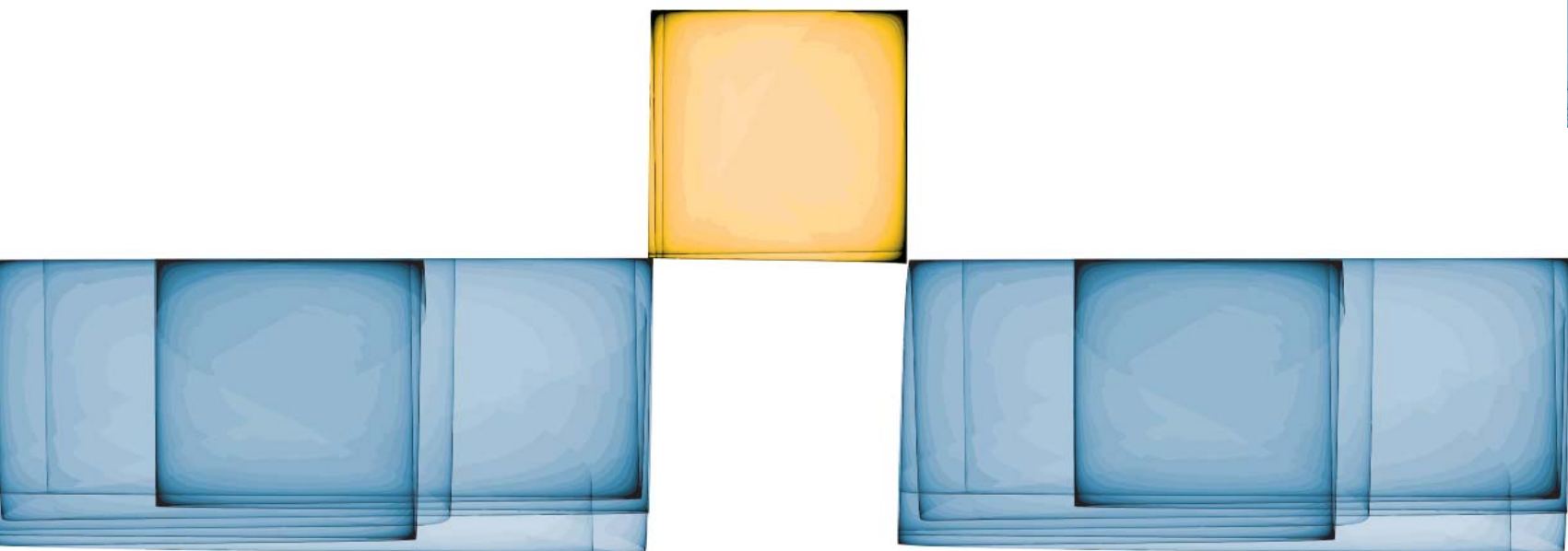




Prepared for the European Commission  
Internal Market and Services DG  
Final Report

# Transparency Directive Assessment Report





Executive summary and  
possible improvements



# Table of contents

<b>Executive summary .....</b>	<b>VI</b>
<b>1. Clarity and suitability of the Directive .....</b>	<b>VII</b>
<b>2. The disclosure of periodic information.....</b>	<b>IX</b>
<b>3. Information and notification of major holdings .....</b>	<b>XI</b>
<b>4. The dissemination and storage of Regulated Information .....</b>	<b>XV</b>
<b>5. Use of language for the disclosure of Regulated Information .....</b>	<b>XVI</b>
<b>6. Supervision.....</b>	<b>XVII</b>
<b>7. Impact of the Directive on the attractiveness of the Single Market ....</b>	<b>XVII</b>
<b>Possible improvements.....</b>	<b>XIX</b>

*The full report and the annexes to the Transparency Report are available on the European Commission Internal Market and Services DG website:  
[http://ec.europa.eu/internal\\_market/securities/transparency/index\\_en.htm](http://ec.europa.eu/internal_market/securities/transparency/index_en.htm) and on [www.mazars.com](http://www.mazars.com).*

# Executive summary

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 (the “Directive”, the “Transparency Directive” or “TD”) requires issuers of securities admitted to trading on 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 (2003/6/EC). The Transparency Directive has been in operation for over two years in the EU. It is one of the key FSAP directives for the transparent functioning, and therefore, attractiveness, for the Single Market.

One of the primary objectives of this study is to provide quantitative and qualitative evidence to assist the Commission in fulfilling its obligation under Article 33 of the Directive by reporting on the operation of the Transparency Directive to the European Parliament and to the Council. The report by the Commission is to be made in 2010 and will examine whether the application and obligations of the Transparency Directive fully meets its objectives.

The Commission issued an invitation to tender (MARKT/2008/07/F) on 13 June 2008 for a study on the application of selected obligations of the Transparency Directive. Following a competitive tender process, the contract was awarded to Mazars on 29 December 2008.

The following key analytical conclusions can be drawn from the investigation carried out for this study\*.

