



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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from:            Presidency

to:                Delegations

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Subject:        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  
- Presidency compromise

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Delegations will find below a Presidency compromise on the above Commission proposal, as a result of the 15 March 2012 meeting.

With respect to the Commission's proposal, additions are underlined. Additions to the latest Presidency compromise are **bolded**.

DIRECTIVE 2012/.../EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 50 and Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Central Bank<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

- (1) According to Article 33 of Directive 2004/109/EC of the European Parliament and of the Council<sup>1</sup> the Commission had to report on the operation of that Directive to the European Parliament and to the Council including on the appropriateness of ending the exemption for existing debt securities after the 10-year period as provided for by Article 30(4) of that Directive, and on the potential impact of the operation of that Directive on the European financial markets.
- (2) On 27 May 2010 the Commission adopted a report on the operation of Directive 2004/109/EC which identified areas where the regime created by that Directive could be improved. In particular, the report demonstrates the need to provide for the simplification of certain issuers' obligations with a view to making regulated markets more attractive to small and medium-sized issuers raising capital in the Union. Furthermore, the effectiveness of the existing transparency regime needs to be improved, notably with respect to the disclosure of corporate ownership.
- (3) In addition, in its Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions entitled "Single Market Act, Twelve levers to boost growth and strengthen confidence, Working together to create new growth", the Commission identified the need to review Directive 2004/109/EC in order to make the obligations applicable to listed small and medium-sized enterprises more proportionate, whilst guaranteeing the same level of investor protection.

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<sup>1</sup> OJ L 390, 31.12.2004, p. 38.

- (4) According to the Commission report and the Commission Communication, the administrative burden associated with obligations linked to admission to trading on regulated markets should be reduced for small and medium-sized issuers in order to improve their access to capital. The obligation to publish interim management statements or quarterly financial reports represent an important burden for many small and medium-sized issuers whose securities are admitted to trading on regulated markets, without being necessary for investor protection. Those obligations also encourage short-term performance and discourage long-term investment. In order to encourage sustainable value creation and long-term oriented investment strategy it is essential to reduce short-term pressure on issuers and give investors incentive to adopt a longer term vision. The requirement to publish interim management statements should therefore be abolished.
- (5) Member States should not be allowed to impose the requirement to publish periodic financial information on a more frequent basis than annual financial reports and half-yearly financial reports in their national legislation. However, Member States may require issuers to publish additional periodic financial information if the additional information does not constitute a significant administrative burden, and if the additional information required is strictly proportionate to what usefully contributes to investment decisions. This directive is without prejudice of any additional information required by sectorial European legislation.

(6)

- (6 a) In order to provide additional flexibility and thereby reduce administrative burdens, the deadline to publish half-yearly financial reports should be extended to three months after the end of the reporting period. As the period in which issuers can publish their half-yearly financial reports is extended, small and medium-sized issuers' reports are expected to get more attention from the market participants, and thereby these issuers become more visible.
- (7) In order to provide for enhanced transparency of payments made to governments, issuers whose securities are admitted to trading on a regulated market and which have activities in the extractive or logging of primary forest industries should disclose in a separate report on an annual basis payments made to governments in the countries in which they operate. The report should include types of payments comparable to those disclosed under the Extractive Industries Transparency Initiative (EITI) established by .... and provide civil society with information to hold governments of resource-rich countries to account for their receipts from the exploitation of natural resources. The initiative is also complementary to the EU Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT) established by COUNCIL REGULATION (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community<sup>1</sup> and to the Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market<sup>2</sup> (hereinafter "Timber Regulation") which require traders of timber products to exercise due diligence in order to prevent illegal wood from entering into the EU market. The detailed requirements are defined in Chapter 9 of Directive 2011/./EU of the European Parliament and of the Council<sup>3</sup>\*

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<sup>1</sup> OJ L 347, 30.12.2005, p. 1.

<sup>2</sup> OJ L 295, 12.11.2010, p. 23.

<sup>3</sup> OJ L, , p..

\* OJ: Please insert the number for the Directive contained in doc. st..... and complete the reference in the footnote.

