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Towards a Uniform European Capital Markets Law: Commission Proposals to Reform Transparency

Abstract:

The European Union has had a uniform legal framework to transparency of major holdings and financial instruments since 2004. These provisions are to be reformed. In October 2011, the European Commission presented a proposal for a Directive to amend the Transparency Directive. This paper analyses the draft and puts it in context. It also looks at the Commission's stated aim to strengthen the disclosure regime and give it a more European emphasis. The proposal could represent a further move towards codification of European capital markets law.

I. Introduction

The European Union has had a uniform legal framework for transparency since 2004[1]. These provisions are to undergo a fundamental reform. On 25 October 2011, the European Commission published a Proposal for a Directive to amend the Transparency Directive.[2] It

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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 (Transparency Directive – TD). On 8 March 2007, the European Commission adopted an Implementing Directive: Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. For an overview of these legal instruments, see R. Veil, in R. Veil (Publ.), *Europäisches Kapitalmarktrecht* (2011), Section 1, note 27 *et seq.*

[2] Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, Brussels, 25 October 2011, COM(2011) 683 final [Transparency Amendment Directive]. The Commission also published a comprehensive Working Paper that expands on its considerations about the proposed regulations and the regulatory options that were discarded from their considerations. See Commission Staff Working Paper, Impact Assessment, SEC(2011) 1279 final, Brussels, 25 October 2011.

seeks to reform the provisions on the publication of financial reports, the regime on disclosure of major shareholdings and available sanctions. The most significant proposed changes are with respect to disclosure obligations for holders of financial instruments, which are to be extended along the lines currently imposed by some Member States. Obligations for investors to disclose their intentions when acquiring shares are, however, not included in the proposal, though some Member States have already introduced such rules.[3] This paper analyses the proposal,[4] focusing on the new concepts of disclosure, the harmonisation of the sanctioning regimes and the further Europeanisation of capital markets law.

II. Regulatory concept and aims

1. Legal instruments

The European Commission seeks to improve the transparency regime with a directive. It indicates that a directive allows for maximum harmonisation in some areas and leaves Member States flexibility to allow for their specific situation to be taken into account in other areas.[5] However, this argument does not explain why the Commission does not want to address the issues of disclosure in the legal form of a regulation as it did only a few days previously with regard to the reform of market abuse.[6] A regulation can also give Member States some legislative freedom[7] and may restrict itself to calling on Member States to adopt regulations.[8] The areas covered by the Transparency Directive are an ideal area for legislation made in the legal form of a regulation. These are not regulatory provisions that have been developed and honed in national jurisdictions over the course of decades. The European

[3] This obligation was first introduced in Europe in 1988 by France (see Art- L 233-7 French Commercial Code (C.com) and Art. 223-14 General Regulation (RG) of the AMF (*Autorité des Marchés Financiers*)); see also P.-H. Conac, *Le nouveau régime des franchissements de seuils issu de l'ordonnance n° 2009-105 du 30 janvier 2009 et du Règlement général de l'AMF*, *Rev. Soc*. 2009, 477 *et seqq.* Germany also introduced similar obligations in 2008 in section 27a Securities Trading Act (*Wertpapierhandelsgesetz* - WpHG).

[4] This paper does not address the issues concerning the restatement of access to financial information by storage of prescribed information (see Art. 22 draft Amendments to the Transparency Directive). The proposal to reform this issue is based on the external report by Atica Consulting Ltd., *Feasibility Study for a pan-European storage system for information disclosed by issuers of securities* - Final Report, 18 October 2011 (available at: http://ec.europa.eu/internal_market/securities/docs/transparency/markt-2010-17-f/final-report_en.pdf).

[5] See European Commission, Explanatory Memorandum to draft Transparency Amendment Directive, p. 6.

[6] According to the European Commission, future market abuse is to be combated by laws adopted in the form of a regulation. See European Commission, Proposal for a Regulation of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse) of 20 October 2011 COM(2011) 651 final [draft Market Abuse Regulation].

[7] The draft Market Abuse Regulation envisages a mere minimum harmonisation in some areas. See R. Veil and P. Koch, *Towards a uniform European Capital Markets Law: Proposals of the Commission to Reform Market Abuse*, *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998376.*

[8] The draft Market Abuse Regulation envisages such regulation in the areas of supervision and sanctions. See R. Veil and P. Koch, *Towards a uniform European Capital Markets Law: Proposals of the Commission to Reform Market Abuse*, *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998376.*

Union provisions are detailed and could be mostly incorporated into a regulation without many constructive amendments.

2. Policy perspectives

There are two aims behind the Commission's Transparency Amendment Directive. Firstly, the Commission seeks to improve the transparency regime by simplifying obligations for issuers, especially for small and medium-sized issuers (SMEs), and concentrate transparency requirements on long-term results.[9] Therefore, the Commission favours revoking obligations to publish interim management statements and/or quarterly financial reports. It also seeks to enhance transparency provisions, thereby reacting to spectacular cases where investors crept in on issuers with the help of certain kinds of financial instruments.[10] The Commission's second aim is to extend and reinforce supervisory and sanctioning powers.[11] This is also one of the main reasons why it is reforming the rules on market abuse.[12]

The first regulatory aim is derived from the findings the Commission obtained in the consultation about the modernisation of the Transparency Directive.[13] The Commission also relies on the report it commissioned from Mazars on the application of selected obligations under the Transparency Directive.[14] Therefore, it is these estimations and regulatory preferences of market participants that have moved the Commission to take action. It is laudable that the Commission is taking account of the experience of market participants. However, the Commission should not settle merely for meeting the preferences of the interested parties. The regulation of markets is a matter of public interest and should be carried out on the basis of public policy guidelines. It is not clear that the Commission is following such guidelines with the proposed Amendment Directive. There is a need to disclose the assessment basis for a European transparency regime.[15] It should be possible to

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[9] See Preamble paras. 3 and 4 draft Transparency Amendment Directive; see also Explanatory Memorandum of the European Commission, p. 3 et seq.

[10] See Preamble para. 8 draft Transparency Amendment Directive; the Commission Staff Working Paper, Impact Assessment, SEC(2011) 1279 refers expressly to the Porsche/VW case.

[11] See Preamble para. 14 draft Transparency Amendment Directive.

[12] See Preamble para. 34 draft Market Abuse Regulation: 'equal, strong and deterrent sanctions regimes'.

[13] The submissions can be viewed on the Commission's website (http://ec.europa.eu/internal_market/securities/transparency/index_de.htm#consultation-modernisation).

[14] See Mazars, *Transparency Directive Assessment Report*, 1 June 2010 (available at: http://eng.mazars.de/Home/News/Publications/Surveys/Transparency-Directive-Assessment-Report). The Report aimed to collate and analyse the opinions of the most important market actors in 15 EU countries and 6 other important non-EU countries as regards the effectiveness of the Directive. Mazars stated that it included the opinions of more than 3,500 interested parties and carried out more than 90 interviews.

