitions would be motivated by the desire to align the "acting in concert" provisions in the Transparency Directive with those of the Takeover Bids Directive. The goal is to capture under the disclosure requirements of the Transparency Directive what might become a situation of control under the takeover bids regulation, also considering the relevant provisions in the International Accounting Standards concerning the definition of control. From this perspective, they consider that no stricter measures are being applied[103].

Among these Member States, in **DE**, the definition in the law introduced by the recent Risk Limitation Act (August 2008) also covers coordinated conduct beyond the execution of voting rights ("*cooperate in some other way*"), provided that the objective is to bring some long-lasting and significant change to the business model of the issuer. In **ES**, the legislation introduces an additional element by which "*an agreement with a purpose to significantly influence the company's management*" would also be captured, beyond the concerted exercised of voting rights. In **BE**, the new legislation would also include a broader definition by including persons "*who have concluded an agreement to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the issuer in question*" (emphasis added). On the one hand, the Belgian rule does not require a binding agreement obliging the parties too adopt a lasting common policy. On the other hand, the expression "*towards the issuer*" is broader than the Directive wording ("*towards the management of the issuer in question*") and could encompass agreements to exercise voting rights with respect to corporate governance issues but without any intention to influence the company's management. In **FR,** the definition is similar to the Belgian one in so far as it refers to the implementation of a policy towards the company (and not towards its management): "*Persons who have entered into an agreement with a view to buying or selling voting rights or with a view to exercising voting rights to implement a policy in relation to a company are deemed to be acting in concert*" (emphasis added)[104]. In **PT**, it is required to notify the voting rights "*held by persons that have entered into any agreement with a shareholder aimed at either acquiring control of the company or frustrating any changes to its control or otherwise constituting an instrument of concerted exercise of influence over the company in which they own shares*" (emphasis

102 See also CESR (September 2008), Annex 2, replies to questions 37, 39 and 72.

103 On the issue of the link between the Transparency Directive and the neighbouring directives, see footnote 84 in Annex 3. On the question of the different definitions of acting in concert in these two directives, see generally ESME (November 2008).

104 See Article 233-10 of the Commercial Code. The takeover bids legislation provides for additional cases of acting in concert.

added). It should be noted that in PT agreements concerning restrictions on the transfer of shares are presumed (thought it is a rebuttable presumption) to be instruments of concerted exercised of influence. In **SE**, the notifying party is required to integrate with its holdings the voting rights held by some relative persons, such as: the spouse or unmarried partner and the immediate family who have shared a common household for at least one year.

– Intentions with holdings[105]. The Directive is silent on this issue. In **FR**, there is an additional disclosure obligation for large investors in relation to the objectives pursued by the investment (Article L233-7 VII of the Code of Commerce). Investors must declare "*the objectives to be pursued during the next twelve months whenever the thresholds of one tenth [10%] or one fifth [20%] of the capital or voting rights are exceeded."* This declaration shall indicate: (1) whether the buyer is acting alone or jointly, (2) whether it envisages making further acquisitions, (3) whether it is seeking to acquire a controlling interest in the company, (4) directorships for itself or for one or more other persons, or seats on the executive board or the Supervisory Board. If the stated objectives change, *"and this can occur only in the event of major changes in the environment, situation or shareholder base of the persons concerned"*, a new declaration shall be made. The declaration is made to the company and to the French competent authority within 10 working days. Then, it is made public.

Similar legislation has recently been adopted in **DE** (the so-called Risk Limitation Act, published on 18 August 2008), although this particular obligation will only apply as of 31 May 2009. According to the new German law, investors reaching or exceeding the 10% threshold (or a higher threshold) will be required to disclose the objectives they are pursuing by acquiring shares/voting rights in the company. Investors are in particular requested to disclose whether: (1) the acquisition is for the purpose of implementing strategic objectives or achieving trading profits; (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.

The notification is to be done to the issuer within 20 trading days following the crossing of the threshold unless the threshold is only crossed temporarily for a short period. 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).

Interestingly, the former BE 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 Directive.