- (8) Financial innovation has led to the creation of new types of financial instruments that give investors economic exposure to companies, the disclosure of which has not been provided for in Directive 2004/109/EC. Those instruments could be used to acquire secret stocks in companies, which could result in market abuse and give a **false and misleading** picture of economic ownership of publicly listed companies. In order to ensure that issuers and investors have full knowledge of the structure of corporate ownership, the definition of financial instruments in that Directive should cover all instruments with similar economic effect to holding shares and entitlements to acquire shares.
- (9) In addition, in order to ensure adequate transparency of major holdings, where a holder of financial instruments exercises its entitlement to acquire shares and the total holdings of voting rights attaching to physical shares exceed the notification threshold without affecting the overall percentage of the previously notified holdings, a new notification should be required to disclose the change in the nature of the holdings.

(10) 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 more stringent rules than those provided in Directive 2004/109/EC regarding the calculation of notification thresholds, aggregation of holdings of voting rights attaching to shares with holdings of voting rights relating to financial instruments and exemptions from the notification requirements. However, taking into account the existing differences in ownership concentration in the Union, and the differences in company laws in the Union leading to the total number of shares differing from the total number of voting rights for some issuers, Member States should continue to be allowed to set both lower and additional thresholds for notification of holdings of voting rights, and to require equivalent notifications in relation to thresholds based on capital holdings. Moreover, Member States should continue to be allowed to set stricter obligations than those provided in Directive 2004/109/EC with regard to the content (such as disclosure of shareholders' intentions), process and the timing for notification and to be able to require additional information regarding major holdings not provided for by Directive 2004/109/EC. In particular, Member States should also be able to continue to apply laws, regulations or administrative provisions adopted in relation to take-over bids, merger transactions and other transactions affecting the ownership or control of companies regulated by the supervisory authorities appointed by Member States pursuant to Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids<sup>1</sup> that impose disclosure requirements more stringent than those in Directive 2004/109/EC.

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<sup>1</sup> OJ L 142, 30.4.2004, p. 12.

- (11) Technical standards should ensure consistent harmonisation of the regime for notification of major holdings and adequate transparency levels. It would be efficient and appropriate to entrust ESMA with the elaboration, for submission to the Commission, of draft regulatory technical standards which do not involve policy choices. The Commission should adopt the draft regulatory technical standards developed by ESMA to specify the conditions for the application of existing exemptions from the notification requirements for major holdings of voting rights. Using its expertise, ESMA should in particular determine the cases of exemptions while taking account of their possible misuse to circumvent notification requirements.
- (12) In order to take account of technical developments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission to specify the types of financial instruments subject to notification requirements and to specify the contents of notification of major holdings of financial instruments. As set out in the Declaration (No 39) on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, it is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drafting up of delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.



- (13) To facilitate cross-border investment, investors should be able to easily access regulated information for all listed companies in the Union. However, the current network of officially appointed national storage mechanisms for regulated information does not ensure an easy search for such information across the Union. In order to ensure cross-border access to information and to take account of technical developments in financial markets and in communication technologies, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission to specify minimum standards concerning the interoperability of the information and communication technologies used by the officially appointed national storage mechanisms and the access to regulated information at the Union level, in particular, concerning the operation of a central access point for the search of regulated information at the Union level.
- (14) In order to improve compliance with the requirements of Directive 2004/109/EC and following the Communication from the Commission of 9 December 2010 entitled "Reinforcing sanctioning regimes in the financial sector", the sanctioning powers should be enhanced and should satisfy certain essential requirements. In particular, Member States should ensure that the administrative sanctions and measures that can be applied include at least the possibility to suspend the exercise of voting rights for holders of shares and financial instruments who do not comply with the notification requirements and to impose pecuniary sanctions which are sufficiently high to be dissuasive. In order to ensure that sanctions have a dissuasive effect on the public at large, they should normally be published **unless a case-by-case analysis on the proportionality of the publication shows this would cause disproportionate damage to the parties involved.** This Directive should refer to both administrative sanctions and measures in order to cover all cases of non-compliance, irrespective of their qualification as a sanction or a measure under national law. Member States may **have other sanctioning powers in addition to those provided for in this Directive and provide for higher levels of administrative pecuniary sanctions** than these provided for in this Directive.