[15] The Commission's grounds for an Amendment Directive, the Preamble and the Commission Staff Working Paper settle only for the stereotyped statement that a revision of transparency would increase investor

understand why on the one hand the Commission seeks to strengthen an issue such as the transparency of financial instruments and on the other hand abstains from providing provisions on the transparency of investor's intentions when acquiring shares or financial instruments. Since the Commission seeks to harmonise the transparency regime, it should also clearly state its ideas about the function of the transparency provisions[16] .[17]

The second regulatory aim is mainly derived from the report of the former CESR (Commission of European Securities Regulators) on existing supervisory measures and criminal sanctions in Member States.[18] This concludes that there are some considerable regulatory differences between the 27 Member States. Therefore, it is fairly obvious that the Commission seeks to harmonise the level of sanctions, although the basis of public policy guidelines is far from clear. The Explanatory Memorandum and Preamble of the Proposal for a Directive merely show that the Commission wants to have deterrent administrative sanctions for breaches of fundamental provisions of the Transparency Directive.[19] The reason behind why the intensification is necessary remains unclear. Unfortunately, there is also no deliberation about the interaction between administrative and civil law sanctions.

3. Degree of harmonisation

Until now the Transparency Directive has followed a minimum harmonisation concept; Member States are prohibited from adopting more stringent provisions only in two regulatory areas, both of which are relatively unimportant.[20] Minimum harmonisation is also followed at the sanction level.[21] This concept is to be changed in part for substantive law on disclosure.[22] According to the Proposal, the publication of periodic financial information in financial reports is still supposed to be subject to minimum harmonisation; however, Member States

confidence. However, it is not at all self-evident that the disclosure of such financial innovations is really advisable. The issue is a matter of intense debate; see section IV.3 below.

[16] Transparency provisions could be necessary for several reasons in economics. See H. Brinckmann, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht*, section 12, notes 14 *et seqq*.

[17] For criticism of the Transparency Directive already raised in 2004, see F. Prechtl, *Kapitalmarktrechtliche Beteiligungspublizität*, 2010, p. 27; for the more concrete regulatory aims of the German legislature, see R. Veil, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht*, section 16, note 3.

[18] See Commission of European Securities Regulators, *Report on the mapping of supervisory powers, administrative and criminal sanctioning regimes of Member States in relation to the Transparency Directive (TD)*, 1 July 2009, CESR/09-058.

[19] See European Commission, Explanatory Memorandum to Transparency Amendment Directive, p. 4 and Preamble para. 14 Transparency Amendment Directive.

[20] See Art. 3(1) (minimum harmonisation) and 3(2) (full harmonisation) Transparency Directive.

[21] See Arts. 7 and 28 Transparency Directive.

[22] No provision that explicitly specifies minimum or full harmonisation is intended for regulation of sanctions. Therefore, the question of which harmonisation level is intended will be a matter of interpretation. See section IV.3 below for more details.

will not be authorised to require the publication of 'periodic information other than annual financial reports referred to in Article 4 and half-yearly financial reports referred to in Article 5'.[23] The Commission wants to ensure that Member States do not provide obligations for issuers to publish quarterly financial reporting. The revised Transparency Directive would finally settle the format of reports. The proposal goes even further: 'A holder of shares or a natural person or legal entity referred to in Articles 10 or 13… [may not be] subject to requirements more stringent than those laid down [in the Directive]'.[24] The Commission states three closely linked regulatory aims as the justification for this full harmonisation. It aims to improve legal certainty, enhance transparency and reduce administrative burden for cross-border investors.[25]

How far the proposed provisions would stipulate full harmonisation is a matter to be clarified by interpretation. The most interesting issue is whether and how far EU countries would still be authorised to adopt substantiating provisions.[26] For example, this applies to the definition of a Group (*Konzern)* (section 22(3) German Securities Trading Act (*Wertpapierhandels-gesetz* – WpHG)) and the right of an issuer to request the proof of the existence of reported holdings (section 27 WpHG).[27] There is also the question of whether the national supervisory authorities would still be allowed to establish guidelines to judge in standard cases whether or not the preconditions are met for an action to fall under notification requirements or whether the prerequisites for an exemption from the notification requirements are fulfilled.

4. Summary

The first conclusion is that the Amendment Directive would lead to further Europeanisation of the regime on disclosure. The scope for national legislatures to adopt their own provisions across large areas of regulation would be restricted by full harmonisation. This is the right approach. However, the Commission could have pursued this approach even more consequently if it had proposed a reform in the form of a regulation. Findings as regards public policy guidelines are more ambiguous. Unfortunately, the Commission has failed to provide a theoretical basis for the European transparency regime. Therefore, for example, it is hard to understand why the provisions governing transparency of the investor's intention

[23] See Art. 3(1) para. 1 in the version in the draft Transparency Directive.
[24] See Art. 3(1) para. 2 in the version in the draft Transparency Directive.
[25] See Preamble para. 9 in the draft Transparency Amendment Directive.
[26] For a discussion against the substantiating competence of national parliaments, courts and public authorities, see T. M. J. Möllers, *Vollharmonisierung im Kapitalmarkt*, in B. Gsell and C. Herresthal, Vollharmonisierung im Privatrecht, 2009, p. 247, 257.
[27] See section IV.1 below.

introduced in some Member States in recent years are not to be harmonised by the European legislature.

III. Regular publication

1. Regulatory options

The Transparency Directive requires an issuer whose shares are admitted to trading on a regulated market to publish an interim management statement during the first six-month period of the financial year and another interim management statement during the second six-month period of the financial year.[28] Issuers that publish quarterly financial reports in accordance with such legislation or rules, under either national legislation or the rules of the regulated market or of their own initiative, are not subject to such obligations.[29] The European Commission was required to provide a report to the European Parliament and the Council by 20 January 2010 on the transparency of quarterly financial reporting and management statements of issuers to examine whether the information provided met the objective of allowing investors to make an informed assessment of the financial position of the issuer.[30] The public hearings and consultations carried out by the Commission have shown that the administrative burden caused by the requirements of quarterly financial reporting is considerable and that this has resulted in substantial costs for small and medium-sized issuers (SMEs).[31] The Commission concluded that there was a need for reform and examined two different regulatory options. Firstly, it considered introducing different disclosure obligations for companies admitted to trading on a regulated market based on the size of the company. Secondly, it considered whether quarterly financial reporting requirements should be abandoned.

2. Reform of quarterly financial reporting

The Commission believes that differentiated disclosure regimes would be confusing for investors and pointed out that they were not regarded as desirable by the consultation

[28] See Art. 6(1) Transparency Directive.
[29] See Art. 6(2) Transparency Directive.
[30] See Art. 6(3) Transparency Directive.
[31] The Commission estimates that average direct costs of quarterly financial reporting amount to between €10,000 and €60,000 per year for SMEs; this is in addition to personnel costs that, according to the Commission, are difficult to estimate. The Commission also notes that one report estimated the total direct costs for reporting at €150,000 to €500,000 per year for SMEs. See Commission Staff Working Paper, p. 13.

participants.[32] It also stated that SMEs could not be reliably defined.[33] This is the final nail in the coffin for quarterly financial reporting. The other arguments put forward by the Commission, that the content of information published in interim management reports is questionable[34] and that interim reporting contributes to short-termism on capital markets (with all its negative effects),[35] appear to seal the fate of quarterly financial reporting. But is there really no other way than to abolish the provisions of the Transparency Directive and prohibit Member States, but not stock exchange operators, from prescribing regulations for issuers listed on regulated markets?