– Disclosures in relation to financial instruments[106]. In **BE**, investors should also disclose the number of convertible bonds, warrants and shares without voting rights they hold (where

[105] Cf. CESR (September 2008), Annex 2, replies to question 71.

[106] Cf. CESR (September 2008), Annex 2, replies to question 72.

applicable). In addition, they have to update notifications concerning financial instruments (1) if these instruments are not exercised at expiry date and that fact causes the crossing of a downward threshold; (2) at year end, if these instruments are not exercised at expiry date without causing the crossing of a downward threshold; (3) at year end, if they were exercised in the course of the year. In **CY**, the notification in relation to financial instruments foreseen in Article 13 of the Directive should also be done independently from whether the shares to which voting rights are attached have been issued by the issuer or not. In **FI**, there is a requirement to disclose any contract or other arrangement which, when effected, will result in reaching or crossing the threshold(s). In **IT**, investors should also disclose the financial instruments that give the right to the holder to sell the underlying shares (the same thresholds as above apply)

B) More stringent rules affecting issuers in relation to notification of major holdings of voting rights

– Shorter deadlines for the disclosure by issuers of notifications of major holdings[107]. According to Article 12(6) of the Directive, issuers are required to disclose to the public the notifications on major holdings made by investors. They should make these disclosures as soon as they receive the notifications but not later than 3 trading days. Some Member States have established shorter deadlines: see table below.

Table 3 – Shorter deadlines for the disclosure by issuers of notifications of major holdings (Article 12(6)) - [cf. replies to Questions 63, 64 and 65 in CESR questionnaire]	
Disclosure to be done as soon as possible/without delay and/or no later than 1 trading day	**CY, DK, FI, IE, LV, UK**
Disclosure to be done no later than 2 trading days	**AT, EL, HU**
The following MS stick to the Directive text: BE, BG, DE, EE, LT, LU, MT, PL, PT, RO, SI, SK,	
In the following MS, the competent authority directly discloses this information and issuers are exempted to disclose those notifications (cf. Article 12(7): CZ, ES, FR, IT, NL, SE	

– Disclosure of transactions in own shares. According to Article 14, issuers are required to disclose to the public the proportion of its own shares held if such proportion reaches or crosses the 5% and 10% thresholds. This disclosure is to be done as soon as possible but not later than 4 trading days following the acquisition/disposal. In some Member States, there are stricter requirements. In **FI**, issuers are required to notify the stock exchange of all transactions concluded with its own shares and this should be done without delay (and at the latest prior to the beginning of the following trading day). This information is made public by the stock exchange. In **ES**, issuers disclose purchases equal to or above 1%[108]. In **BE** and **SE**, the applicable thresholds are the general ones for major holdings notifications (see above). In **SE**, the disclosure should be done no later than noon the trading day after the day of acquisition of disposal. In **CY**, the disclosure of transactions in own shares must be done the day following the acquisition/disposal.

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107 Cf. CESR (September 2008), Annex 2, replies to questions 63 to 65.

108 This requirement is based on market abuse prevention purposes. By requiring issuers to disclose aggregated purchases (excluding sales) reaching or crossing the 1% threshold, it is possible to capture potential trading operations that would otherwise not be capture by the provision in Article 14 of the Directive. Also, in ES, issuers are only allowed to to own up to 5% of the own capital. If the 1% threshold had not been applied, the Directive rule would hardly capture any transaction on own shares (only when reaching the 5% threshold). In this connection, see the comment made in Annex 3, footnote 84.

– Other requirements[109]. It should be underlined that where investors are required to notify to the issuer the share capital and/or the voting rights when reaching or crossing other thresholds than those foreseen in the Directive (see above), issuers must also disclose these notifications (see replies to question 74 in CESR questionnaire). **PT** imposes disclosure requirements concerning alterations in the type of attribution of the same voting rights: e.g. voting rights indirectly held by a controlled company are now directly held by the parent company.