(15) In order to clarify the treatment of non-listed securities represented by depository receipts admitted to trading on a regulated market and in order to avoid transparency gaps, the definition of "issuer" should be further specified to include issuers of non-listed securities represented by depository receipts admitted to trading on a regulated market. It is also appropriate to amend the definition of 'issuer' taking into account that in some Member States issuers can be natural persons with securities admitted to trading on regulated markets.

**(15a) References in Directive 2004/109/EC to natural persons and legal entities should include all natural persons and legal entities including registered business associations without legal personality and trusts.**

(16) All issuers whose securities are admitted to trading on a regulated market within the Union should be supervised by a competent authority of a Member State to ensure that they comply with their obligations. Issuers who, according to Directive 2004/109/EC, have to choose their home Member State but who have not done so, could avoid being supervised by any competent authority in the Union. Therefore, Directive 2004/109/EC should be amended to determine a home Member State for issuers that have not communicated their choice of home Member State to the competent authorities within a three-month period. **[Recital 16 will be aligned with the relevant provision.]**

(17) According to Directive 2004/109/EC, the choice of a home Member State is valid for three years. However, where an issuer's securities are no longer admitted to trading on the regulated market in the issuer's home Member State and remains admitted to trading in one or more host Member States, such issuer has no relationship with its originally chosen home Member State where that is not the Member State of its registered office. Such issuer should choose one of its host Member States or the Member State where it has its registered office, as its new home Member State before the expiration of the three-year period. **[Recital 17 will be aligned with the relevant provision.]**

- (17a) There should be consistency between Directives 2004/109/EC and 2003/71/EC concerning the definition of the home Member State. In this respect, in order for supervision to be ensured by the most relevant Member State, Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 should be modified to provide for more flexibility for situations where the securities of an issuer incorporated in a third country are no longer admitted to trading on the regulated market in its home Member State but instead are admitted to trading in one or more other Member States.
- (18) Commission Directive 2007/14/EC<sup>1</sup> contains in particular rules concerning the notification of the choice of the home Member State by the issuer. These rules are moved to Directive 2004/109/EC. To avoid that competent authorities of the host Member State(s) and of the Member State where the issuer has its registered office, where such Member State is neither home nor host Member State, are not informed about the choice of home Member State by the issuer, all issuers should be required to communicate the choice of their home Member State to the competent authorities of all host Member States and to the competent authority of the Member State where they have their registered office, where it is different from their home Member State. The rules concerning notification of the choice of home Member State should therefore be amended accordingly.
- (19) The requirement of Directive 2004/109/EC regarding disclosure of new loans has **led** to many implementation problems in practice and its application is considered to be complex. Furthermore, that requirement overlaps partially with the requirements laid down in Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading<sup>2</sup> and Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>3</sup> and it does not provide much additional information to the market. In order to reduce unnecessary administrative burden for issuers, that requirement should therefore be abolished.

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<sup>1</sup> OJ L 69, 9.3.2007, p. 27.

<sup>2</sup> OJ L 345, 31.12.2003, p. 64.

<sup>3</sup> OJ L 96, 12.4. 2003, p. 16.

(20) The requirement to communicate any amendment of issuer's instruments of incorporation or statutes to the competent authorities of the home Member State overlaps with the similar requirement of Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies<sup>1</sup> and can result in confusion regarding the role of the competent authority. In order to reduce unnecessary administrative burden for issuers, that requirement should therefore be abolished.

(21) Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>2</sup> and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data<sup>3</sup>, are fully applicable to the processing of personal data for the purposes of this Directive.

**(21a) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union as enshrined in the Treaty, notably the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, the presumption of innocence and right of defence, the principles of legality and proportionality of offences and penalties, and the right not to be tried or punished twice for the same offence. Limitations placed on these rights are in accordance with article 52(1) of the Charter as they are necessary to ensure the general interest objectives of the protection of investors and the integrity of financial markets, and appropriate safeguards are provided to ensure that rights are limited only to the extent necessary to meet these objectives and by measures that are proportionate to the objective to be met.**

(22) Directives 2004/109/EC, 2003/71/EC and 2007/14/EC should therefore be amended accordingly,

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<sup>1</sup> OJ L 184, 14.7.2007, p. 17.