*\* In order to meet the objectives of the study, the approach for collating evidence on stakeholder perception, operation of the Transparency Directive and third country comparison, has included the following methodologies: on-line questionnaires (with a 12% global response rate), stakeholder interviews, financial reporting compliance reviews; and legal implementation reviews. When the number of responses for a specific category of stakeholders and/or a particular Member State was considered insufficient, we have tried to compensate for this lack of input with interviews with those stakeholders or their associations.*

*The EU Member States included in the study are: Austria, Czech Republic, France, Germany, Hungary, Ireland, Italy, Luxembourg, The Netherlands, Poland, Spain, Romania, Slovakia, Sweden and the United Kingdom. Non-EU Member States are: US, Japan, China, India, Hong Kong and Switzerland. The categories of stakeholders studied include: Issuers of shares, Issuers of debt or other securities, Institutional investors, Retail investors associations, Media, Financial Analysts, Exchanges, Other stakeholders' associations and Supervisors. Financial Intermediaries responded to the questionnaire as issuers of shares or debt securities or as Institutional Investors.*

*The results presented in this Executive Summary and in the full Report should be read in conjunction with the attached annexes<sup>2</sup>, which provide detailed statistics and a commentary on the methodologies used in the study, the key sources of information and material used.*

*This study is conceived as a complement to exhaustive reports on the functioning of the Directive published in particular by the European Commission and the Committee of European Securities Regulators (CESR). It is therefore not the objective of this study to repeat the findings and conclusions of those reports. It should be noted also that the period of time elapsed since an effective application of the Directive in all Member States is too short to obtain informative quantitative figures measuring the impact of the Directive. The best attempt to achieve this can be found in the two studies commissioned by the Commission on the economic impact of the FSAP and on the cost of compliance with selected FSAP measures (see “How to know more about the Transparency Directive”, section 5 of the Methodology Annex).*

## 1. Clarity and suitability of the Directive

Above all, it should be highlighted that a strong majority of stakeholders consider the Directive to be useful for the proper and efficient functioning of the market. Indeed, 65% of stakeholders consider that the provisions of the Directive are appropriate to achieving its objectives of providing accurate, comprehensive and timely information to the market. Two points were nevertheless frequently made regarding the general architecture of the Directive:

- The fact that the Directive is a minimum harmonisation directive that gives Member States the possibility to adopt more stringent requirements has created real and costly implementation problems.
- The absence of more flexible rules for Small and Medium size Enterprises (SMEs)\*\* makes the requirements too demanding and costly according to SMEs. This even creates some inefficiency in the market.

No strong voice is challenging the existence or the merits of the legislation. It was made absolutely clear, however, by all issuers interviewed that no additional requirement to publish financial information should be imposed on them. In addition, 81% of stakeholders believe that the provisions of the Directive are sufficiently clear. This is due in particular to the fact that a number of key provisions were already in existence in most of the Member States. When lack of clarity is signalled, in most cases stakeholders consider this to be caused by the national transpositions or market practices, very few consider that this is due to the Directive itself.

62% of stakeholders consider the Directive to be sufficiently detailed except for: (i) some provisions (i.e. content of the Quarterly Interim Management Statement), (ii) where it allows for excessive divergence in national implementation (i.e. notification of thresholds), and (iii) some definitions triggering obligations (i.e. “acting in concert”).

Harmonisation is considered sufficient by 45% of stakeholders and during interviews a clear tendency in favour of maximum harmonisation was expressed by investors. This was particularly highlighted for the crossing of thresholds requirement where national divergences increase overtime. This maximum harmonisation is required for practical reasons: definitions, scope, exemptions, calculations, level of thresholds, deadlines and notification forms. It should be noted that issuers are less concerned by the lack of harmonisation as they benefit from the home competent authority principle imposed by the Directive; more vocal are the users of regulated information (financial analysts and institutional investors) who are more often confronted with cross-border differences. In order to compensate this lack of harmonisation, 44% of stakeholders would agree to have more guidance to help them comply with specific requirements of the Directive. They would favour in particular harmonised guidance issued by CESR. A clear majority of non-EU issuers, in particular, when they are listed overseas, favour additional guidance as to the obligations of the Directive.

\*\* The term SME is often used in this report but it should not be understood as referring to an existing definition in Community Law. A specific definition of SMEs having their securities admitted to trading on a Regulated Market would be necessary if a specific regime is put in place.

As regards the relevance of a specific transparency regime for SMEs, 59% of stakeholders having an opinion on this issue are, in general terms and as a matter of principle, in favour of distinct transparency rules applicable to SMEs. The major difficulty seems to be the deadline for the publication of half-yearly reports. If SMEs should be defined, a market capitalisation between 250 million and 1 billion euros is often mentioned. Financial analysts are strong supporters of spreading the disclosure of financial reports over an extended period of time.

Generally speaking, stakeholders do not believe that the Directive has an impact either on the primary issuance of securities or on listings:

- 50% of stakeholders have no opinion on this matter or believe that the Directive has no effect on primary market issuances. More regular issuers of debt or other securities are inclined to believe that the Directive has favoured issuances.
- 50% of stakeholders consider that the Directive has no effect on the IPO\* market. The current dry IPO market is more readily explained by the financial crisis.

Companies not listed in their Member State of incorporation have expressed frustration as the Home Member State principle of the Directive was to simplify matters, whereas in reality they do not feel that this is the case - dual reporting and compliance with two different sets of rules continue to exist due to supervisors' practices going beyond what is required by the Directive.