The last two arguments are easily disproven. The disparate content of interim management statements and quarterly financial reports is self-inflicted. The requirements for a quarterly financial report are not set down in European law. The Transparency Directive sets out provisions about the required content of an interim management statement but the general nature of the provisions requires substantiation. The European legislature failed to give the Commission the power to enact implementing rules under level two of the *Lamfalussy* process.[36] Therefore, it is not surprising that no general standard for 'a general description of the financial position and performance'[37] has developed in practice.[38] Statutory publication requirements are legitimised by the consideration that the legislature is in the best position to determine the content of information to be published and that this is also the most cost efficient approach.[39] The European Union legislature has not yet fulfilled this expectation. Finally, it is hard to make the accusation against the interim management statement that it contributes to short-term thinking about earnings, as the management statement consists solely of narrative elements; such statements principally seek to provide an explanation of material events and transactions that have taken place.[40]

[32] See European Commission, Explanatory Memorandum, draft Transparency Amendment Directive, p. 5.
[33] See Commission Staff Working Paper, p. 10.
[34] See Commission Staff Working Paper, p. 12 (with reference to the results of hearings and consultations).
[35] See Commission Staff Working Paper, p. 14.
[36] The Commission is only authorised to adopt implementing rules with respect to half-yearly financial reports (see Art. 5(6) Transparency Directive). This mandate was fulfilled under Arts. 3 and 4 of Directive 2007/14/EC.
[37] See Art. 6(1) sentence 4 indent 2 of the Transparency Directive.
[38] For the approach followed by British law placing trust in the formation of a market standard (market-led solution), see. H. Brinckmann, in: R Veil (Publ.), *Europäisches Kapitalmarktrecht*, section 14, note 50.
[39] See T. J. M. Möllers, *Effizienz als Maßstab des Kapitalmarktrechts*, *AcP* 208 (2008), 1, 10 *et seq.;* L. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation, Mich. L. Rev.* 87 (1988), 613, 705; for a summary, see H. Brinckmann, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht*, section 12, note 23.
[40] See Art. 6(1) sentence 4 indent 1 of the Transparency Directive.

If the legal policy background of reducing the costs of quarterly financial reporting is accepted, there are three possible solutions to consider. The first approach would be to keep the current legal requirement compelling issuers to publish an interim management statement. The European legislature would then have to substantiate the content of the interim management statement and make the provisions more meaningful. Secondly, the format of the interim management statement could be abolished and issuers could only be required to publish quarterly financial reports. In order to prevent an unnecessary cost burden, small and medium-sized companies (SMEs) would either have to have the publication requirement waived or they would have to be allowed to submit simplified reports, dependent on the size of the company.[41] Thirdly, as suggested by the Commission, statutory publication requirements could be abolished. It would then be up to stock exchange operators to specify requirements for the preparation of quarterly financial reports.

The first solution is not convincing. Interim financial statements are correctly regarded as a foreign body in the system of financial reporting.[42] If there is a trade off between the second and third solutions, it should be taken into consideration that the stock exchange operators would prescribe the most important segments as regards publication of quarterly financial reports.[43] A European law specification would in any case only reflect the practice on the regulated market. There would also be an opportunity to harmonise the content of quarterly financial reports throughout Europe. The rules of stock exchange operators do not contain substantive requirements as regards the content of a quarterly financial report. Instead, they generally refer to requirements for half-yearly financial reports.[44] Of course, the problem of costs expressly highlighted by the Commission would have to be taken into account by exemptions for SMEs. The argument that it is not possible to develop convincing criteria for a definition of SMEs does not make sense.[45] The European Commission or the European Securities and Markets Authority (ESMA) could also be authorised to amend the criteria

[41] There is already a size-dependent regulation in capital markets accounting law. However, until now a publicly traded company has always been regarded as a large corporation; see section 267(3) sentence 2 of the German Commercial Code (*Handelsgesetzbuch* - HGB).
[42] See H. Brinckmann, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht*, section 14, notes 5, 13, 49 and 78.
[43] For example, see section 48 of the Exchange Rules of the Frankfurter Wertpapierbörse (FWB) as regards admission to the Prime Standard as a special sub-segment of the Regulated Market.
[44] For example, with respect to the content of quarterly financial reports, the Exchange Rules of the FWB are content to refer to the provisions of section 37w(2) nos. 1 and 2 and subsections (3) and (4) of the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG) on half-yearly financial reports (see Rule 51(1) FWB Exchange Rules).
[45] The Commission's proposal for a revision of MiFID also includes a special regulation of SME growth markets. See Art. 35 draft Markets in Financial Instruments Directive.

relevant for the definition of SMEs to take account of interim development by means of delegated legislation or technical regulatory standards.

3. Summary

The proposals on quarterly financial reporting put forward by the European Commission are not convincing. Even if Member States were not allowed to introduce any further publication provisions, stock exchange operators would still demand the publication of quarterly financial reports in line with international practices. Against this background, it makes sense to make the publication of quarterly financial reports mandatory and to give the reports a clear structure by prescription of content. Interim management reports should be abolished. Exemptions or simplified structures should be available for SMEs.

IV. Transparency of major holdings

1. Regulatory concept

Transparency of major holdings is one of the oldest issues in European capital markets law[46] and is now to be reformed for the third time. The Commission seeks to improve legal certainty, enhance transparency and reduce administrative burdens for cross-border investors.[47] Firstly, this aim is expressed in the proposal to prohibit Member States from having stricter regulation. In future, notification requirements as regards changes in major holdings are to be the same across the European Union. Secondly, the Commission has published expanded notification and disclosure requirements for the holders of certain financial instruments.

Before examining these two issues in greater detail, we should take a closer look at the approach to fully harmonise the regime. Under the draft Directive, 'a holder of shares or a natural person or legal entity referred to in Articles 10 or 13… [may not be] subject to requirements more stringent than those laid down [in the Directive]'.[48] This provision throws up a range of difficult interpretation questions as regards the extent of full harmonisation. They will be discussed below under the analysis of reformed notification requirements.

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[46] Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of, Official Journal L 348, 17 December 1988 pp. 62-65, harmonised the provisions on transparency of changes in investment holdings; see R. Veil, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht*, section 1, note 10 and section 16, note 1.

[47] See Preamble para. 10 draft Transparency Amendment Directive.

[48] See Art. 3 (1) subparagraph 2 draft Transparency Amendment Directive.

Attention should now be drawn to one aspect that show the problems that result from a partial full harmonisation.