C) More stringent rules affecting issuers in relation to financial disclosures

– Shorter deadlines for the disclosure of financial reports[110]. The Directive establishes some requirements regarding the timing for making public the financial reports and the interim management statement. A few Member States have, however, established different deadlines, in particular regarding the disclosure of the annual report: see table below.

Table 4 – – Shorter deadlines for the disclosure of financial reports(highlighted) – Articles 4(1), 5(1) and 6(1) of the Directive [cf. questions 78, 84, 92 and 100 in CESR questionnaire]

	Annual Report (Article 4(1))	**Half-yearly report (Article 5(1))**	**Interim management statement (Article 6(1))**	**Quarterly reports (Article 6(1))**
Directive	**At the latest 4 months after the end of each financial year**	**As soon as possible after the end of the relevant period (1st 6 months of the financial year) but at the latest two months thereafter**	**In a period between 10 weeks after the beginning and 6 weeks before the end of the relevant 6 month period.**	***Deadline to be decided at national level (no deadline set in the Directive)***
AT	Directive deadlines	Directive deadlines	Directive deadlines	*60 days from end of quarter*
BE	Directive deadlines*	Directive deadlines	Directive deadlines	*Same deadline as for half-yearly report*
BG	**90 days**	**30 days**	-	*30 days from end of quarter*
CY	Directive deadlines	Directive deadlines	Directive deadlines	*Same deadline as for half-yearly report*
CZ	Directive deadlines	Directive deadlines	Directive deadlines	*?*
DE	Directive deadlines	Directive deadlines	Directive deadlines	*Deadline decided by the stock exchange rules*
DK	Directive deadlines	Directive deadlines	Directive deadlines	*Same deadline as for half-yearly report*
EE	Directive deadlines	Directive deadlines	Directive deadlines	*Same deadline as for half-yearly report*
EL	**3 months**	Directive deadlines	-	*Same deadline as for half-yearly report*
ES	Directive deadlines*	Directive deadlines	Between 3 months after the beginning and approx. 6 weeks before the end**	*45 days from end of quarter*
FI	**3 months**	Directive deadlines	Directive deadlines	*Same deadline as for half-yearly report*
FR	Directive deadlines	Directive deadlines	Between 3 months after the beginning and approx. 6 weeks before the end**	*45 days from end of quarter?*
HU	Directive deadlines	Directive deadlines	Directive deadlines	*Same deadline as for interim manag. statement*
IE	Directive deadlines	Directive deadlines	Directive deadlines	*Same deadline as for half-yearly report*
IT	Directive deadlines	Directive deadlines	Directive deadlines	*45 days from end of quarter*
LT	Directive deadlines	Directive deadlines	-	*Same deadline as for half-yearly report*
LU	Directive deadlines	Directive deadlines	Directive deadlines	*60 days from end of quarter*
LV	Directive deadlines	Directive deadlines	-	*Same deadline as for half-yearly report*

109 Cf. CESR (September 2008), Annex 2,replies to questions 74 and 75.

110 Cf. CESR (September 2008), Annex 2, replies to questions 78, 84, 92 and 100.

MT	Directive deadlines	Directive deadlines	Directive deadlines	*N/A*
NL	Directive deadlines	Directive deadlines	Directive deadlines	*Same deadline as for half-yearly report*
PL	Directive deadlines	Directive deadlines	[Legislation in preparation]	*35 days from end of quarter*
PT	Directive deadlines	Directive deadlines	Directive deadlines	*Same deadline as for interim manag. statement*
RO	Directive deadlines	Directive deadlines	-	*45 days from end of quarter*
SE	**As soon as possible**, but at the latest within 4 months	Directive deadlines	Directive deadlines	*Same deadline as for half-yearly report*
SI	Directive deadlines	Directive deadlines	Directive deadlines	*Same deadline as for interim manag. statement*
SK	Directive deadlines	Directive deadlines	Directive deadlines	*N/A*
UK	Directive deadlines	Directive deadlines	Directive deadlines	*N/A*