Finally, 60% of stakeholders support lighter transparency rules for Exchanges-regulated or alternative markets and therefore oppose extending the requirements of the Directive to those markets.

The above comments reflect a general trend. For each issue, opinions differ per category of stakeholder and among the various Member States. In order to have a global vision and a better understanding of these matters, a closer reading of the report in full is necessary.

The legal analysis of the operation of the Directive confirms that its drafting is, generally speaking, sufficiently clear, with the following exceptions:

- Some definitions should be reviewed to take into account specific regimes or legal mechanisms (e.g. the definition of “issuer” should more clearly take into account fiduciaries and common funds), and the use of different terms with similar meanings (such as “material events” and “important events”) should be made more consistent.
- Rules regarding the notification of major holdings (which are addressed in section 3).

\* *Initial Public Offering*

## 2. The disclosure of periodic information

As a general assessment derived from targeted reviews, stakeholders' opinion and legal assessments, it can be stated that the provisions of the Directive regarding the publication of periodic information by issuers having securities admitted to trading on a regulated market are suitable and meet the objectives.

Indeed, 82% of stakeholders consider the periodic information published by the listed issuers to be useful for investment purposes. 70% of stakeholders also believe that the content of the information is pertinent to making an informed assessment as to the financial position of an issuer. A systematic review indeed shows that issuers voluntarily publish more than the minimum requirements regarding half-yearly and quarterly financial information. Furthermore, 71% maintain that the issuers produce sufficient information compared to those required. In addition, 69% of stakeholders do not consider the compliance cost with periodic information obligations to be too onerous.

The stakeholders' perception is that periodic information is disclosed in a timely manner (82%). When conducting a systematic compliance checking review, one can see that the reality is even better (with some difficulties for recent Member States).

Seen from the issuers' point of view, 70% do not experience any difficulty with the publication deadlines; however, 26% of issuers of shares or debt securities confess to having problems in meeting the publication deadlines. In most cases (87%), the difficulty comes from the two month deadline for the publication of half-yearly reports. SMEs have been very vocal in expressing their dissatisfaction about this deadline. Users of financial information, and in particular financial analysts, also feel that this bottleneck of disclosure of information at the end of the second month disrupts the market, deviating the analysts' and financial press' attention from SMEs as they focus more on the Blue chips. In addition, be it by obligation or on a voluntary basis, 80% of issuers have their half-yearly reports audited or reviewed by an external auditor (in 5 Member States this is mandatory) and this contributes to the difficulty in meeting the deadline. Spreading the publications over an extended period of time would therefore both alleviate SMEs and contribute to a more fluid functioning of the market. The idea of having different deadlines for SMEs is supported by 26% of stakeholders. It has recently been recommended by the International Organisation of Securities Commissions (IOSCO) and is currently practised in the U.S.

The balance achieved by the Directive to avoid the "short-termist" effect of the publication of full quarterly reports is supported by stakeholders. 69% of the latter judge quarterly information to be useful for the transparency and the functioning of the market. The information published in the Interim Management Statements (IMS) is deemed valuable by 62% of users of financial information and more valuable than quarterly financial reports. Having said that, a number of stakeholders complained about the lack of clarity and detail of the content of the IMS (Article 6.1 of the Directive). Some predictability and comparability

has been provided by CESR in October 2009 (see FAQ Regarding the Transparency Directive – Ref 09-965). Stakeholders have very mixed views on the use of the XBRL\*. Users of financial information are inclined to favour the use of a common interactive data technology (as also recommended by IOSCO), but issuers have adopted a “wait and see” attitude and are, in any case, against a mandatory use of XBRL. Non-EU stakeholders seem to be more familiar with XBRL than the EU market players. In October 2009, CESR launched a wide consultation on the pros and cons of the use of a Standard Reporting Format for the Financial Reporting (Ref 09-859).

Only 35% of stakeholders believe that the Directive has enhanced the comparability of companies active in the same sector. In fact, they consider the IFRS as being the driving force for an enhanced comparability. An element of frustration is that retail investors do not feel that the Directive has made them invest more in non-domestic listed companies.

From a legal standpoint, the provisions regarding periodic information are clear. No major loopholes or compliance issues have been identified. The following should, however, be noted:

- Some technical improvements could be introduced regarding, for instance, the content of the statements made by responsible persons in half-yearly statements or information requirements under section 16.3 of the Directive regarding the disclosure of new loans.
- Statements made by responsible persons in the annual and half-yearly financial reports enhance the accountability of such persons but do not lead to a unified liability regime regarding false or misleading statements. An enhanced harmonisation in this area would be beneficial to a transparency level playing field.

\* *eXtensible Business Reporting Language*

### 3. Information and notification of major holdings

The provisions of the Directive regarding the on-going information and the notification of major thresholds is considered to be the most problematic according to the perceptions of stakeholders and the legal assessment of the legal operation in the Member States.