<sup>2</sup> OJ L 281, 23.11.1995, p. 31.

<sup>3</sup> OJ L 8, 12.1.2001, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

*Amendments to Directive 2004/109/EC*

Directive 2004/109/EC is hereby amended as follows.

(1) Article 2(1) is amended as follows:

(a) point (d) is replaced by the following:

"(d) "issuer" means a natural **person**, or legal entity governed by private or public law, including a State, whose securities are admitted to trading on a regulated market. In case of depository receipts admitted to trading on a regulated market, the issuer means the issuer of the securities represented, whether or not those securities are admitted to trading on a regulated market;"

(b) point (i) is amended as follows:

(i) in sub point (i) the second indent is replaced by the following:

"- where the issuer is incorporated in a third country, the Member State referred to in sub point (iii) of Article 2(1)(m) of Directive 2003/71/EC, **unless the issuer becomes covered by sub point (iii)**;"

(ii) in sub point (ii) are replaced by the following:

**“for any issuer not covered by (i), the Member State chosen by the issuer from among the Member State in which the issuer has its registered office, where applicable, and those Member States which have admitted its securities to trading on a regulated market on their territory. The issuer may choose only one Member State as its home Member State. Its choice shall remain valid for at least three years unless its securities are no longer admitted to trading on any regulated market in the Union or unless the issuer becomes covered by (i) or (iii), during the three-year period;”**

(iii) the following sub points are added:

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**(iii) an issuer whose securities are no longer admitted to trading on a regulated market in its home Member State as defined by sub point (i) second indent or sub point (ii) but instead are admitted to trading in one or more other Member States, that issuer shall choose a new home Member State from amongst the Member States where its securities are admitted to trading on a regulated market and, where applicable, the Member State where the issuer has its registered office;**

**(iv) an issuer shall disclose its home Member State in accordance with Articles 20 and 21. In addition, an issuer shall disclose its home Member State to the competent authorities of the Member State where it has its registered office, where applicable, and to the competent authorities of all host Member States.**

**In absence of disclosure by the issuer of its home Member State as defined by sub point (i) second indent or sub point (ii) within a period of three months from the date the issuers' securities are first admitted to trading on a regulated market, the home Member State shall be the Member State where the issuers securities are admitted to trading on a regulated market on its territory. Where the issuer's securities are admitted to trading on regulated markets situated or operating within more than one Member State, those Member States shall be the issuer's home Member States until a subsequent choice of a unique home Member State has been taken and disclosed by the issuer.**

**In absence of communication by the issuer of its choice of home Member State according to sub point (iii) within a period of three months from the date the issuers' securities are no longer admitted to trading on a regulated market it is original home Member State, the new home Member State shall be the Member State where the issuers securities are admitted to trading on a regulated market on its territory. Where the issuer's securities are admitted to trading on regulated markets situated or operating within more than one Member State, those Member States shall be the issuer's home Member States until a subsequent choice of a unique home Member State has been taken and communicated by the issuer.:"**

- (c) the following point is added:

"(q) "formal agreement" means an agreement which is binding under the applicable law."

(2) Article 3 is **amended as follows**:

**(a) Paragraph 1 is replaced by the following:**

"1. The home Member State may make an issuer subject to requirements more stringent than those laid down in this Directive, except requiring issuers to publish periodic financial information on a more frequent basis than annual financial reports referred to in Article 4 and half-yearly financial reports referred to in Article 5."

**(b) The following Paragraphs are inserted:**

**"1a. By derogation from paragraph 1, the home Member States may require issuers to publish periodic financial information other than the annual financial reports referred to in Article 4 and the half-yearly financial reports referred to in Article 5, under the following conditions:**

- **the additional periodic financial information does not constitute a significant administrative burden in the Member State concerned, in particular for the small and medium sized issuers; and**
- **the content of the additional periodic financial information required is strictly proportionate to what usefully contributes to investment decisions by the investors in the Member State concerned.**

**Before taking a decision imposing additional periodic information, Member States shall assess the possible negative impacts on short-termism and on access of small and medium sized issuers to the regulated markets.**

**1b. 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 when:**



- (i) setting lower or additional notification thresholds than those laid down in Article 9(1) and requiring equivalent notifications in relation to thresholds based on capital holdings;
- (ii) applying more stringent requirements than those referred to in Article 12; and
- (iii) applying laws, regulations or administrative provisions adopted in relation to takeover bids, merger transactions and other transactions affecting the ownership or control of companies, regulated by the supervisory authorities appointed by Member States pursuant to Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (\*).