N.B. Deadlines referred to in this table should be counted after the end of the relevant financial period (e.g. year, 6 months etc.)
N.B. In most Member States, issuers of shares are allowed to choose whether they publish an interim management statement or a quarterly report: AT, BE, CY, CZ, DE, DK, EE, ES, FI[111], HU, IE, IT, LU, MT, NL, PL, SE[112], SI, SK, UK). Only in BG, EL, LT, LV and RO quarterly financial reports are compulsory for the issuers of shares. In PT quarterly reports are compulsory for certain large issuers of shares[113]. In most Member States, issuers of debt securities or other securities are not required to publish an interim management statement or a quarterly financial report (see below)[114].
* In BE, the annual financial report should be published by the Belgian issuer at the latest 15 days before the annual general meeting, which may take place before the 4 month deadline. In ES, if the issuer publishes the agenda of the annual general meeting before the 4 months deadline, it is required to publish its annual financial statements at this moment.
** In ES and FR, legislation indicates that there should be an interim management statement for the 1st quarter of the financial year and for the 3rd quarter of the financial year. These statements must be published within 45 days after the end of these periods. In practice this amounts to approximately 6 weeks before the end of the relevant 6 month period.

– Availability of annual financial report and half-yearly financial report[115]. According to Articles 4(1) and 5(1) of the Directive, issuers must ensure that their annual and half-yearly financial report should remain available to the public for at least 5 years. Only two Member States request issuers to keep these reports available for a longer period: **MT** (10 years) and **SE**.

– Frequency of half-yearly financial reports[116]. According to the Directive, issuers must make public a half-yearly financial report related to the first 6 months of the financial year. Some Member States, however, require the preparation of half-yearly financial reports for the second half of the financial year as regards issuers of shares only (**ES[117], FI, PL, SE**)[118].

– Issuers required to prepare half-yearly financial reports and interim management statements[119]. According to Article 5(1) of the Directive, issuers of shares and of debt securities must publish half-yearly financial reports, while according to Article 6(1)à of the Directive, issuers of shares must publish interim management statements in the period referred to in the Article. Some Member States have extended these obligations to other issuers. Hence, in seven Member States, half-yearly financial reports are required for all

111 The choice is possible under certain conditions. Otherwise, quarterly reports are compulsory.
112 However, the listing agreement with the stock exchange requires quarterly information.
113 If they meet 2 of the following 3 criteria: balance above 100 M€; turnover above 150 M€, number of average employees above 150 (cf. Article 246 of the Securities Code).
114 Cf. CESR (September 2008), Annex 2, replies to questions 95 to 97.
115 Cf. CESR (September 2008), Annex 2, replies to question 80.
116 Cf. CESR (September 2008), Annex 2, replies to question 112.
117 Unless the annual report is disclosed within 2 months of the end of the financial year.
118 It should be noted that some countries require the publication of quarterly reports instead of interim management statements and that those quarterly reports are also provided for the last quarter of the year (BG, LT, LV)
119 Cf. CESR (September 2008), Annex 2, replies to questions 83 and 91.

issuers having securities[120] admitted to trading on a regulated market: **FI, FR, IT, LT, RO[121], SE,** and **SI**. At the same time, four Member States have imposed issuers of other securities than shares the requirement to publish an interim management statement (or quarterly reports, where appropriate): **AT** (for equity-oriented profit-sharing certificates, participation certificates and deposit receipts); **BG** (all issuers) and **LT** (all issuers).

– Content of annual financial report[122]. According to Article 4 of the Directive, issuers shall disclose the annual financial report (including: (a) the audited financial statements – consolidated where applicable; (b) the management report; and (c) the true-and-fair-view-statements by the persons responsible within the issuer) and the audit report. Some Member States impose, however, other requirements[123]. In **CZ**, issuers should prepare a specific report on relations between the controlling person and the controlled person and on relations between the latter and other persons controlled by the same controlling person (based on Czech company law). In some countries, the report is completed by additional information, for instance: **BG**[124], **IT**[125], **MT**[126].

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120 Except for the cases covered by the exceptions in Article 8 of the Directive.