The fundamental principles of the Directive are not in question. Indeed, 79% of financial information users (financial analysts and institutional investors) are of the opinion that the information disclosed on major holdings (including financial instruments) is useful for investment purposes. In addition, 58% of stakeholders indicate that the notification obligations of the Directive do not result in an unreasonable increase of burden. There is no voice to say that the Directive has resulted in too much information given to the market but rather a call for more situations to be disclosed.

It is when the stakeholders start expressing an opinion on more detailed or practical measures of the Directive that their dissatisfaction becomes visible. This is mainly due to the fact that the possibility for Member States to adopt more stringent requirements has undermined the harmonisation attempt of the Directive. To clarify: the Transparency Directive has not succeeded in simplifying the notification of major holdings in the EU. One of the consequences of this lack of harmonisation is that the burden to declare thresholds has not diminished despite the adoption of the Directive. It is a missed opportunity to reduce compliance costs. The other factor explaining the frustration of stakeholders is that financial innovation or unclear provisions of the Directive allows certain market players to circumvent transparency requirements. In other words, the provisions of the Directive on major holdings are not market resistant (too rule-based and not sufficiently principle-based).

The following perception trends illustrate this general opinion on the weaknesses of the Directive:

- Only 15% of stakeholders believe that the Directive has facilitated cross-border declaration of thresholds;
- 83% of financial analysts as well as 87% of retail and institutional investors declare to be adversely affected by the fact that Member States impose lower initial thresholds;
- 55% of stakeholders believe that the lending of voting rights should be made transparent;
- 86% of stakeholders having a view on the matter feel that the Directive should include provisions to prevent “empty voting”;
- 90% of stakeholders expressing an opinion on this issue favour the inclusion of cash-settled equity swaps and cash-settled contracts for differences in the calculation of thresholds (fully or above a certain threshold);
- 58% of stakeholders support the fact that investors acquiring a certain significant holding (such as 10%, 15% or 20%) should be required to provide more detailed information;

- Some stakeholders are in favour of lowering the initial threshold of the Directive below 5% as in several Member States.

Stakeholders also expressed their dissatisfaction regarding the practical measures to notify the crossing of thresholds. 66% believe that national differences for the notification of major holdings should be reduced. 60% are in favour of a single harmonised set of rules for major holdings disclosure. Finally, 62% of stakeholders clearly support the use of a common electronic form to notify the crossing of thresholds in the EU.

From a legal standpoint, most of the concerns regarding the Directive are linked to requirements regarding the notification of major holdings. The issues relate to almost all provisions, with a focus on potential loopholes regarding stock lending, “empty voting” and the use of derivatives (in particular when they are cash-settled).

Regarding the general provisions of the Directive, clarification would be particularly useful on the following issues:

- The definition of “acting in concert” (section 10.2) should be further clarified, in particular in connection with the border line between discussions or actions taken collectively between shareholders and “shareholder activism”. More specifically, the notion of “lasting common policy” raises a number of questions. An analysis of practical situations that may arise is necessary to provide further specifications. However, any revised legislation or set of guiding principles should remain “principle based”.
- The duties of the issuers to make the notification public (section 12.6) should be clarified, in particular when the notification form they receive from investors is not satisfactory or includes calculation errors.

XII

The following issues should be addressed, through a revision of the Directive or provision of further guidance:

- In connection with article 9 of the Directive, providing for the core notification obligation: the way depositary receipts and voting caps should be taken into account, and the manner in which the denominator is computed.
- For purposes of section 12.3, in connection with the definition of control that should be used, the case where more than one controlling shareholder exists.

The scope of certain exemptions should be clarified or extended. This relates in particular to the following:

- The extension of the exemption benefiting credit institutions acting for their own account (section 9.6 of the Directive) when acting as underwriters (and in particular for “greenshoe” options and alike).
- The extension of the exemption of article 12.4 to non-UCITS Asset management firms (the current exemption applying only to management companies covered by the UCITS directive (85/611/EC)).

In order to avoid loopholes and in view of an enhanced transparency regime, the following mechanisms have been noted:

- **Catch-all provision:** In Austria, there is a broad catch-all provision which may prove useful to avoid loopholes. It imposes notification obligations to “*persons being entitled to exercise voting rights without being the legal owner of the respective shares.*” In the US, there is also a broad anti-avoidance provision which has proved useful in the context of the abusive use of derivatives.
- **Enhanced disclosure for significant holdings:** It has also been shown that, in view of more complete information useful for investment purposes, acquirers of significant holdings (for example 10% or 20%) should disclose additional information. The information to be disclosed may include the potential acquisition of control, the willingness to continue to buy shares, the intention to change the composition of the board and any plans to change the strategy of the company. If possible, the investor could also be required to disclose the time frame of the investment, some information on the sources of financing and whether the shares are held in full ownership or through stock lending. This system, which exists in France and Germany, also bears some similarity with the US disclosure system, which requires filing of extensive information on Schedule 13 D when thresholds of 5% and each additional 1% are crossed.

In all EU jurisdictions under review, typical **stock-lending** agreements result in a transfer of ownership of the lent shares. Under article 9 of the Directive, the transaction should thus be notified both by the lender and the borrower. Some countries, such as the United Kingdom, consider that the lender does not need to be notified. The logic is that, under a standard stock lending arrangement, whereby the lender maintains a right to call for redelivery of the shares, there is a simultaneous disposal of rights in the shares and the acquisition of a corresponding right to reacquire them. The lender under such an arrangement is permitted to “net off” the disposal and acquisition and, therefore, not count the transaction under its disclosure obligations. There is a concern that disclosure on both sides of the transaction would lead to confusing and conflicting disclosures which may harm the market information available to third parties.