Under the Proposal, Member States would be prohibited from introducing more stringent provisions for *shareholders* and other *notifying parties.* It makes no reference to *issuers.* Under this wording, Member States would not be excluded from retaining or adopting more stringent provisions for issuers. This could, for example, affect the publication of disclosed information. However, the narrow wording of Article 3(1) subparagraph 2 of the draft Transparency Amendment Directive does not mean that Member States are free to act at will. Full harmonisation could also be deduced from the sense and purpose of the substantive law provisions of the Transparency Directive. Therefore, all areas of the regulatory regime that go beyond Article 3(1) subparagraph 2 in the version of the draft Transparency Amendment Directive must be examined to see if national legislation would be permissible. If European law does not cover a certain area, this would be a convincing argument for minimum harmonisation or a remaining legislative competence of national legislatures. This is illustrated by the issue of access to information of issuers. The Transparency Directive does not determine if an issuer has a right to request the proof of the existence of reported holdings.[49] The Amendment Directive also fails to address this issue. This cannot be interpreted as the European legislature having dealt with this issue. Consequently, a national provision granting the issuer the right to request the proof of the existence of reported holdings would remain in accordance with European law after the reform and could be retained.[50]

2. Duty to notify changes in proportion of voting rights

The Transparency Directive requires a shareholder to notify the issuer about specified changes in the proportion of voting rights.[51] The notification thresholds are 5%, 10%, 15%,

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[49] The procedure for disclosure of changes in major shareholdings is governed by Art. 12 of the Transparency Directive and the Implementation Directive 2007/14/EC. However, these legal acts do not provide any provision that regulates the access to information by the issuer. One reason for this might be that this issue only arises when voting rights are lost *ex lege*, as provided under German law in section 28 of the Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG), if the notifying party fails to exercise his notification obligations (see C. Dolff, *Der Rechtsverlust gem. § 28 WpHG aus der Perspektive eines Emittenten*, 2011, pp. 34 *et seqq.*). The Transparency Directive has not yet required the loss of voting rights as a sanction for the breach of notification obligations. Therefore, there was no reason for the European legislator to address the issue of access to information by the issuer.

[50] The European Commission now wants to prescribe the loss of voting rights in European law. However, Art. 28a(2)(c) in the version of the draft Transparency Amendment Directive only envisages public power to suspend voting rights attached to shares where there is an infringement of notification obligations. This is why the Transparency Directive does not deal with the access of an issuer to the relevant information.

[51] See Art. 9(1) Transparency Directive.

20%, 25%, 30%, 50% and 75%.[52] In determining proportions of voting rights, eight circumstances in which a person may be entitled to acquire, dispose of or exercise voting rights must also be taken into consideration.[53] Under these circumstances, third party voting rights may be attributed to a person, with the consequence that this person may also be subject to a notification requirement even if he does not himself holds any shares.[54]

As already stated, in future there is to be a uniform regulatory basis for the regime governing transparency of major holdings. According to the proposed revision of Article 3(1) subparagraph 2 of the Transparency Directive, the home Member State 'may not 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, except setting lower notification thresholds than those laid down in Article 9(1)'. This provision throws up several controversial questions of interpretation. Firstly, it is doubtful how far the exception would stray from the principle of full harmonisation. The Member States would probably be allowed to determine a notification threshold lower than 5%.[55] But would they also be allowed to have lower thresholds than the 10%, 15%, 20% 25%, 30% 50% and 75% thresholds provided in the Transparency Directive? The United Kingdom and France already have such thresholds[56] or they may be provided by issuers in their articles of association.[57] Furthermore, it is unclear if the new provision only prescribes a full harmonisation of notification thresholds applicable to shareholders and holders of financial instruments, or if the provision goes beyond this and fully harmonises the rules which deal with the attribution of voting rights and the notification requirements for persons holding financial instruments. If the latter were correct, this would have substantial effects on the legal position in Member States. In the past, many national legislatures have adopted stricter provisions concerning the attribution of third party voting rights, particularly with respect to parties acting in concert or for circumstances concerning groups of companies.

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[52] See Art. 9(1) Transparency Directive. Alternatively, in place of a 30% threshold there may be a threshold of one-third of shares, and in place of a 75% threshold there may be a threshold of two-thirds of shares; see Art. 9(3) Transparency Directive.

[53] See Art. 10 Transparency Directive

[54] See R. Veil, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht,* section 16, note 35.

[55] Most Member states stipulate lower notification thresholds, such as 2% in Italy and 3% in Germany, Spain and the United Kingdom. For more information, see R.Veil, in: R.Veil (Publ.), *Europäisches Kapitalmarktrecht,* section 16, note 23.

[56] The United Kingdom has the most extensive network of thresholds. See FSA Handbook, DTR 5.1.2; also R. Veil and M Wundenberg, *Englisches Kapitalmarktrecht*, 2010, p. 124 *et seqq*.

[57] In France, an issuer may define additional thresholds in its Articles of Association. See F. Grillier and H. Segain, *Franchissements de seuils: Réglementation applicable et evolutions souhaitables, RTDF* 2007-4, p. 20, 24; summarised in R. Veil and P. Koch, *Französisches Kapitalmarktrecht*, 2010, p. 81 *et seq.*

Firstly, it should be noted that the wording of Article 3(1) subparagraph 2 of the draft Directive is ambiguous. However, the preamble and Explanatory Memorandum to the draft Directive give some background to the regulatory issues. The Commission's concept is made clear in paragraph 10 of the preamble:

> *A harmonised regime for notification of major holdings of voting rights, especially regarding aggregation of holdings of shares with holdings of financial instruments, should improve legal certainty, enhance transparency and reduce administrative burden for cross-border investors. Member States should therefore not be allowed to adopt stricter or divergent rules in that area than those provided in Directive 2004/109/EC. However, taking into account the existing differences in ownership concentration in the Union, Member States should continue to be allowed to set lower thresholds for notification of holdings of voting rights.*[58]

If Article 3(1) subparagraph 2 of the draft Directive is read in light of this Preamble, a wide interpretation of full harmonisation and a narrow interpretation of exceptions come to the fore. The first question would thus be answered to the extent that Member States could only adopt lower commencement thresholds.[59] This harmonisation of laws would counter the current fragmentation of laws and the legal policy deserves full support. However, there should also be consideration of amending the Transparency Directive to include a further threshold of 90% or 95% of voting rights. Many Member States already have such a provision to ensure that shareholders are kept informed that there is a possibility of a 'squeeze out'.[60]

The second question is more difficult to answer. According to the preamble, the new provisions also appear to promote full harmonisation of the rules dealing with the attribution of voting rights and the notification requirements for financial instruments. Furthermore, the directive prohibits Member States from adopting stricter rules in 'that area', meaning the whole area of notification requirements.[61] It should also be noted that Article 3(1) subparagraph 2 of the draft Directive is couched in wide terms. The provision prohibits more stringent 'requirements' for 'a natural person or legal entity referred to in Articles 10 or 13'. This interpretation of the concept of full harmonisation would mean that Member States

[58] See also Commission Staff Working Paper, p. 21 *et seq.* and pp.25, 65 *et seqq.*
[59] The wording ('setting lower notification thresholds') allows for not just one, but for multiple, lower thresholds.
[60] This is the case in France, Italy, Austria and Sweden. See R. Veil, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht,* section 16, note 24.
[61] See also the Explanatory Memorandum for the draft Amendment Directive, p. 8.

would have to strictly comply with the European law provisions of the Transparency Directive.