121 In the case of RO, issuers of shares and of all kind of debt securities (including those that if converted or if the rights conferred on them are exercised give rise to a right to acquire shares or securities equivalent to shares – Cf. Article 2(1)(b))

122 Cf. CESR (September 2008), Annex 2, replies to questions 81 and 82.

123 Requirements imposed by other directives, such as Article 10 of the Prospectus Directive (i.e. a list of public announcements and other published documents, released during the financial year), are not considered here. See Annex 1 for the reference to the Prospectus Directive. The requirement to disclose the website of the company where the annual financial report can be accessed is not considered to be a more stringent/additional requirement as it will be in most cases the consequence of the requirement to keep the report available to the public for at least five years, in accordance with the Directive.

According to the replies to CESR (September 2008), the following Member States do not impose further requirements to those contained in the Directive: AT, BE, CY, DE, DK, EE, ES, FI, FR, HU, IE, IT, LT, LU, LV, NL, PL, PT, RO, SE, SI, SK, UK. It should be noted, however, that it cannot be excluded that in some cases, requirements are imposed by the regulated market's rules. For instance, in **EL**, issuers are required to prepare an annual report on the use of funds raised from a share capital increase in cash or from bonds issuance. This report also includes information about the use of the proceeds as compared to the original investment plan stated in the related prospectus.

124 In particular information related to large transactions of material importance to the issuer's activity, transactions to related parties etc.

125 In particular information regarding related parties transactions or unusual operations.

126 1) a report by the auditors on the compliance by the Issuer with the Code of principles for Good Corporate Governance; 2) if the Board of the Issuer determines that the results for the period under review differ by ten percent (10%) or more materially from any published forecast or estimate or financial projections by the Issuer for that period an explanation of the difference must be made with immediate effect; 3) a statement of the amount of interest capitalised by the Group during the period under review with an indication of the amount and treatment of any related tax relief; 4) details of any arrangement under which a Director of the Issuer has waived or agreed to waive any Emoluments from the Issuer or any Subsidiary Undertaking; where a Director has agreed to waive future emoluments, details of such waiver together with those relating to Emoluments which were waived during the period under review; 5) details of any arrangement under which a Shareholder has waived or agreed to waive any dividends; where a Shareholder has agreed to waive future dividends, details of such waiver together with those relating to dividends which are payable during the period under review; 6) a statement as at the end of the Financial Year, showing by way of note the beneficial and non-beneficial interests of each Director of the Issuer in the Share capital of the Issuer, or in any Related Company together with any change to those interests occurring between the end of the Financial Year and a date not earlier than one month prior to the date of the notice of general meeting at which audited Annual Accounts are to be laid before the Issuer in general meeting or, if there has been no such change, disclosure of that fact; 7) a statement as at the end of the Financial Year, setting out by way of note: i)

– Content of half-yearly financial report[127]. According to Article 5 of the Directive, issuers of shares or debt securities[128] shall disclose the half-yearly financial report (including: (a) the condensed set of financial statements – consolidated where applicable; (b) the interim management report; and (c) the true-and-fair-view-statements by the persons responsible within the issuer). The Directive contains some requirements on how to prepare the non-consolidated condensed set of financial statements and the interim management report. These requirements were completed by Commission Directive 2007/14/EC[129]. The audit report or the auditor's review should be disclosed if it has been prepared (see below). Most of the Member States have not imposed other requirements related to the Transparency