On the other hand, enhanced disclosure is supported by the need to have a complete picture of the situation at any given time. The only way to provide complete and consistent information to the market would be to have the transaction declared both by the lender (who would disclose his move from full owner to holder of a right to re-acquire the shares) and the borrower (who would declare his status of owner and his obligation to return the shares). In this case, there would be no risk of confusion. On the contrary, it would eliminate the risk of double counting the shares (a first time for the lender and a second time for the borrower, which is potentially misleading or at least confusing). The system would also be simpler, as the same rule would apply to all stock lending transactions, irrespective of specific contractual terms (whose complexity may lead to diverging interpretation). Italy and Luxembourg both apply a system imposing disclosure requirements to the lender.

Regarding “empty voting” (i.e. voting without the economic exposure attached to shares), there is a wide consensus that such a practice is contrary to the basic principles of company law. The position in support of further regulation is based on the idea that voting power is conferred to the shareholders in view of the fact that they will bear the positive and negative consequences of their decisions. On the contrary, empty voting includes the possibility to exert influence on companies without any financial consequences for the investors. In other words, the person who exercises the voting rights is not the one who bears the consequences of the decision. As a result, decisions detrimental to other investors and to the issuer could be decided. A number of high profile cases have shown the potential for abuse resulting from this type of conduct (for the instance the Laxey Partners case in the UK, the OMV / MOL case in Hungary, the Perry/Milan case in the US or the Henderson Land case in Hong Kong). Seminal research produced by Bernard Black and Henry Hu\* and specific research in Europe by Michael Schouten\*\* provide a complete description of the mechanism and its potentially harmful effects. The position taken by a number of financial industry representatives (such as the International Securities Lending Associations, the International Corporate Governance Network or the Hedge Fund Standard Board) also demonstrates that the concern regarding empty voting is widely shared within the financial community.

Positions taken in support of empty voting (in particular, the fact that it may facilitate the monitoring of the management) does not appear strong enough in view of the foregoing. In theory, the issue could be addressed through disclosure or prohibition. Mandating full disclosure would not change the contradiction between the “empty voting” practice and the basic principles of company law. Setting up a disclosure regime could even be perceived as an implicit legal recognition of the practice. Therefore, all in all, we are inclined to recommend a ban on this practice.

**Cash-settled derivatives** have raised a number of comments following their use in various jurisdictions to avoid notification requirements (Porsche / VW, Schaeffler / Continental, SGL Carbon, TCI / CSX, Laxey Partner / Implenla, Victory / Sulzer, Glencore International / Austral Coal, Fiat). In most jurisdictions, these derivative-products are seen as a well identified risk of potential abuse. Appropriate disclosure requirements have been imposed in the United Kingdom, in Switzerland and in Hong Kong and disclosure requirements have recently been implemented in France. There seems to be a clear case to close the loophole. We thus suggest the implementation of a notification regime.

\* Hu, Henry T.C. and Black, Bernard S., *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership*. *Journal of Corporate Finance*, vol. 13, pp. 343-367, 2007

\*\* Schouten, Michel, C., *The Case for Mandatory Ownership Disclosure (April 21, 2009)*. *Stanford Journal of Law, Business & Finance*, Forthcoming

## 4. The dissemination and storage of Regulated Information

Stakeholders consider the provisions of the Directive regarding the dissemination of regulated information of issuers having securities listed on a regulated market to be satisfactory. In fact, the Directive has not introduced significant changes to market practices. The only novelty is the requirement of an EU wide dissemination of regulated information.

70% of stakeholders using the information believe that issuers use the appropriate media to disseminate the financial information that they produce and 45% do not believe that the Directive has changed the way financial information is made public. 50% of users of financial information feel that the information easily reaches the investor. The fact that some Member States still require a paper based publication of some regulated information in newspapers is considered to be more a matter of financing of the press than a dissemination of information issue.

A heavily commented issue is the poor cross-border dissemination of regulated information by SMEs and the low interest shown by analysts and investors in those companies (“Black hole”). 72% of financial information users have no opinion on the impact of the Directive on better access to financial information disclosed by Small and Mid caps. 83% of issuers think that the Directive’s provisions for dissemination have no effect on their cross-border visibility or they express no opinion at all on the subject.

If the issue is well identified, no real solution has been put forward during our interviews and the general consensus is that the law or the rules cannot fill the gap. Only a change in the behaviour of the markets’ participants would be likely to do so. At this juncture, financial analysts and investors focus their attention on top companies, leading SMEs to wonder if it is indeed worth the effort to communicate more widely. One could, however, consider that public authorities at EU or national level could play a role in promoting a more cross-border secondary market for listed SMEs. This could include encouraging more cross-border financial research, cross-border indices per sector, cross-border investment funds per sector, etc.

The provisions of the Directive for storage of regulated information disclosed by issuers whose securities are traded on a regulated market are generally well accepted by stakeholders.