The full harmonisation of the regime makes sense but it is not convincing if decades-old provisions in need of modernisation are to apply simultaneously across the European Union. Take one example: the regulation of acting in concert[62] dates from the first Transparency Directive in 1988.[63] German, French, Italian and Spanish legislatures[64] have long since distanced themselves from the outdated concepts of European law and developed their own definitions. These may be the subject of intense debate[65] but there is no doubt about their aim: to make the influence of investors acting in concert transparent at an early stage. The European Commission must be aware that the concept of acting in concert should have been redefined in the Transparency Directive.[66] Therefore, it would be strange if the revision of Article 3(1) subparagraph 2 were intended to represent a full harmonisation of attribution provisions.

There is no point in attempting to give a definitive answer to the questions of interpretation as regards Article 3(1) subparagraph 2 of the draft Directive at the current stage of the legislative process. It appears to be more important to have a discussion about the harmonisation concept.[67] If a decision is made in favour of full harmonisation of the whole investment transparency regime, there is no alternative than to modernise the attribution provisions.[68] However, if the only intent is to eliminate legal fragmentation as regards notification thresholds, Article 3(1) subparagraph 2 of the Transparency Directive should be worded in another way. The first solution seems to be the most preferable approach, but at the moment this is in its infancy.

3. Transparency of financial instruments

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[62] See Art. 10(a) Transparency Directive.

[63] See R. Veil, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht,* section 16, note 41.

[64] For an analysis of these regulations, see R. Veil, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht,* section 16, note 46 *et seqq.* (Germany), note 54 *et seqq.* (France), note 57 *et seqq.* (Italy) and note 62 *et seq.* (Spain).

[65] For criticism of the revision of German law by the Risk Reduction Act (*Risikobegrenzungsgesetz*), see H. Fleischer, *Finanzinvestoren im ordnungspolitischen Gesamtgefüge von Aktien-, Bankaufsichts- und Kapitalmarktrecht, ZGR* 2008, 185, 196; M. Schockenhoff and E. Wagner, *Zum Begriff des „acting in concert“, NZG* 2008, 361 *et seqq.*

[66] See European Securities Markets Expert Group (ESME), *Preliminary views on the definition of ‘acting in concert’ between the Transparency Directive and the Takeover Bids Directive*, 17 November 2008.

[67] In conjunction to the Transparency Directive, see already H. Fleischer and K.-U. Schmolke, *Das Anschleichen an eine börsennotierte Aktiengesellschaft, NZG* 2009, 401, 408.

[68] The European Securities and Markets Authority (ESMA) could be given a mandate to regulate details in conjunction with the Commission by means of technical regulatory standards. This would ensure that the provisions could be quickly adapted to developments in the financial markets.

The Transparency Directive creates further notification requirements for natural persons and legal entities. The prerequisite is that a person or entity directly or indirectly holds financial instruments that give their holder the right to acquire voting rights in shares of an issuer that have already been issued.[69] The financial instruments that trigger such an obligation are defined by the Commission in Article 11 of Directive 2007/14/EC.[70] The Commission now wishes to expand this requirement in order to take account of the many innovations in the area of finance.[71] It is targeting financial instruments such as cash settled equity swaps, which have been used by investors in recent years to creep in on a target company without drawing attention to their activities. France,[72] the United Kingdom[73] and Germany[74] have already reacted to headline cases[75] and have introduced special transparency regulations. These statutory responses have been subject to criticism from the legal community.[76] It is argued that additional notification and disclosure requirements will involve further costs. Also, it is unlikely that the information will really be price relevant and there is a danger of information overload. Finally, it is argued that transparency regulations would make company takeovers more costly. This would mean that the market for corporate controls would be adversely affected.

Nevertheless, the European Commission has taken up the issue. Its proposal to extend transparency regulations across the European Union deserves support. The occasionally spectacular cases of creeping in have damaged investor confidence.[77] Other solutions to the

[69] See Art. 13(1) Transparency Directive.

[70] Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. OJ L 69/27, 9 March 2007, p.27.

[71] Preamble, para. 8.

[72] See Art. L 233-7 *et seq.* Code de commerce (C. com.) and Art. 233-11 *et seqq.* General Regulation of the Autorité des Marchés Financiers (RG AMF); see R. Veil and P. Koch, *Französisches Kapitalmarktrecht*, 2010, p. 94 *et seq*.

[73] See Financial Services Authority Handbook, Disclosure Rules and Transparency Rules (DTR) 5.1 and DTR 5.3; see R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, 2010, p. 127.

[74] See section 25a of the German Securities Trading Act (WpHG); see also A. Merkner and M. Sustmann, *Vorbei mit dem unbemerkten Anschleichen an börsennotierte Unternehmen?*, *NZG* 2010, 681 *et seqq.*

[75] The most important cases are detailed in the Commission Staff Working Paper, p. 97 *et seq.* (Annex 8); see also T. Baums and M. Sauter, *Anschleichen an Übernahmeziele mit Hilfe von Aktienderivaten*, *ZHR* 173 (2009), 454; H. Fleischer and K.-U. Schmolke, *Kapitalmarktrechtliche Beteiligungstransparenz nach §§ 21 ff. WpHG und „Hidden Ownership“, ZIP* 2008, 1501.

[76] See U. Brandt, *Meldepflichten für aktienbasierte Instrumente: Anmerkungen zum Diskussionsentwurf des Bundesfinanzministeriums (AnlegerStärkungsG), BKR* 2010, 270 *et seqq.;* D. Zetzsche, *Against Mandatory Disclosure of Economic – only Positions Referenced to Shares of European Issuers – Twenty Arguments against CESR Proposal,* 11 *EBOR* (2010), 231 *et seqq.*

[77] See H. Fleischer and K.-U. Schmolke, *Zum beabsichtigten Ausbau der kapitalmarktrechtlichen Beteiligungstransparenz bei modernen Finanzinstrumenten (§§ 25, 25a DiskE-WpHG), NZG* 2010, 846, 852.

evasion issue[78] do not appear to be productive. It might make sense to strengthen the intervention powers of national competent authorities by giving them the competence to ban unlawful transactions[79] but this would not ensure that investors would not be able to exploit the gaps in the current transparency regime. Furthermore, the legal position would remain unsatisfactory as Member States would have different notification and disclosure requirements. The question is not whether there should be regulation, but what form it should take.