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(\*) OJ L 142, 30.4.2004, p. 12."

(3)

(3a) Article 5(1) is replaced by the following:

"1. The issuer of shares or debt securities shall make public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest three months thereafter. The issuer shall ensure that the half-yearly financial report remains available to the public for at least five years."

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(\* ) OJ L 331, 15.12.2010, p. 84.'

(4)

(5) Article 6 is replaced by the following:

"Article 6

Report on payments to governments

Member States shall require issuers active in the extractive or logging of primary forest industries, as defined in [...] to prepare, in accordance with Chapter 9 of Directive 2011/..\*/EU of the European Parliament and of the Council of .... on ..... (\*\*), a report on payments made to governments on an annual basis. The report shall be made public at the latest six months after the end of each financial year and shall remain publicly available for at least five years. Payments to governments shall be reported at consolidated level.

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(\*) OJ: Please insert the number for the Directive contained in doc. st..... and complete the reference in the footnote.

(\*\*) OJ L [...]"

(6) Article 8 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. Articles 4 and 5 shall not apply to the following issuers:

(a) a State, a regional or local authority of a State, a public international body of which at least one Member State is a member, the ECB, the European Financial Stability Facility (EFSF) as established by EFSF Framework Agreement and any other mechanism established with the objective to preserve financial stability of European monetary union by providing temporary financial assistance to euro area Member States and Member States' national central banks whether or not they issue shares or other securities; and

(b) an issuer exclusively of debt securities admitted to trading on a regulated market, the denomination per unit of which is at least EUR 100 000 or, in the case of debt securities denominated in a currency other than euro, the value of such denomination per unit is, at the date of the issue, equivalent to at least EUR 100 000."

(c) Paragraph 4 is replaced by the following:

" By way of derogation from paragraph 1a of this Article, Articles 4 and 5 shall not apply to issuers of exclusively debt securities the denomination per unit of which is at least EUR 50 000 or, in the case of debt securities denominated in a currency other than euro, the value of such denomination per unit is, at the date of the issue, equivalent to at least EUR 50 000, which have already been admitted to trading on a regulated market in the Union before 31 December 2010, for as long as such debt securities are outstanding."

(7) Article 9 is amended as follows:

(b) Paragraph 6 is replaced by the following:

"6. This Article shall not apply to voting rights held in the trading book, as defined in Article 11 of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (\*), of a credit institution or investment firm provided that:

(a) the voting rights held in the trading book do not exceed 5 %, and

(b) the voting rights attached to shares held in the trading book are not exercised nor otherwise used to intervene in the management of the issuer.

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(\*) OJ L 177, 30.6.2006, p. 201.!

(c) The following paragraphs are inserted:

"6a. This Article shall not apply to voting rights attached to shares acquired for stabilisation purposes in accordance with Commission Regulation (EU) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments (\*\*), provided the voting rights attached to these shares are not exercised nor otherwise used to intervene in management of the issuer.

(\*\*) OJ L 336, 23.12.2003, p. 33."

6b. ESMA shall develop draft regulatory technical standards to specify the method of calculation of the 5 % threshold referred to in paragraphs 5 and 6, including in the case of a group of companies, taking into account Article 12(4) and (5).

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2013.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010."

(8) Article 13 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. The notification requirements laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly:

- (a) financial instruments that give the holder, under a formal agreement, either the unconditional right to acquire or the discretion as to his right to acquire, shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market;
- (b) financial instruments which are not included in point (a) but which are referred to shares referred to in that point and with economic effect similar to financial instruments referred to in that point, whether they give right to a physical settlement or not.