85% of stakeholders consider the storing of historical information to be useful. 50% are of the opinion that what is required to be stored is relevant (periodic reports and price sensitive information); investors would even be in favour of storing more information. 70% of stakeholders agree that the information should be stored for a minimum of five years. Views are mixed regarding the impact of the Directive on storage practices but 63% of issuers perceive the Directive to be neutral.

Opinions are more divided and sometimes paradoxical regarding the storage mechanism itself and the access to stored information. There would appear to be a preference for a central storage system (45%) as it is recommended by the International Organisation of Securities Commissions (IOSCO). Even if 38% of investors have more confidence in the information obtained through an Officially Appointed Mechanism (OAM), the national independent storage mechanisms are not well known and only 5% of users of financial information resort to them as a primary source of information regarding a specific company. In fact, the business case for commercially driven OAMs is not clear (in some Member States there are no applications to become an OAM). 60% of stakeholders believe that the Supervisor or the Exchange should be the central access point for stored information, with a preference for the Supervisor. Finally, 63% of stakeholders who expressed an opinion would be in favour of a central EU storage system to facilitate cross-market information searches.

In other words, two years after the introduction of the Directive, there would still not appear to be a stable and consensual vision on the manner in which stored information may be accessed at national and EU level. No real cost benefit analysis taking into account the interests of all stakeholders has been conducted on the issue.

Three possible scenarios may be derived from the opinions expressed by stakeholders:

- To rely exclusively on the issuers' website. In order for this to function, the way in which information is stored in a specific section of the issuers' website would have to be harmonised and made compulsory at EU level.
- To improve the functioning and visibility of national storage mechanisms. This would mean more streamlined and harmonised technical requirements to allow for an efficient interconnection at a regional or pan European level, and more flexibility in the way in which such systems are run to improve their business case.
- To create an EU single entry point. One possibility is to give this role to the Committee of European Securities Regulators (CESR), where a list of EU listed companies would be accessible with a direct link to the specific section of the company's website where regulated information would be stored.

## 5. Use of language for the disclosure of Regulated Information

The provisions of the Directive regarding the language to be used for the disclosure of Regulated Information do not seem to create a particular problem for stakeholders. Indeed, 89% of stakeholders have no opinion or believe that the Directive has not changed market practices. 59% of stakeholders that use the financial information disclosed consider this information to be readily available and easily accessible in a language customary to the sphere of finance. 56% of financial information users declare that they consult press releases or financial information in languages other than English. 50% of financial information users believe that the absence of financial information published in English is an obstacle for investment decisions. In response to this, 42% of issuers feel that the use of the English language for the publication of their financial information has enhanced their visibility abroad.

## 6. Supervision

As a complement to the exhaustive mapping of regulatory and supervisory powers of competent authorities under the Directive, published by the CESR in July 2009 (CESR/09-058), it may be stated that the stakeholders' perception on the manner in which supervisors play their role is positive.

Stakeholders generally (55%) feel that their relationship with their regulator has not changed with the Directive. 48% believe that supervisors have issued sufficient guidance for the daily compliance of the obligations of the Directive.

46% of stakeholders deem monitoring and sanctioning of transparency obligations by supervisors to be appropriate, whereas investors would prefer supervisors to be stricter. It is interesting to note that 50% of financial information users do not have a clear view of who the relevant supervisor for each issuer is. Finally, the manner in which the Directive's obligations are implemented and enforced is not considered to be determining criteria for issuers in selecting their country of incorporation.

One point highlighted by stakeholders is the lack of transparency in the process to assess the equivalence of third countries transparency regimes and its consolidated result on an EU level.

As regards the opportunity to extend the 10 year exemption to publish half-yearly reports for bond issuers listed before 2005 (section 30.4), stakeholders are relatively indifferent on this point. Subject to a more specific identification of the debt issuers likely to be affected and an impact assessment, we recommend letting the exemption expire in 2015.

## 7. Impact of the Directive on the attractiveness of the Single Market

It should be noted from the outset that non-EU stakeholders have not shown a great interest in commenting on the functioning of the EU transparency regime created by the Directive. The rate of "no opinion" from non-EU stakeholders to a number of questions on the online questionnaire is much higher than the one on the EU respondents. The overall knowledge and understanding of the obligations of the Directive is low (32%) and only 16% of non-EU issuers believe that the Directive provides sufficient clarity and predictability.

When they do express an opinion, however, the perception of non-EU stakeholders on the accessibility of the Single Market is not very positive.

Positive points are expressed mainly by institutional investors: 66% of non-EU institutional investors consider that the level of transparency of the ownership of EU listed companies is sufficient and that they have satisfactory access to the financial information stored by EU listed companies. 55% are of the opinion that the

compliance with the Directive has not resulted in an increase of burden. Finally, non-EU stakeholders do not consider language to be an obstacle in accessing the EU markets.