The Commission suggests extending the current provisions on notification of financial instruments by two general clause elements. The notification requirement is to be extended to financial instruments that, on maturity, either give the holder discretion with respect to his right to acquire shares[80] or which have a similar economic effect, whether or not they give right to a physical settlement.[81] The financial instruments that might trigger a notification requirement are also determined.[82] However, this does not mean that they would also be subject to the new provision: this only applies if the financial instrument also meets the other requirements of Article 13(1)(a) or (b). The Amendment Directive also fails to create final clarity. It attempts to take account of the requirements of legal certainty, in that it specifies that ESMA is to draw up an indicative list of financial instruments that are subject to notification requirements.[83] However, the legal character of this list is not clear. It is not a regulatory technical or implementation standard within the meaning of Article 10 *et seqq.* of the ESMA Regulation[84]. The list would only be a recommendation within the meaning of Article 16 of the ESMA Regulation.[85]

In comparison with the relevant provisions under German, French and English law, the provisions in the Amendment Directive are not very substantial. It would probably have been

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[78] The European Commission also appears to proceed on the basis that there is an evasion issue. See explanatory Memorandum to the Transparency Amendment Directive, p. 6 ('eliminate the gaps').
[79] See U. Schneider and H. Anzinger, *Umgehung und missbräuchliche Gestaltungen im Kapitalmarktrecht oder: Brauchen wir eine § 42 AO entsprechende Vorschrift im Kapitalmarktrecht?, ZIP* 2009, 1 *et seqq.;* see also the suggestion in F. Walla, *Die Konzeption der Kapitalmarktaufsicht in Deutschland*, due to be published in 2012.
[80] See Art. 13(1)(a) alt. 2 in the version of the draft Transparency Amendment Directive.
[81] See Art. 13(1)(b) in the version of the draft Transparency Amendment Directive.
[82] See Art. 13(1b) subparagraph 1 in the version of the draft Transparency Amendment Directive: transferable securities; and options, futures, swaps, forward rate agreements, contracts for differences and any other derivative contracts which may be settled physically or in cash.
[83] See Art. 13(1b) subparagraph 2 in the version of the draft Transparency Amendment Directive.
[84] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331/84, 15 December 2010, p. 84.
[85] For the legal effects of ESMA recommendations, see F. Walla, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht,* section 6, note 58.

beneficial to substantiate more precisely which financial instruments would have 'similar economic effects', not least because an infringement of notification requirements under the new proposal for a revision of the Transparency Directive might be sanctioned with a suspension of voting rights.[86] In this regard, there is also the question of whether significantly more substantial and more stringent provisions in Germany, France and the United Kingdom would be allowed to remain in force. Even if Article 3(1) subparagraph 2 of the draft Transparency Amendment Directive would not prescribe full harmonisation of these notification requirements,[87] the sense and purpose of the provision would mean that Member States would not be authorised to adopt more stringent provisions.

Finally, it should be noted that the draft Directive includes detailed provisions covering the determination of notifiable holdings in voting rights.[88] The commencement threshold would still be 5%.[89] In order to ensure an early transparency of influence or potential influence, the draft Directive prescribes an aggregation of voting rights holdings.[90] This means that the European legislature is following the path set by German law. If a person holds 2% of share voting rights and also owns financial instruments that give the shareholder the possibility of acquiring a further 4% of shares, the shareholder would be required to notify that he had exceeded the threshold of 5% of voting rights.

4. Summary

The European Commission is right to seek to develop the transparency regime, as the legal situation in Member States is diverse. There is also an urgent need to prevent evasion of the current provisions. However, the draft Directive is only a half-hearted attempt and does not take a sufficiently robust approach to the issues. The concept of full harmonisation being pursued by the Commission does not appear to have been thought through. If full harmonisation is also to apply to attribution provisions, modernisation of the respective provisions in the Transparency Directive will be necessary. One positive note is that the Commission is seeking to close the most glaring regulatory gaps in the Transparency Directive. Its approach of extending the transparency of financial instruments is convincing. The circumstances where there are to be notification and disclosure requirements should be

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[86] See section V.4 below.
[87] See section IV.2 above.
[88] See Art. 13(1a) in the version of the draft Transparency Amendment Directive. ESMA is also authorised to develop drafts of regulatory technical standards in order to determine calculation methods.
[89] This results from the reference in Art. 13(1) in the version of the draft Transparency Amendment Directive to Art. 9 of the Transparency Directive.
[90] See Art. 13a in the version of the draft Transparency Amendment Directive.

more clearly defined. Finally, the Commission should reveal why it does not propose to impose a Union-wide obligation governing the transparency of investor intentions when building up a major shareholding. This would have been an ideal opportunity to set aside the considerable regulatory differences across Europe. One approach would be to make transparency provisions mandatory; another would be to restrict European law, and leave Member States free to adopt such notification and disclosure requirements if they wish, but establishing firm guidance in the statutory regulation if the Member States choose to enact provisions. This would counter legal fragmentation in the European Union, as is repeatedly mentioned in the Explanatory Memorandum and Preamble to the Amendment Directive.

V. Sanctions

1. Overview

Existing provisions governing competent authorities[91] are to remain unchanged. The draft Amendment Directive seeks to introduce a new chapter VIa on sanctions, restating Articles 28 and 29 and inserting Articles 28a, 28b and 28c. Outwardly, it appears that it is important to the European Commission to make the sanctions more effective.[92] Firstly, this is achieved by way of more substantive provisions as regards the type of sanctions to be introduced by Member States. Secondly, a new sanction – the loss of voting rights – is to be introduced into the Transparency Directive, and two other sanctions – publication of sanctions imposed and the imposition of administrative pecuniary sanctions – are to be made more stringent. Thirdly, the draft Amendment Directive gives concrete prescriptions of the circumstances that national authorities should take into account in imposing sanctions. This is designed to unify very diverse current practices as regards sanctions.

Contrary to the situation governing substantive law, no provision explicitly addresses either a minimum or full harmonisation of sanctions. The level of harmonisation must therefore be determined on the basis of interpretation of the provisions. The matter is hardly relevant with respect to the provisions contained in Article 28 of the draft Directive. This only contains general clauses that are mainly designed to make the sanctions effective, proportionate and dissuasive.[93] The situation as regards what applies with respect to the special provisions of Article 28a is more interesting. The wording indicates that there is to be minimum

[91] See Art. 24 *et seqq.* of the Transparency Directive
[92] See Explanatory Memorandum to Transparency Amendment Directive, p. 10; Preamble para. 14 of draft Transparency Amendment Directive; see also Commission Staff Working Paper, p. 84 *et seq.*
[93] See Art. 28(1) in the version of the draft Transparency Amendment Directive.

harmonisation.[94] This is less clear for the provisions of Article 28b on the publication of sanctions and of Article 28c on the circumstances to be taken into account on application of sanctions. If we reflect on the legislative purpose of ensuring that as far as possible there are uniform sanctions across the EU, this in principle indicates full harmonisation. However, Member States would retain a certain discretion when introducing respective provisions.[95]

2. Administrative pecuniary sanctions

The plan to increase administrative pecuniary sanctions is highlighted amongst the huge range of sanctions. Under the Commission's Proposal, an administrative pecuniary sanction of up to 10% of total annual turnover may be imposed against a legal person and a fine of up to €5 million may be imposed against a natural person.[96] In this respect the European Commission has been influenced by the legal position in France and Italy;[97] the United Kingdom even allows for unlimited fines.[98] For some Member States, such as Austria and Germany, the revision means a considerable expansion of the scope for administrative sanctions.[99] It is also quite remarkable that the total annual turnover resulting from the consolidated account of the ultimate parent company in the preceding business year is applicable to determine the subsidiaries'[100] fines.[101] The idea behind this rule is to make the parent company responsible for its subsidiaries.