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the names of shareholders holding five percent or more of the Equity Share Capital as shown in the Issuer's Register of Shareholders; ii) the number of holders of each Class of Shares and the voting rights attaching to each Class; iii) a distribution schedule of each Class of Shares setting out the number of holders in the following categories: 1 - 1000 1001 - 5000 5001 and over together with any change to those interests occurring between the end of the Financial Year and a date not earlier than one month prior to the date of the notice of general meeting at which audited Annual Accounts are to be laid before the Issuer in general meeting or, if there has been no such change, disclosure of that fact; 8) in the case of an Issuer incorporated in Malta, details of any shareholders' authority for the purchase by the Issuer of its own Shares still valid at the end of the period under review and, in the case of such purchases made otherwise than through the market or by tender or partial offer to all shareholders, particulars of the names of sellers of such Shares purchased, or proposed to be purchased, by the Issuer during the period under review; in the case of any such purchases, or options or contracts to make such purchases, entered into since the end of the period covered by the report, details thereof; 9) where an Issuer has Securities authorised as Admissible to Listing in issue and is a Subsidiary Undertaking of another Company, particulars of the participation by the Parent Undertaking in any placing made during the period under review; 10) particulars of any contract of significance, subsisting during the period under review, to which the Issuer, or one of its Subsidiary Undertakings, is a party and in which a Director of the Issuer is or was materially interested; 11) particulars of any contract of significance between the Issuer, or one of its Subsidiary Undertakings, and a Substantial Shareholder subsisting during the period under review; 12) particulars of any contract for the provision of services to the Issuer or any of its Subsidiary Undertakings by a Substantial Shareholder subsisting during the period under review; such a contract need not be disclosed if it is a contract for the provision of services which it is the principal business of the Shareholder to provide and it is not a contract of significance; 13) details of Related Party transactions; 14) in the case of a Company incorporated in Malta, a statement by the Directors that the business is a going concern with supporting assumptions or qualifications as necessary; such statement to be reviewed by the Auditors before publication; 15) the name of the Issuer's secretary, the address and telephone number of the registered office; 16) an explanatory statement including: i) any significant information enabling investors to make an informed assessment of the trend of the Group's activities and profit or loss; ii) an indication of any special factor which has influenced those activities and the profit or loss during the period in question; iii) enough information to enable a comparison to be made with the corresponding period of the preceding Financial Year; and iv) so far as possible, a reference to the Group's prospects in the current Financial Year.

127 Cf. CESR (September 2008), Annex 2, replies to questions 85 and 87.

128 See above on other issuers required to prepare half-yearly financial reports.

129 See reference in Annex 1.

Directive[130], except in relation to the content of the non-consolidated condensed set of financial statements or the interim management report[131].

– Content of interim management statement[132]. According to Article 6 of the Directive issuers of shares[133] shall disclose the interim management statement, unless they disclose quarterly financial reports (the content of the quarterly financial statements is not addressed in the Directive). The Directive requires the interim management statement to provide: an explanation of material events and transactions that have taken place during the relevant period and their impact on the financial position of the issuer and its controlling undertakings; and a general description of the financial position and performance of the issuer and its controlled undertakings during the relevant period. In principle Member States have not added further requirements to those in the Directive[134], except in the case of **FR**. The French legislation requires the interim management statement to include the net amount of the turnover for the last quarter per economic sector and, where applicable, for each of the preceding quarters of the current accounting period and for the period as a whole, together with an indication of the corresponding turnover figures for the previous accounting period. The said amount is established on an individual or consolidated basis, as applicable.

– Audit or review of half-yearly financial statements[135]. The Directive does not require that that an audit or an auditor's review is conducted on the half-yearly financial statements, but requires the publication of the audit report or auditor's review if they have been done. A few Member States (**EL, FR**), however, require mandatory review of the half-yearly financial reports, whereas audit or review of half-yearly financial report remains voluntary in the other Member States.

– Other financial disclosures. In **RO**, issuers of shares are required to report any legal document concluded by the issuer with administrators, employees and significant shareholders, as well as with persons related to them, if the (cumulated) value of the transaction account for €50000. These reports shall be submitted no later than 5 days (in some cases the delay may be longer) from the drawing up of the legal document subject of the report to the regulated market operator and to the competent authority, for publication in the bulletin of the competent authority. Also in **RO**, issuers of debt securities must inform the public as soon as possible (and in any case not later than 48 hours following the event) of any major new development in its sphere of activity which are not public knowledge and which may significantly affect its ability to meet its commitments (unless the competent authority waives this obligation) and of the changes in the rights underlying

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130 According to CESR (September 2008), the following Member States do not impose further requirements to those contained in the Directive: AT BE, CY, CZ, DE, DK, EE, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK. It should be noted, however, that it cannot be excluded that in some cases, requirements are imposed by the regulated market's rules. For instance, in **EL**, issuers are required to prepare a report on the use of funds, during the first half-year, raised from a share capital increase in cash or from bonds issuance. This report also includes information about the use of the proceeds as compared to the original investment plan stated in the related prospectus.