The notification required shall include the breakdown by type of financial instruments held according to point (a) and financial instruments held according to point (b), **distinguishing between the financial instruments which are physically settled and the financial instruments settled in cash.**;

(b) The following paragraphs are inserted:

'1a. The number of voting rights shall be calculated by reference to the full notional amount of shares underlying the financial instrument **except when the financial instrument provides exclusively for a cash settlement, in which case the number of voting rights shall be calculated on a 'delta-adjusted' basis, by multiplying the notional amount of underlying shares by the delta of the instrument.** For this purpose, the holder shall aggregate and notify all financial instruments relating to the same underlying issuer. Only long positions shall be taken into account for the calculation of voting rights. Long positions shall not be netted with short positions relating to the same underlying issuer.

ESMA shall develop draft regulatory technical standards to specify the method to calculate the number of voting rights referred to in the first subparagraph in case of financial instruments referenced to a basket of shares or an index.

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2013.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the second subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

**Five years after the entry into force of this Directive, the Commission shall review the functioning of the retained method to calculate the number of voting rights relating to the financial instruments referred to in paragraph 1a and present a report to the European Parliament and to the Council assessing its effectiveness. The report shall be submitted together with a legislative proposal, if appropriate.**

- 1b. For the purposes of paragraph 1 transferable securities, options, futures, swaps, forward rate agreements, contracts for differences and any other contracts **or agreements with similar effects** which may be settled physically or in cash, shall be considered to be financial instruments, provided they satisfy any of the conditions set out in points (a) or (b) of paragraph 1.

ESMA shall establish and periodically update an indicative list of financial instruments that are subject to notification requirements according to paragraph 1, taking into account technical developments on financial markets.";

- (c) Paragraph 2 is replaced by the following:

'2. The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 27(2a), (2b) and (2c), and subject to the conditions of Articles 27a and 27b, the measures to:

- (a) (b) specify other types of instruments to be considered as financial instruments within the meaning of paragraph 1b;
- (c) specify the contents of the notification to be made, the notification period and to whom the notification is to be made, as referred to in paragraph 1.";



(d) The following paragraph is added:

'4. The exemptions laid down in Article 9(4), (5) and (6) and in Article 12(3), (4) and (5) shall apply *mutatis mutandis* to the notification requirements under this Article.

ESMA shall develop draft regulatory technical standards to specify the cases in which the exemptions referred to in the first subparagraph apply to financial instruments held by a natural person or a legal entity fulfilling orders received from clients or responding to a client's requests to trade otherwise than on a proprietary basis, or hedging positions arising out of such dealings.

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2013.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the second subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010<sup>1</sup>.

(9) The following Article is inserted:

"Article 13a

Aggregation

1. The notification requirements laid down in Articles 9, 10 and 13 shall also apply to a natural person or a legal entity when the number of voting rights held directly or indirectly by such person or entity under Articles 9 and 10 aggregated with the number of voting rights relating to financial instruments held directly or indirectly under Article 13 reaches, exceeds or falls below the thresholds set out in Article 9(1).

The notification required under the first subparagraph of this paragraph shall include the breakdown of the number of voting rights attached to shares held according to Articles 9 and 10 and voting rights relating to financial instruments within the meaning of Article 13.

2. Voting rights relating to financial instruments that have already been notified according to Article 13 shall be notified again when the natural person or the legal entity has acquired the underlying shares and such acquisition results in the total number of voting rights attached to shares issued by the same issuer reaching or exceeding the thresholds of Article 9(1)."

(10) Article 16(3) is deleted.

(11) In Article 19(1), the second subparagraph is deleted.

(12) Article 21(4) is replaced by the following:

"4. The Commission shall be empowered to adopt, by means of delegated acts in accordance with Article 27(2a), (2b) and (2c), and subject to the conditions of Articles 27a and 27b, measures to specify the following minimum standards and rules:

- (a) minimum standards for the dissemination of regulated information, as referred to in paragraph 1;
- (b) minimum standards for the central storage mechanism as referred to in paragraph 2;
- (c) rules concerning the interoperability of the information and communication technologies used by the national officially appointed mechanisms and the access to regulated information at the Union level, as referred to in paragraph 2.

The Commission may also specify and update a list of media for the dissemination of information to the public."