The Amendment Directive does not cover disgorgement of profits. However, the Directive does require national supervisory authorities to take account of profits gained or losses avoided in determining the level of administrative pecuniary sanctions, insofar as the profits or losses can be determined.[102] This provision would be particularly relevant if an investor acquires shares successively and infringes statutory notification requirements on multiple occasions. It might be difficult to exactly determine the advantage gained under such

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[94] See Art. 28a(2) in the version of the draft Transparency Amendment Directive: 'at least'.
[95] The Transparency Directive expressly states that there should be a possibility of appeal. This weakens even the provision concerning mandatory publication. As it does not give member States any substantive guidance as regards the form of appeal, States would be able to water down the sanctions.
[96] See Art. 28a(2)(d) and (e) in the version of the draft Transparency Amendment Directive.
[97] See Committee of European Securities Regulators (CESR), *Report on the mapping of supervisory powers, administrative and criminal sanctioning regimes of Member States in relation to the Transparency Directive (TD)*, 1 July 2009, CESR/09-058, p. 9
[98] See R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, 2010, p. 8 and p. 134.
[99] In Germany, the fine has recently been increased to a maximum amount of €1 million. See section 39(4) of the German Securities Trading Act (WpHG).
[100] The terms *parent company* and *subsidiary* are not defined in the draft amendment Directive. The provisions of the Transparency Directive only define *controlled undertaking* (Art. 2(1)(f) Transparency Directive). There is an urgent need for definitions to be introduced.
[101] See Art. 28a(2) in the version of the draft Transparency Amendment Directive.
[102] See Art. 28c(2)(d) in the version of the draft Transparency Amendment Directive.

circumstances. Therefore, a system that allows for an estimate of the benefit to be made would be preferable.

3. Publication

The principle of 'naming and shaming' deserves closer examination. It is included in Article 28a(2)(a) of the draft Transparency Directive: Member States must make a public statement that indicates the natural or the legal person and the nature of the breach as an administrative sanction. This is followed by Article 28b of the draft Transparency Directive: competent authorities must publish any sanction or measure imposed for breach of provisions without undue delay, including information on the type and nature of the breach and the identity of persons responsible for it. This means that there is no discretion as regards publication of sanctions. Only anonymisation would be possible if publication would cause disproportionately significant damage to a party.

It is notable that the draft Directive regards naming and shaming as a type of sanction. The punitive nature of publication has until now been disputed by jurisprudence.[103] The most important aspect of the revision is that the supervisory regime must be subject to fundamental changes.[104] The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* - BaFin) has not yet exercised its powers to publish sanctions imposed (under section 40b of the Securities Trading Act - WpHG).[105] It would no longer have this discretion under the draft Directive. Finally, it should be noted that, according to the wording of the new Article 28a, sanctions and measures would have to be published as soon as a national supervisory authority had imposed sanctions or taken measures.[106] The AMF, BaFin, Consob or the FSA[107] would not be able to wait until a legal process was completed.

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[103] Publication is mainly understood as an instrument of averting hazards. See J. Vogel, in: H.-D. Assmann and U. Schneider, *WpHG*, section 40b, note 4.

[104] We cannot address constitutional aspects in this paper. For an Austrian perspective, see S. Kalss and J. Oelkers, *Öffentliche Bekanntgabe – ein wirksames Aufsichtsinstrument im Kapitalmarktrecht?, ÖBA 2009*, 123, 126 *et seq.*

[105] See R. Veil and F. Walla, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht,* section 7, note 10.

[106] In Austria, a sanction may also be published during an ongoing process. See S. Kalss and J. Oelkers, *Öffentliche Bekanntgabe – ein wirksames Aufsichtsinstrument im Kapitalmarktrecht?, ÖBA 2009,* 123, 132.

[107] The national financial supervisory authorities are: France - Autorité des marchés financiers (AMF); Germany - Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin); Italy - Commissione Nazionale per le Società e la Borsa (Consob); United Kingdom - Financial Services Authority (FSA).

An accused party would be threatened with significant reputational damage. Therefore, it would be extremely important to have appeals available to affected parties.[108]

4. Loss of voting rights

Finally, the planned introduction of a loss of voting rights should be highlighted. This sanction shall apply if an investor violates his notification obligations.[109] According to the Proposal, the voting rights would not be lost *ex lege*. Competent authorities should receive the 'power to suspend the exercise of voting rights attached to shares'.[110] A competent authority may exercise such authority if it 'finds that the provisions of this Directive, concerning notification of major holdings have been infringed by the holder of shares or other financial instruments, or a person or entity referred to in Articles 10 or 13.'

The Commission regards this authority as the most efficient administrative sanction.[111] It is not fully clear how the Commission came to this opinion. It appears to have adopted the approach from the report of the former Committee of European Securities Regulators (CESR) on existing supervisory powers in Member States.[112] This report states that the loss of voting rights by public order has been adopted in six Member States.[113] However, this information is not strictly correct. Under French law, the voting rights get lost *ex lege*.[114] The same is true for Italy.[115] This also applies to German law, which prescribes the loss of all rights attached to shares of the company, such as voting rights and rights on dividends.[116] In these four EU countries the loss of voting or other shareholder rights is attributed with a significant deterrent

[108] Art. 29 in the version of the draft Transparency Amendment Directive requires Member States to allow appeals against decisions made and measures taken.
[109] See Art. 28(2)(c) in the version of the draft Transparency Amendment Directive.
[110] Contrary to the position under German law (see section 28 Securities Trading Act - WpHG), other administrative rights and monetary rights would not be lost.
[111] See Explanatory Memorandum, p. 10; see also Commission Staff Working Paper, p. 85.
[112] The CESR report is referenced in the Commission Staff Working Paper, p. 85.
[113] See CESR, *Report on the mapping of supervisory powers, administrative and criminal sanctioning regimes of Member States in relation to the Transparency Directive (TD),* 1 July 2009, CESR/09-058, pp. 54, 59, 63.
[114] See Art. L. 233-14 C. com. ('*L'actionnaire … est privé des droits de vote*'); as regards this 2-year loss of voting rights, see R.Veil and P. Koch, *Französisches Kapitalmarktrecht*, 2010, p. 97 et seqq. (also covers the competence of courts contained in this provision to also order a loss of voting rights for up to 5 years).
[115] However, under Italian law the supervisory authority Consob has the possibility of challenging resolutions of annual general meetings on the grounds that voting rights were exercised that should not have been valid due to a breach of the notification requirements; see. Art. 122(4) Consolidated Law on Financial Intermediation (*Testo unico delle disposizioni in materia di intermediazione finanziaria* – TUF).
[116] See section 28 sentence 1 of the Securities Trading Act (WpHG).

effect.[117] Should this approach also be the preferred approach across the European Union?[118] An answer may be provided by closer examination of the effect of the proposed authorisation of competent authorities as compared with the loss of voting rights *ex lege*.