Non-EU issuers have a more harsh opinion on the attractiveness of the EU financial markets. Only 14% of non-EU issuers consider that there is sufficient guidance regarding the requirements of the Directive and 77% would welcome additional guidance. Access to EU markets is perceived as complicated by 63% of them (some even spoke of the EU as the “most complicated market of the world”). In addition, 57% of non-EU issuers stated that obligations for being listed in the EU are expensive (for example, the EU wide dissemination of Regulated Information is considered too demanding). Non-EU institutional investors confess that the legal framework created by the Directive has not incited them to change their desire to invest in the EU.

This said, non-EU stakeholders are supportive of the measures that would facilitate the access to EU markets. 66% of non-EU stakeholders would favour a common electronic form for the notification of major holdings (77% are not aware of the existence of the current Standard Form or do not believe that the Standard Form is widely used). In addition, 89% support the idea of a central EU access point to information stored by EU-listed issuers.

## Possible improvements

As a result of the findings in the core report, where detailed evidence can be found, and of the analytical conclusions on the functioning of the Directive, the following improvements could be suggested:

### General clarity and suitability of the Directive

1. Should the **Directive (or selected provisions of the Directive) become of maximum harmonisation**, a number of practical cross-border implementation issues would be solved, notably those connected with the notification of the crossing of thresholds.
2. A **specific regime for SMEs**, limited to well-identified measures, would create a more favourable environment for listing and, if in relation to the timing of the publication of periodic information, it would contribute to the efficiency of the market. Without undermining investor protection, well identified measures could include more flexible deadlines and an exemption from certain disclosure obligations during an initial period of time.
3. For the benefit of the daily application of a number of practical issues that are described in the report and in the recommendations, **additional harmonised guidance by CESR (or binding standards by its successor)**, would facilitate market participants daily compliance with the requirements of the Directive. The additional guidance should be rigorously implemented and in a uniform manner by the relevant authorities.

### Periodic information

4. **Deadline for the publication of half-yearly reports**: an extension of the timeline for the publication of half-yearly reports would enhance market efficiency. An extension on the deadline could be conceived for a pre-defined category of SMEs. Alternatively, this could be made possible by allowing a different deadline for issuers that have their half-yearly report reviewed or audited by an external auditor (be it on a mandatory or a voluntary basis). A three month deadline would be considered reasonable.
5. **Home Member state principle**: a more rigorous application of the Home Member State principle of the Directive would help to avoid discriminating companies choosing to be listed on a regulated market other than the Member State where they are incorporated.
6. **Use of XBRL**: more experience from countries where XBRL is used would appear necessary before an EU decision or recommendation on the use of XBRL be made.

## Major holdings

7. **Maximum harmonisation for the notification of thresholds:** to simplify cross-border compliance with notification requirements, a number of major holding provisions of the Directive could be made of maximum harmonisation. This could include: the definition of the category of financial instruments or products to be included in the calculation of the threshold, the exemptions, the timelines for notification and disclosure as well as the threshold levels (initial and subsequent) and the content of the notification. For the latter two, specific options could be explicitly introduced as long as they add value to the functioning of the Single Market. In order to ensure validity of the legislation over time, more market-resistant principles of transparency of ownership should be included in the Level 1 Directive and the harmonised figures and practical details specified in a Level 2 implementing measure under the Lamfalussy approach. In short, a better combination of Principle and Rule based approaches.
8. **Lowering the initial threshold to 3%:** without experiencing a disruption in the market, a number of Member States with significant financial markets have decided to lower the initial threshold during the process of national transposition to below 5%. This could be reflected in common EU law for the benefit of higher transparency but should not undermine the existing thresholds for exemptions. The lowering of the initial threshold to 3% appears to be a measure permitting maximum harmonisation.
9. **Making the lending and borrowing of voting rights more transparent:** in our view, the correct application of article 9 of the Directive leads to a notification requirement by the lender and the borrower. As a result, application of this principle should be enforced. If there is a real desire to amend the Directive, the general rule regarding disclosure by borrowers may make room for specific exemptions, such as the exemptions applicable in the UK, Italy or Luxembourg for very short term transactions (such borrowed shares which are on loan by close of business the next day), to the extent that such exemptions do not jeopardize the efficiency of the overall disclosure regime. If need be, based on quantitative data supplied by independent and reliable sources, and an impact assessment, a specific exemption for transactions below a certain percentage could be provided for.
10. **Limiting “empty voting” practices:** more transparency on empty voting could be contemplated (with a reservation on this option, as the creation of a disclosure regime would provide a legal framework comforting empty voting). The notification proposal would require the economic exposure of all shareholders (above a certain threshold) be notified on the day of the record date of each general meeting, to the extent such net economic exposure was not disclosed pursuant to a previous notification (no double notification would be required if it does not provide any new information). Any change in the net economic exposure between the record date and the date of the general meeting should be immediately notified. This system would be

comprehensive and would not be very burdensome as only one extra notification would be required (subject to updates, which should be limited). This mechanism would also prevent hidden record date captures. However, a more straight-forward and radical response to “empty voting” practices would be to ban them entirely. To this effect, the appropriate legislative instruments could consider suspending voting rights for investors holding their shares, either directly or indirectly, on the basis of a stock loan or a similar temporary transfer.

11. **Requiring disclosure of cash-settled equity swaps or similar financial products:** in order to close a major loophole affecting the Directive, the specific regime could be based on the following principles.