131 For instance, ES requires a Cashflow statement and a Statement of changes in Equity, in order to be as close as possible to IAS that guide local GAAP requirements, which do require those statements. BG and CY do also impose additional requirements.

132 Cf. CESR (September 2008), Annex 2, replies to questions 93 and 94.

133 See above on other issuers required to prepare interim management statements.

134 See CESR (September 2008), Annex 2, replies to question 93.

135 Cf. CESR (September 2008), Annex 2, replies to question 88.

the shares when the securities are convertible into shares. In IT, issuers should disclose to the public the balance sheet and the profit and loss accounts of the controlled extra-EU companies, as well as having at the disposal of the public the by-laws and powers of the corporate bodies of those companies.

D) More stringent rules affecting issuers in relation to dissemination of regulated information

– Concept of 'regulated information'[136]. According to Article 2(1)(k) of the Directive, 'regulated information' primarily means all information which the issuer is required to disclose under the Transparency Directive (and its implementing measures), as well as information disclosed pursuant to Article 6 of the Market Abuse Directive[137]. Additionally, Member States may include in that concept the information whose disclosure is requested under the laws, regulations or administrative provisions adopted under Article 3(1) of the Directive (e.g. the more stringent requirements). Further to the elements identified above, some Member States (**BE, CY**) include in this concept of regulated information the – either optional or compulsory[138] – announcements of financial results. Others (**IT, LV**) also include in the concept the information on corporate actions or significant events related to the issuer. **FI** has also included the information to be disclosed pursuant to stock exchanges rules. In **RO**, the concept of regulated information encompasses the disclosure by the issuer (by publishing this information on its website) of the list of the persons who are members of the management bodies of the companies. Finally, it should be noted that several countries include in the concept of regulated information the statement to be made under Article 10 of the Prospectus Directive (i.e. a list of public announcements and other published documents, released during the financial year)[139].

– Dissemination of regulated information: publication in (paper) press[140]. The Directive (Article 21(1)) is neutral regarding the media to be used for the effective dissemination of information to the public throughout the Community[141]. Some Member States (**DE, EL, FR, ML, PL,** and **RO** require some kind of paper-based dissemination of regulated information (or of information on the "regulated information"), while it is permitted in all but one Member State (**NL**). For instance, in **EL**, issuers are requested by national law to publish in the press selected annual and half-yearly financial information[142] at the same time as Annual or Half-Yearly Financial Report is disclosed.

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136 Cf. CESR (September 2008), Annex 2, replies to question 147.

137 See reference in Annex 1

138 In **CY**, the indicative results regarding the unaudited financial statements shall be made public at the latest 2 months after the end of the financial year.

139 See reference to this Directive in Annex 1.

140 Cf. CESR (September 2008), Annex 2, replies to questions 123 and 124.

141 At the same time, the Directive recognises that Member States maintain the "*right to request the issuer to publish, in addition, parts or all regulated information through newspapers*" (Recital 8, *in fine*).

142 The annual financial information includes: selected accounts of the balance sheet, the profit & loss account, the equity statement and the cash flow statement (on a consolidated and non-consolidated basis) and - other material information (such as business combinations, recognition of errors, contingent liabilities, related party transactions etc).
The half-yearly financial information includes: - selected accounts of the balance sheet, the profit & loss account, the equity statement and the cash flow statement (on a consolidated and non-consolidated basis) and - other material information (such as business combinations, recognition of errors, contingent liabilities, related party transactions etc).