(13) Article 22 is replaced by the following:

*"Article 22*

**Access to regulated information at the Union level**

1. ESMA shall develop draft regulatory technical standards setting technical requirements regarding access to regulated information at the Union level in order to specify the following:
  - (a) the technical requirements regarding the interoperability of the information and communication technologies used by the national officially appointed mechanisms;
  - (b) the technical requirements for the operation of a central access point for the search of regulated information at the Union level;
  - (c) the technical requirements regarding the use of a unique identifier for each issuer by the national officially appointed mechanisms;
  - (e) the common classification of regulated information by national officially appointed mechanisms and the common list of types of regulated information.

2. In developing the draft regulatory technical standards, ESMA shall ensure that the technical requirements specified in Article 22(1), are compatible with the technical requirements for the electronic network of national company registers set up by the Directive 2011/./EU of the European Parliament and of the Council of ..... (\*) on .....(\*\*).

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2014.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.'

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(\*) OJ: Please insert the number for the Directive contained in doc. st.... and complete the reference in the footnote.

(\*\*) OJ L [...]'".

(13a) In Article 23, paragraph 1, a subparagraph is added after the second subparagraph:

"The information covered by the requirements laid down in the third country shall be filed in accordance with Article 19 and disclosed in accordance with Articles 20 and 21."

**(13b) In Article 24 the following paragraph is added:**

**"4a. Without prejudice to paragraph 4, competent authorities shall be given all investigative powers that are necessary for the exercise of their functions."**

**(13c) In Article 25 (2) the following subparagraph is added:**

**“In the exercise of their sanctioning and investigative powers, competent authorities shall cooperate to ensure that sanctions or measures produce the desired results and coordinate their action when dealing with cross border cases.”**

(14) The following title is inserted after Article 27b:

“CHAPTER VIa  
**SANCTIONS AND MEASURES”**

(15) Article 28 is replaced by the following:

“Article 28  
**Administrative measures and sanctions**

1. Member States shall lay down rules on **administrative measures and sanctions** applicable to **the persons responsible for breaches** of the national provisions adopted in the implementation of this Directive and shall take all measures necessary to ensure that they are implemented. Those administrative sanctions and measures shall be effective, proportionate and dissuasive.
2. Without prejudice to Article 7, Member States shall ensure that where obligations apply to legal **entities**, in case of a breach, sanctions can be applied, subject to the conditions laid down in national law, to the members of administrative, management or supervisory bodies of the legal **entity**, and to other individuals who are responsible for the breach under national law.

”

(16) The following articles are inserted:

*"Article 28a*

Breaches

**Article 28b shall apply to the following breaches:**

- (a) failure by the issuer to make public information required under **the national provision adopted in the implementation of** Articles 4, 5, 6, **14** and 16 within the required time limit;
- (b) failure by the natural or the legal person to notify the acquisition or disposal of a major holding according to **the national provisions adopted in the implementation of** Articles 9, 10, **12,** 13 and 13a within the required time limit.

***Article 28b***

Sanctioning powers

**1. Without prejudice to the powers of competent authorities in accordance with Article 24 and the right of Member States to impose criminal sanctions, in case of an breaches referred to in Article 28a competent authorities shall have the power to impose at least the following administrative measures and sanctions:**

- (a) a public statement **or warning** which indicates the natural **person** or the legal **entity** responsible and the nature of the breach;
- (b) an order requiring the natural **person** or the legal **entity** responsible to cease the conduct and to desist from a repetition of that conduct;
- (c)

(d) **administrative pecuniary sanctions of:**

- in case of a legal **entity**, administrative pecuniary sanctions of up to **2%** of the total annual turnover **according to the last available accounts approved by the management body**; **where the legal entity is a parent undertaking or a subsidiary of a parent undertaking which has to prepare consolidated financial accounts according to Directive 83/349/EEC, the relevant total turnover shall be the total annual turnover or the corresponding type of income according to the relevant accounting Directives according to the last available consolidated account approved by the management body of the ultimate parent undertaking**;
- in case of a natural person, administrative pecuniary sanctions of up to EUR **1 000 000**; **or in the Member State where the Euro is not the official currency, the corresponding value to EUR 1 000 000 in the national currency shall be calculated taking into account the official exchange rate on [insert the date of entry into force of this Directive];**
- up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined;