The Amendment Directive does not provide clear guidelines for when an authority should intervene. Article 28c(1)(a) and (b) sets out circumstances which a competent authority would take into account. However, this does not provide a definitive answer as to when and how long a competent authority should or must order the suspension of voting rights. Experience in Switzerland[119] with a court's authority has demonstrated the difficulties involved in determining reliable guidelines for the exercise of discretion by a competent authority.[120] Therefore, the preventative effects of sanctions are significantly lower than a loss of rights *ex lege* that has clearly defined required elements, as is the case in Germany, France and Italy.[121]

The Commission's proposed solution of authorisation of a competent authority carries the advantage that one instance would be available to enforce the regulations and to exercise the imposition of sanctions. However, if voting rights or other shareholder rights were to be lost *ex lege*, various different parties would be in charge of enforcement. An automatic 'negligent failure to fulfil obligations = loss of voting rights or other shareholder rights' would mean that the issuer would have to deal with the matter; at the very latest it would be addressed when the chair of the company's general meeting would have to determine whether or not shareholders at an annual general meeting were entitled to vote. Civil courts could then be confronted with the issue of a possible loss of rights or voting rights. In Germany and in France the issue of shareholders challenging resolutions of an annual general meeting is of

[117] See also R. Veil and F. Walla, in: R. Veil (Publ.), *Europäisches Kapitalmarktrecht,* section 7, notes 11, 13, 15.

[118] However, the issue of a statutory loss of rights has recently been questioned in Germany; for an expansion on this from the supervisory point of view, see C. Dolff, *Der Rechtsverlust gem. § 28 WpHG aus der Perspektive eines Emittenten*, 2011; also R. Veil, *Wie viel „Enforcement" ist notwendig? Zur Reform des Instrumentenmix bei der Sanktionierung kapitalmarktrechtlicher Mitteilungspflichten gem. §§ 21 ff. WpHG*, ZHR 175 (2011), 83, 106 *et seqq.*

[119] See Art. 20 (4)[bis] Swiss Federal Statute on Exchanges and Securities Dealing (SESTA).

[120] For criticism of the Swiss legal position, see N. Reiser and H. von der Crone, *Stimmrechtssuspendierung nach Art. 20 Abs. 4bis BEHG – Strafrechtliche Rechtsnatur mit verfahrensrechtlichen Konsequenzen,* SZW (81) 2009, 509, 510; P. Kunz, *Die Stimmrechtssuspendierungsklage im revidierten Börsengesetz,* SZW (80) 2008, 280, 288 *et seq.*

[121] Another issue is whether the low level of requirements (atypical in capital markets) is plausible for behaviour characterised by simple negligence. For more on this issue, see R. Veil, *Wie viel „Enforcement" ist notwendig? Zur Reform des Instrumentenmix bei der Sanktionierung kapitalmarktrechtlicher Mit-teilungspflichten gem. §§ 21 ff. WpHG,* ZHR 175 (2011), 83, 105 *et seqq.*

practical relevance. Such actions are often based on the fact that shareholders had no right to vote due to infringement of notification requirements.[122]

The discussion about the advantages and disadvantages of the two options for a loss of voting rights or other shareholder rights shows that it would not be prudent to prescribe a specific concept to Member States.[123] An order from a competent authority suspending voting rights might work in the Czech Republic,[124] while in Germany for several decades the desired preventative effect has been achieved by a loss of rights *ex lege*.[125] The European legislature would be well advised to take note of traditions of legal enforcement in Member States and offer both models as regulatory options. This should also apply to circumstances where a person has infringed notification requirements for financial instruments.[126]

Finally, there is also a need for discussion of the proposal to allow authorities to suspend voting rights if 'a person or entity referred to in [the] Article 10' has infringed the provisions on notification requirements for notification of major holdings. This rule far exceeds the prevailing legal position currently in effect in Member States. The idea is not justified even by the most outlandish proposals to protect against evasion. A loss of rights or voting rights for third party rights may be justified for a trust relationship or a Group relationship. But why should a shareholder acting in concert with another shareholder as regards to exercise of voting rights have the mistakes of that other person attributed to him? This represents the creation of a sanction to punish third parties that can have no place in the legal order of Member States.

VI. Conclusion

The Proposal to reform the Transparency Directive is disappointing. It is not clear that the European Commission is following a clear regulatory concept. The Commission claims that it

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[122] Another issue is whether this form of legal enforcement is also plausible from a legal policy viewpoint. In Germany, such actions are often launched by predatory shareholders who seek to secure special advantages for themselves.

[123] It is highly unlikely that a statutory loss of rights would be regarded as a implementation of Art. 28a(2)(c) in the version of the draft Transparency Amendment Directive. An analysis of the different effects shows that this would involve other sanctions.

[124] According to the CESR report, the following EU countries have the right for a public authority to suspend voting rights: France, Lithuania, Luxembourg, Portugal and the Czech Republic.

[125] However, in Germany the loss of rights attached to shares should *de lege ferenda* require at least *grobe Fahrlässigkeit* (gross negligence). For more on the need for reform of German law, see R. Veil, *Wie viel „Enforcement" ist notwendig? Zur Reform des Instrumentenmix bei der Sanktionierung kapitalmarktrechtlicher Mit-teilungspflichten gem. §§ 21 ff. WpHG,* ZHR 175 (2011), 83, 97 *et seqq.,* 105 *et seqq*.

[126] The draft Directive should also allow authorities to suspend voting rights for such circumstances. See Art. 28a(2)(c) in the version of the draft Transparency Amendment Directive: 'a person or entity referred to in [the] Articles'.

is seeking to strengthen investor confidence, but this does not adequately explain why it is aiming to introduce certain notification and disclosure requirements but not others. It is also not clear how the Commission views the relationship between the various European legal instruments. Both the Prospectus Directive and the Market Abuse Directive cover the transparency of price-relevant information; this has been expressly confirmed by the Commission.[127] However, the Commission has not drawn any definitive conclusions. The Commission could have taken the opportunity provided by the reform of three Lamfalussy framework instruments to more closely integrate the regulatory areas. Above all, it could have used the Transparency Directive to integrate the disclosure requirements for issuers set out by the Market Abuse regime.[128]

The content of the Proposals could be improved. Problems are raised by issues such as the move towards full harmonisation that threatens to have much wider application than intended. It probably makes sense to unify attribution provisions across the EU. However, this should only take place when the other 20-year old provisions have been brought up to date. The reform of sanctions is also ambiguous. The basic aim to strengthen sanctions deserves support. However, it would make sense for competent authorities to disgorge unlawfully gained profits. It is also clear that publication of sanctions imposed strengthens the effect of those sanctions. The proposals to introduce the power for a competent authority to suspend voting rights are not convincing. It is very doubtful whether this sanction will have a deterrent effect, as the Commission contends. The Commission also seems not to have taken the diverse development of sanctions in Member States into account, particularly the concept of private enforcement. The Amendment Directive does not (yet) really represent real progress for the development of European capital markets law.

[127] See Commission Staff Working Paper, p. 7.

[128] The Market Abuse Directive governs the duty to disclose inside information and the duty to notify and disclose director dealings. The Commission wants these duties to be governed in future by the Market Abuse Regulation; see R. Veil and P. Koch, *Towards a uniform European Capital Markets Law: Proposals of the Commission to Reform Market Abuse*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998376.