ANNEX 6 – ARTICLE 4 OF COMMISSION DIRECTIVE 2006/73/EC

Article 4

Additional requirements on investment firms in certain cases

1. Member States may retain or impose requirements additional to those in this Directive only in those exceptional cases where such requirements are objectively justified and proportionate so as to address specific risks to investor protection or to market integrity that are not adequately addressed by this Directive, and provided that one of the following conditions is met:

(a) the specific risks addressed by the requirements are of particular importance in the circumstances of the market structure of that Member State;

(b) the requirement addresses risks or issues that emerge or become evident after the date of application of this Directive and that are not otherwise regulated by or under Community measures.

2. Any requirements imposed under paragraph 1 shall not restrict or otherwise affect the rights of investment firms under Articles 31 and 32 of Directive 2004/39/EC.

3. Member States shall notify to the Commission:

(a) any requirement which it intends to retain in accordance with paragraph 1 before the date of transposition of this Directive; and

(b) any requirement which it intends to impose in accordance with paragraph 1 at least one month before the date appointed for that requirement to come into force.

In each case, the notification shall include a justification for that requirement.

The Commission shall communicate to Member States and make public on its website the notifications it receives in accordance with this paragraph.

4. By 31 December 2009 the Commission shall report to the European Parliament and the Council on the application of this Article.

ANNEX 7 – THE QUESTION OF THE NON-REGULATED MARKETS

The information in this Annex is provided to the best of the Commission services' knowledge[143]. It is largely based on information on the implementation of the Directive by the Member States disclosed by CESR[144] and on information provided to the Commission services by stakeholders during the survey referred to in Annex 2.

The question at stake is whether moving to the non-regulated markets with a view to escape the Transparency Directive is a realistic option.

It appears that Member States have generally not extended the applicability of the rules of the Transparency Directive to the non-regulated markets[145].

This does not mean that the alternative markets have no transparency requirements for issuers at all. However, they are less demanding than those in the Directive. For instance, regarding financial reporting[146], in the **UK** Professional Securities Market (PSM), for debt and depository receipts, there is an obligation to produce an annual financial report (though the deadline for its disclosure is longer – 6 months – and there is no requirement to use IFRS). In Alternext (**BE, FR, NL**), the annual financial report (and the half-yearly condensed accounts) should also be disclosed, but there is no requirement to use IFRS either and in the case of half-yearly condensed accounts, the deadline for disclosure is 4 months. Additionally, the deadline for disclosure of half-yearly condensed accounts is 4 months. In Latibex (**ES**), issuers disclose annual, half-yearly and quarterly financial reports with similar obligations to those of the Directive. Concerning the notification of major holdings, major shareholding disclosure rules apply, for instance, to holdings of shares in companies listed in the AIM and PLUS (**UK**), First North (**DK**), Alternext (BE, FR, NL), albeit thresholds are not necessarily the same as in the Transparency Directive (e.g. 25%, 30%, 50%, 75%, and 95% in Alternext).

The option of moving to the non-regulated markets is more attractive to new listings[147], than it is for companies already listed. Delisting from regulated markets to move to the non-regulated markets does not happen so often. Anecdotal evidence collected in the survey 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.

Concerning the investors perspective, no evidence has been obtained on whether the national rules applied pursuant to the Transparency Directive have a decisive influence on large investors (i.e. those likely to be exposed to the disclosure rules of the Directive) on any possible shift of investment between regulated to non-regulated markets.

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143 This Annex is provided for information purposes and the Commission services are not responsible for any possible factual inaccuracies.

144 CESR (September 2008).

145 Had they done so, one could have considered those measures as more stringent national measures pursuant to the Transparency Directive, to the extent that the Member States would not be taking full advantages of the provisions of Directive 2001/34/EC repealed by the Transparency Directive (although this interpretation is disputed, see Annex 3 above, footnote 85).

146 See also CESR (September 2008), Annex 2, replies to question 120.

147 According to Enriques & Gatti (April 2007), citing a survey done by PriceWaterhouseCoopers, of the 643 IPOs on the twelve main European exchanges in 2006, 400 took place on exchange-regulated markets – although in terms of offering value, those taking place on regulated markets still dwarfed them: 57,105 million euro for the former against 7,987 million euro for the latter.

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N.B. Several of the academic papers are accessible via www.ecgi.org and the SSRN.