**whichever is higher.**

**2. Without prejudice to the powers of competent authorities in accordance with Article 24 and the right of Member States to impose criminal sanctions, Member States shall ensure that their laws, regulations or administrative provisions provide for possibility to suspend the exercise of voting rights attached to shares in case of the breaches referred to in Article 28 point (b). Member States may provide that the suspension of voting rights applies only to the most serious breaches.**



**3. Member State shall ensure that after every adoption of a decision imposing an administrative measure or an administrative sanction of breach of this Directive, competent authorities shall proceed with its publication unless a case-by-case analysis on the proportionality of the publication of that measure or sanction shows this would cause disproportionate damage to the parties involved. Such publication shall be without undue delay and it shall include at least information on the type and nature of the breach and the identity of persons responsible for it. If such publication would seriously jeopardise the stability of financial markets or where publication would cause disproportionate damage to the parties involved or jeopardise an ongoing criminal investigation, competent authorities shall publish the measures and sanctions on an anonymous basis.”.**

**(17) Article 29 is replaced by the following:**

**"Article 29**

**Exercise of sanctioning powers**

1. Member States shall ensure that when determining the type **and level** of administrative sanctions or measures , the competent authorities shall take into account all relevant circumstances, including where appropriate:
  - (a) the gravity and the duration of the breach;
  - (b) the degree of responsibility of the responsible natural **person** or legal **entity**;

- (c) the financial strength of the responsible natural **person** or legal **entity**, for example as indicated by the total turnover of the responsible legal **entity** or the annual income of the responsible natural person;
- (d) the importance of profits gained or losses avoided by the responsible natural **person** or legal **entity**, insofar as they can be determined;
- (e) the losses for third parties caused by the breach, insofar as they can be determined;
- (f) the level of cooperation of the responsible natural **person** or legal **entity** with the competent authority;
- (g) previous breaches by the responsible natural **person** or legal **entity**.

2. **The processing of personal data collected in or for the exercise of the supervisory and investigatory powers in accordance with this Directive shall be carried out in accordance with Directive 95/46/EC and Regulation 45/2001 where relevant.**

(18) Article 31(2) is replaced by the following:

"2. Where Member States adopt measures pursuant to Articles 3(1), 8(2), 8(3) or Article 30, they shall immediately communicate those measures to the Commission and to the other Member States."

*Article 1a*

*Amendments to Directive 2003/71/EC*

Directive 2003/71/EC is amended as follows:

[In Article 2(1)(m) sub point (iii) is replaced by the following:

“(iii) for all issuers of securities incorporated in a third country, which are not mentioned in (ii), the Member State where the securities are intended to be offered to the public for the first time after the date of entry into force of this Directive or where the first application for admission to trading on a regulated market is made, at the choice of the issuer, the offeror or the person asking for admission, as the case may be, subject to a subsequent election by issuers incorporated in a third country in the following circumstances:

- where the home Member State was not determined by their choice; or
- in accordance with Article 2(1)(i) sub point (iii) of Directive 2004/109/EC.”]

*Article 2*  
*Amendments to Directive 2007/14/EC*

Directive 2007/14/EC is hereby amended as follows:

- (1) Article 2 is deleted.
- (2) In Article 11, paragraphs 1 and 2 are deleted.
- (3) Article 16 is deleted.

*Article 2 a*  
*Transitional provisions*

- [1. By way of derogation from Article 1(1)(b), for an issuer whose securities are already admitted to trading on a regulated market and that has not made a choice of a home Member State prior to the date in Article 3(1) [or prior to the date of entry into force of this Directive], the period of three months will start on the date in Article 3(1) [or the date of entry into force of this Directive] ;
2. By way of derogation from Article 1(1)(b)(iii), an issuer that has made a choice of a home Member State and has communicated this choice to the competent authorities of the home Member State prior to the date in Article 3(1) [or prior to the date of entry into force of this Directive], shall be exempted from the requirement of Article 1(1)(b)(iii), unless such issuer chooses another home Member State after the date in Article 3(1) [or after the date of entry into force of this Directive]. ]

*Article 3*  
*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ....\* at the latest.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 4*  
*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 5*  
*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament  
The President

For the Council  
The President

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\* OJ: please insert the date ...