- Creation of a minimum threshold under which no notification of derivatives would be required. The threshold could for instance be set at 5% (the exact figure should be derived from quantitative data coming from independent and reliable sources and an impact assessment). This exemption would be subject to the fact that (i) the acquirer of the derivative commits not to acquire a corresponding number of underlying shares for the duration of the derivative agreement and during a certain period after maturity and (ii) cash-settled transactions below the threshold are subject to reporting requirements with supervisors (such supervisors would then be required to provide the market, on a regular basis, with aggregate figures).
- Aggregation of all derivatives (above the 5% threshold) with shares for the purpose of computing the notification thresholds and notification in the event the relevant thresholds are crossed.
- Issues regarding baskets of shares and the equivalence between derivatives and underlying shares should be dealt with by Level 2 legislation.

Thus for instance, an investor holding a 4.5% financial interest through cash-settled derivatives and a 4.5% interest in shares would not be subject to notification requirements (provided that the specific threshold for cash-settled derivatives is set at 5%) but if the cash-settled derivatives represent 5.5% and the shares 3%, a notification would be required.

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

13. **Create a single e-notification form:** considerable simplification can be obtained by making a common electronic notification form for the EU mandatory especially if additional harmonisation is successfully introduced in the Directive. Specificities in national company law could be taken into account in subsections on the common form. The electronic form could be conceived in such a way that basic error would be signalled prior to validation, and the form routed to the relevant issuer and competent authority.

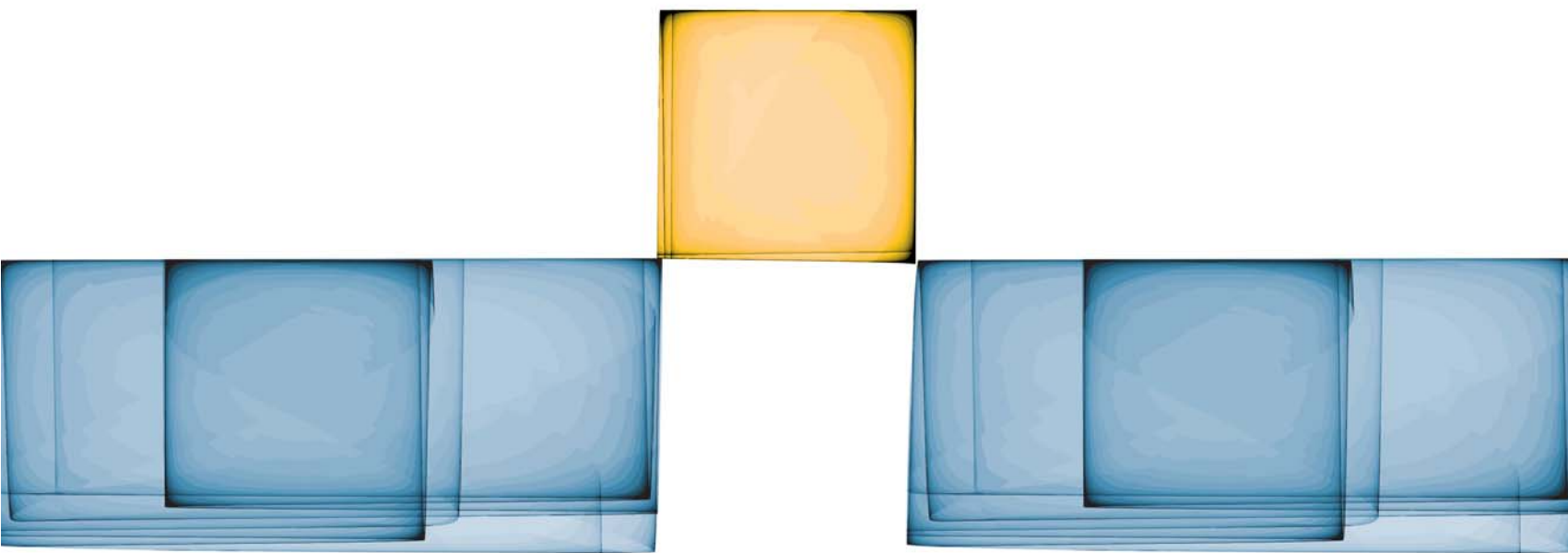
## Dissemination and storage of financial information

14. **A single EU access to Regulated Information:** the time has come for the EU to set up a single access point for stored information based on a serious cost benefit analysis while taking into account recent advances in technology. One option is to create a single EU access point at CESR level with a direct internet link to a compulsory and harmonised section of the issuers' website where the information would be stored.

## Supervision

15. **Equivalence of third countries Transparency regimes:** the market would benefit from a increased transparency by supervisors regarding: (i) their decision-making processes when assessing equivalence and (ii) the result of their decision by publishing a consolidated list of thirds countries transparency regimes considered equivalent.

16. **Section 30.4 exemption for bond issuers:** based on a more precise identification of debt issuers likely to be affected (and in particular those with outstanding Eurobonds after January 1<sup>st</sup>, 2015) and the assessment of the impact of such a decision on those issuers, the Commission could consider leaving the ten year exemption to publish half-yearly financial reports (section 30.4) to expire in 2015.





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